1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	ARIZONA, ET AL., :
4	Petitioners : No. 12-71
5	v. :
6	THE INTER TRIBAL COUNCIL :
7	OF ARIZONA, INC., ET AL. :
8	x
9	Washington, D.C.
L O	Monday, March 18, 2013
L1	
L2	The above-entitled matter came on for oral
L 3	argument before the Supreme Court of the United States
L 4	at 10:04 a.m.
L 5	APPEARANCES:
L6	THOMAS C. HORNE, ESQ., Attorney General of Arizona,
L 7	Phoenix, Arizona; on behalf of Petitioners.
L 8	PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf
L9	of Respondents.
20	SRI SRINIVASAN, ESQ., Deputy Solicitor General,
21	Department of Justice, Washington, D.C.; for United
22	States, as amicus curiae, supporting Respondents.
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1	PROCEEDINGS
2	(10:04 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear argument
4	first this morning in Case 12-71, Arizona v. the Inter
5	Tribal Council of Arizona.
6	General Horne.
7	ORAL ARGUMENT OF THOMAS C. HORNE
8	ON BEHALF OF THE PETITIONERS
9	MR. HORNE: Thank you, Mr. Chief Justice,
10	and may it please the Court:
11	The NVRA should not be construed to preempt
12	Arizona's Proposition 200 for three reasons. First,
13	prohibiting a State from effectively enforcing the
14	citizenship requirement is so far-reaching that if
15	Congress had intended that, it would have put the
16	prohibition in the statute expressly, which it did not
17	do. Congressional silence should not disable States
18	from taking sensible precautions to exclude noncitizens
19	from voting.
20	Second, when Congress wanted to expressly
21	prohibit something, it knew how to do it. It expressly
22	prohibited notarization and other forms of
23	authentication. This Court has frequently held that
24	statutory language that indicates that prohibits one
25	thing indicates there's no other implicit prohibition:

- 1 The expressio unius rule.
- 2 Third, Proposition 200 is consistent with
- 3 the purposes and objectives of the NVRA because the
- 4 purpose of the NVRA --
- 5 JUSTICE SOTOMAYOR: If I see the purpose of
- 6 the NVRA to simplify registration --
- 7 MR. HORNE: Yes, Your Honor.
- 8 JUSTICE SOTOMAYOR: -- how is Arizona's
- 9 provisions consistent with that objective and purpose?
- 10 MR. HORNE: Your Honor --
- 11 JUSTICE SOTOMAYOR: Given that some of the
- 12 amici explain that many people don't have the documents
- 13 that Arizona requires?
- 14 MR. HORNE: Yes, Your Honor. First of all,
- 15 the -- simplifying the procedure is one of two important
- 16 purposes of the NVRA. The other is the integrity of the
- 17 system --
- 18 JUSTICE SOTOMAYOR: Well, but why does one
- 19 take precedence over another?
- MR. HORNE: I would say, Your Honor, that
- 21 neither takes precedence over the other. They're both
- 22 equally important. And so --
- JUSTICE SOTOMAYOR: So, if something you do
- 24 conflicts with one of those purposes, why isn't it
- 25 preempted by the Federal law?

- 1 MR. HORNE: Your Honor, I think the question
- 2 is, if you take the two purposes together, does -- does
- 3 the Proposition 200 strongly fulfill one and have a
- 4 minimal burden on the other? And, Your Honor, I would
- 5 rely on the findings of the -- of the district court in
- 6 this case. In fact, this Court instructed the Ninth
- 7 Circuit to defer to the factual findings of the district
- 8 court in the Purcell case, which was this case in an
- 9 earlier stage.
- 10 JUSTICE SOTOMAYOR: Why would you think that
- 11 Congress, in doing the short form registration, didn't
- 12 consider the issue of fraud, and decide that it had
- 13 arrived at the balance it wanted?
- MR. HORNE: Because, Your Honor, the -- the
- 15 Congress did not specify what the States could or could
- 16 not do.
- 17 JUSTICE GINSBURG: But it did -- but
- 18 Congress did specify how citizenship was to be handled.
- 19 And it was to be an attestation, a signed attestation
- 20 subject to -- to the penalty of perjury. So it's not as
- 21 though the Federal form didn't relate to citizenship.
- 22 It did. And it said this is the way we deal with
- 23 citizenship. Then Arizona adds something else.
- So I would like, General Horne, for you to
- 25 respond to a question that's already been raised in --

- 1 by the -- the panel that decided this case originally,
- 2 which was, the statute said -- says each State must
- 3 accept and use the Federal form, period. That's the end
- 4 of it.
- 5 And then it says, in addition to that, the
- 6 State can do other things. The judge who asked that
- 7 question thought it was perfectly clear, you use the
- 8 Federal form, and if you want to do something in
- 9 addition -- but you must use and accept the Federal Form
- 10 and not add something to it.
- 11 MR. HORNE: Yes, Your Honor. I think it's
- 12 very clear that this statute does not say the signature
- is the only thing that the States can use to verify the
- 14 eligibility of the applicant. Now, in -- in using the
- 15 term "accept and use," Your Honor, accept and use in
- 16 ordinary language -- we've given lots of examples in our
- 17 briefs -- one can accept and use a form for a particular
- 18 purpose without that form being sufficient to accomplish
- 19 that purpose.
- I came here from Arizona on an airplane. If
- 21 the airline said we accept and use an e-mail ticket, you
- 22 don't need to bring a paper ticket. And then I got
- 23 there and they said, we want to see identification to
- 24 prove that you are who you say you are, that would not
- 25 contradict the statement that they are accepting and

- 1 using the e-ticket. They are accepting and using the
- 2 e-ticket for a specific purpose --
- JUSTICE KAGAN: But, General Horne, wouldn't
- 4 it contradict it if instead of saying well, we'd like
- 5 you to offer identification, saying, well, we'd like you
- 6 also to have a paper ticket.
- 7 MR. HORNE: Yes, Your Honor. If they --
- 8 JUSTICE KAGAN: That would be inconsistent
- 9 with the accept and use language, isn't that right?
- 10 MR. HORNE: That's correct, Your Honor.
- 11 Yes, Your Honor. And if I take that analogy to our --
- 12 to our facts, if we had changed the Federal form, I
- 13 think we would have been in violation. But we did not
- 14 change the Federal form. We used the Federal form
- 15 exactly as it's printed by the Federal government. And
- 16 we --
- 17 JUSTICE KAGAN: Well, you have done
- 18 something to the Federal form, and that essentially
- 19 creates a new set of requirements and a new form.
- MR. HORNE: Your Honor, we -- we accept and
- 21 use the Federal form. We ask, in addition to that, for
- 22 evidence that the person is a citizen, that they're
- 23 eligible to vote. The form is not exclusive. The form
- 24 does not bind us to use only the form and nothing else.
- JUSTICE KAGAN: Do you -- do you think that

- 1 you could have said -- you know, we have our own State
- 2 form, which we're allowed to have under the statute.
- 3 Anybody who requires the Federal form has to append the
- 4 State form as well.
- 5 Could you have done that?
- 6 MR. HORNE: I think not, Your Honor, because
- 7 I think that would have been contrary to the purposes
- 8 and objectives of the Act. I think what we did is
- 9 consistent with the purposes and objectives of the Act.
- 10 But if you --
- 11 JUSTICE KAGAN: Well, how do we draw the
- 12 line? Where does the line get drawn between adding just
- 13 your own form, and adding a new set of requirements,
- 14 which -- you know, you could just as easily have called
- 15 a form?
- 16 MR. HORNE: Because the statute contemplates
- 17 that it -- that it is the burden of the States to
- 18 determine the eligibility of the voters. The -- the EAC
- 19 was given the duty to develop the form, and we don't
- 20 argue with the fact that the form belongs to the EAC.
- 21 JUSTICE SCALIA: So that form should have
- 22 included the eligibility requirements that your State
- 23 demands. And it seems to me your complaint is that the
- 24 Federal form does not require proof of citizenship,
- 25 unless you consider just the statement that I'm a

- 1 citizen to be proof of citizenship.
- 2 But why didn't you challenge the form? I
- 3 mean, that's -- that's my problem with this. I frankly
- 4 think that Federal form doesn't make much sense unless
- 5 it's -- unless it's to be exclusive for Federal voting.
- 6 And -- and why didn't you challenge the -- the refusal
- 7 of the Commission to include on the form, as additional
- 8 State requirements, the proof of citizenship?
- 9 MR. HORNE: Your Honor, under Section
- 10 6(a)(1) of the statute, the burden of determining
- 11 whether the citizen is eligible rests with the State.
- 12 That --
- 13 JUSTICE SCALIA: Sure. Sure.
- 14 MR. HORNE: The form belongs to the EAC.
- 15 The determination of whether the applicant is eligible
- 16 belongs to us. So whether or not they put what -- what
- 17 we're asking for on the form doesn't matter. We are
- 18 fulfilling our duty under Section 6(a)(1) by determining
- 19 the eligibility of the applicant by asking for
- 20 additional evidence of citizenship.
- JUSTICE SCALIA: Well, you're -- you're
- 22 simply denying then that the Federal government can, so
- 23 long as it protects the requirements that your State
- 24 imposes, you're -- you're saying the Federal government
- 25 cannot prescribe a single form for -- for voter

- 1 registration.
- 2 MR. HORNE: Your Honor, the Federal
- 3 government can prescribe the form, but the form is not
- 4 exclusive. The responsibility to determine the
- 5 eligibility --
- 6 JUSTICE SCALIA: Why -- why can't it make it
- 7 exclusive? Let's assume -- I think -- I think that --
- 8 that accept and -- and employ, whatever the language
- 9 is --
- MR. HORNE: Accept and use.
- JUSTICE SCALIA: -- suppose -- suppose I
- 12 think that that does mean that it's supposed to be
- 13 exclusive. What harm is there so long as the Federal
- 14 Commission requires, as part of the Federal form, all of
- 15 the necessary proofs of -- of qualification that the
- 16 State imposes?
- 17 MR. HORNE: Well, Your Honor, the -- the
- 18 form is -- cannot be exclusive. I mean, even the ITCA
- 19 Respondent and the United States Respondent admit that
- 20 we can look to external evidence to determine whether
- 21 the voter is eliqible. The argument is, they say we can
- look at external evidence, but we can't ask the
- 23 applicant himself, who has the most information, to pull
- 24 out his driver's license and write down a number.
- 25 There's no --

- JUSTICE GINSBURG: General Horne, there --
- 2 there are a whole list of State-specific requirements
- 3 that get appended to the form. And I think Justice
- 4 Scalia was raising the question, did you ask to have
- 5 Arizona's requirement -- just as the other
- 6 State-specific requirements -- did you ask the Federal
- 7 Commission to include, as a State-specific requirement,
- 8 this proof of citizenship?
- 9 MR. HORNE: We did, Your Honor, and the
- 10 Commission itself took no action. The executive
- 11 director rejected our request. The executive director
- 12 has no power to make determinations. Congress
- 13 explicitly stated that the EAC can act only by a vote of
- 14 three out of four of its members.
- 15 JUSTICE SCALIA: And you did nothing more
- 16 about that?
- 17 MR. HORNE: Yes, sir.
- 18 JUSTICE SCALIA: You -- you didn't go to
- 19 court to say you have to include this as one of the
- 20 State-specific requirements.
- 21 Why didn't you do that?
- MR. HORNE: Your Honor, that -- that was
- 23 under a predecessor of mine, so I don't know the reason.
- JUSTICE SCALIA: Oh. Okay.
- Why didn't he do it?

1	(Laughter.)
2	MR. HORNE: I'm I'm not sure I would be
3	competent to answer for him, Your Honor. But I think
4	but I don't think it makes any difference because the
5	form is is one thing that we accept and use to
6	determine the eligibility of the voter, but it's not the
7	only thing.
8	My friends on the other side
9	JUSTICE SOTOMAYOR: I have a I have a
10	hugely great difficulty, which is, the NVRA says that
11	people can mail in this form.
12	MR. HORNE: Yes.
13	JUSTICE SOTOMAYOR: I don't know how your
14	rejection of the mail-in, how you're accepting and using
15	it when you're refusing to register someone when they do
16	exactly what the Federal law permits them to do: Mail
17	it in. There there's I don't I have a real big
18	disconnect with how you can be saying you're accepting
19	and using, when you're not registering people, when they
20	use it the way the Federal law permits them to.
21	MR. HORNE: Yes, Your Honor. That is the
22	position that the executive director took, that if the
23	form is fully filled out and on its face it shows the

person is qualified we must accept the application. We

then pointed out in our brief that that would mean that

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- 1 even if we had documentary proof that the person was not
- 2 a citizen, we'd still have to accept the application.
- In response to that, the Respondent ITCA and
- 4 the Federal government said, no, you can look at
- 5 external evidence, if it shows that the person is not a
- 6 citizen. So the only question remaining then is there
- 7 any basis in the statute for drawing a distinction
- 8 between our looking to external evidence that we have
- 9 and our asking the applicant to write down a -- a number
- 10 from his driver's license.
- 11 JUSTICE KENNEDY: Could you also ask for an
- 12 address, for proof of the address, or proof of date of
- 13 birth?
- 14 MR. HORNE: If that were consistent with the
- 15 purposes and objectives of the Act we could, Your Honor.
- 16 And in determining that, one would have to weigh our
- interest in the integrity of the system versus what
- 18 burdens that places on the --
- 19 JUSTICE KENNEDY: But then again, it seems
- 20 to me the Federal form, as some of my colleagues have
- 21 indicated, is not worth very much.
- MR. HORNE: Your Honor, the Federal form
- 23 sets forth certain minimum requirements that -- that
- 24 have to be met. In fact, the -- the Act says
- 25 specifically in Section 7(b)(2) that they must ask for

- 1 the signature under oath of the applicant. The Federal
- 2 form also provides under 7(a)(1) that additional things
- 3 that are necessary to determine the eligibility of the
- 4 applicant can also be put on the form.
- 5 The EAC chose not to put anything additional
- 6 on the form, which was their right. It was permissive.
- 7 But they did set -- set up a system of State-specific
- 8 requirements. I think that reflects the fact that the
- 9 States have the burden of determining whether or not the
- 10 eligible -- the applicant is eligible.
- 11 That's -- that's our burden. We must accept
- 12 and use the Federal form as a tool in doing that, but it
- is not the exclusive tool, and my friends on the other
- 14 side have admitted that it's not the exclusive tool
- 15 because they've admitted that if we have documentary
- 16 evidence the person is not a citizen, we can reject the
- 17 application.
- 18 JUSTICE SCALIA: How could you establish
- 19 citizenship without having something mailed in, in
- 20 addition to the form? What are the other State-specific
- 21 requirements? You have to put down your driver's
- 22 license number or some other numbers? I -- I quess you
- 23 could -- you could make them check off place of birth
- 24 and if that place of birth is not the United States, you
- 25 could require them to write down some number of -- of

- 1 their admission to citizenship. Are there -- are there
- 2 numbers that you could demand?
- MR. HORNE: Well, some States require the
- 4 Social Security number --
- JUSTICE SCALIA: Okay.
- 6 MR. HORNE: -- which is not -- which is not
- 7 provided for in the statute.
- JUSTICE SCALIA: Right.
- 9 MR. HORNE: But the -- but it's not
- 10 prohibited. And the States were held in -- in the cases
- 11 that were brought under that, the States were held that
- 12 they could add it because it's not prohibited.
- 13 The State of Louisiana -- inconsistently on
- 14 the part of the EAC, the State of Louisiana has a
- 15 requirement that was approved by the EAC and is in the
- 16 form that says, "If the applicant has neither a
- 17 Louisiana driver's license, a Louisiana special
- 18 identification card, or a Social Security number, the
- 19 applicant shall attach one of the following items to his
- 20 application: A copy of a current and valid photo
- 21 identification, a copy of a current utility bill, bank
- 22 statement, government check, paycheck or other
- 23 government document." So --
- JUSTICE SCALIA: Yes, that's the kind of
- 25 thing you should have had and that your predecessor

- 1 should have asked for to be included in the Federal
- 2 form.
- 3 MR. HORNE: Your Honor, the Federal form is
- 4 not exclusive.
- JUSTICE KAGAN: But -- but, General, doesn't
- 6 the -- the statute make the EAC the decisionmaker with
- 7 respect to what can be added to the Federal form? The
- 8 Federal form -- form, you're exactly right, sets a
- 9 floor. But if you look at Section 7, what Section 7
- 10 does is to say the EAC gets to decide the minimum
- 11 necessary, and it consults with the States and the
- 12 States can come to it and tell it what it needs, and the
- 13 EAC can take action. But the EAC is driving the bus,
- 14 according to Section 7 of this statute.
- 15 MR. HORNE: Yes, Your Honor. The EAC is
- 16 driving the bus as to the form, but the States are
- 17 driving the bus as to what is necessary to determine the
- 18 ultimate --
- JUSTICE SCALIA: Well, I don't think they're
- 20 driving the bus as to the form. They can't drive it
- 21 into a ditch. They're -- they're -- they're subject to
- 22 arbitrary and capricious limitations, just as any other
- 23 agency is. And to allow Louisiana -- to include what --
- 24 what they've allowed in Louisiana to include and to say
- 25 that the only proof of citizenship -- there is a

- 1 provision in the statute which says consistent with
- 2 determining, the States being able to determine the
- 3 qualifications.
- 4 Isn't there a provision which makes it clear
- 5 that the Federal form has to make allowance for the
- 6 States determining the qualifications?
- 7 MR. HORNE: That's correct, Your Honor. And
- 8 the -- and the -- but the --
- 9 JUSTICE SCALIA: Now --
- 10 MR. HORNE: The -- the duty of the States,
- 11 Your Honor, to determine whether or not a voter is
- 12 eligible, that is a duty that rests with the State, not
- 13 with the EAC.
- 14 JUSTICE SCALIA: That's true.
- MR. HORNE: The EAC can only --
- 16 JUSTICE SCALIA: But the form has to enable
- 17 the State to do that. And it seems to me you were quite
- 18 able to argue that in -- in refusing to allow you to
- 19 include in the -- in the Federal form in Arizona some
- 20 indication of proof of citizenship requiring nothing
- 21 else except oh, I'm a -- check off, I am a citizen,
- 22 right? So it's under oath. Big deal. If -- if -- if
- 23 you're willing to violate the voting laws, I suppose
- 24 you're willing to violate the perjury laws.
- 25 MR. HORNE: That's exactly right, Your

- 1 Honor.
- 2 JUSTICE SCALIA: So I think you should --
- 3 you should have challenged the commission's refusal
- 4 to -- to place that evidence in the Federal form.
- 5 MR. HORNE: Your Honor, the Federal form
- 6 is -- is a tool that we have to use to determine the
- 7 eligibility of the voter, but the ultimate
- 8 responsibility under -- under Section 6(a)(1) of -- of
- 9 this very Act is with the States to determine the
- 10 eligibility of the voter.
- 11 My friends on the other side are admitting
- 12 that the -- that we're not stuck with the four corners
- of the form because -- because we've pointed out that
- 14 would result in a ridiculous conclusion that we could
- 15 have documentary proof that the person is not eligible.
- 16 So, if we're not bound by the four corners of the form,
- 17 as in the ordinary use of the term "accept and use," we
- 18 accept and use the form for a specific purpose, but it
- 19 does -- it is not sufficient to satisfy that purpose.
- 20 All parties agree to that.
- 21 The only question is, is there a
- 22 distinction, which we do not find in the statute,
- 23 between using external evidence that we already have and
- 24 asking someone to write down the -- the number on his
- 25 driver's license, which he is the one that has the most

- 1 information. It's the logical way to do it. In fact,
- 2 there is no Federal register of American citizens.
- JUSTICE KAGAN: I'm a little bit confused.
- 4 JUSTICE KENNEDY: Well, I take it -- I take
- 5 it that -- that counsel on -- on -- on the other side
- 6 will disagree with that and they say, well, this is --
- 7 this is the line to be drawn. The -- the postcard is
- 8 presumptive evidence of registration and -- and of
- 9 qualification. And if you have evidence to the
- 10 contrary, then it's different. But otherwise, the whole
- 11 utility of the single form is missing -- is gone.
- 12 MR. HORNE: Your Honor, there -- there is
- 13 nothing in the statute to draw a distinction between our
- 14 having other extrinsic evidence, which they agree we can
- 15 use outside of the form and our asking people to say,
- 16 write down --
- 17 JUSTICE KENNEDY: Other than the statutory
- 18 words that authorize the use of the form.
- MR. HORNE: Yes, but -- but they don't make
- 20 the form exclusive. Congress could have said the form
- 21 is exclusive and you can't ask for anything else. They
- 22 didn't do that. And they had shown when they dealt with
- 23 authentication that they knew how to prohibit something
- 24 if they wanted to prohibit it. They chose not to
- 25 prohibit this exclusively and -- and so therefore, it

- 1 rests with the States --
- JUSTICE SOTOMAYOR: Some of us have -- do
- 3 believe in legislative history. Some of my colleagues
- 4 don't.
- 5 MR. HORNE: Yes, Your Honor.
- 6 JUSTICE SOTOMAYOR: All right. But at least
- 7 one of --
- 8 (Laughter.)
- JUSTICE SOTOMAYOR: Did he point to himself?
- 10 One of the concurring judges below said that
- 11 he found the statute ambiguous, but that with the -- the
- 12 legislative history there just could be no conclusion,
- 13 but that Congress rejected your reading. Legislation
- 14 history is very clear that this issue of what States
- 15 could add to the form was raised and permission to do so
- 16 was proposed explicitly and rejected.
- 17 How do you -- assuming that I believe in
- 18 legislative history, don't argue to me that I shouldn't,
- 19 okay?
- MR. HORNE: Yes, Your Honor.
- 21 JUSTICE SOTOMAYOR: How do you get around
- 22 that?
- 23 MR. HORNE: Your Honor, if the -- if the
- 24 legislative history were consistent, I would -- I would
- 25 say that was an argument that could be made. But the

- 1 legislative history here is extremely self-contradictory
- 2 and one cannot conclude from any part of that
- 3 legislative history what was the intent of the majority
- 4 of the Congress.
- 5 The House committee which dealt with the
- 6 very act that -- that we have said, "Only the elected
- 7 officials designated and authorized under State law are
- 8 charged with responsibility to enroll eligible voters on
- 9 the list of voters. The NVRA should not be interpreted
- 10 in any way to supplant that authority. The committee is
- 11 particularly interested in ensuring that election
- 12 officials continue to make determinations as to
- 13 applicants' eligibility, such as citizenship, as they're
- 14 made under current law and practice."
- And the FEC, which is a predecessor to the
- 16 EAC, relying on that House committee report, said that
- 17 an application received by a local voter registration
- 18 official is only an application and be subject to
- 19 whatever verification procedures are currently applied
- 20 to all applications.
- 21 In addition, Your Honor --
- JUSTICE SCALIA: Gee, if I believed -- if I
- 23 believed in legislative history, I would find that very
- 24 persuasive.
- 25 (Laughter.)

1 MR. HORNE: Thank you, Your Honor. 2 JUSTICE BREYER: Could I ask a different --3 can I ask --4 (Laughter.) 5 MR. HORNE: Could I just add one quick point, and that is that the sponsor of the bill was б 7 opposed to that amendment in conference committee, 8 saying it wasn't necessary, that the States could already verify applicants under the existing law, as it 9 10 was written before that amendment. 11 JUSTICE BREYER: There's probably a 12 perfectly good answer to this, but I -- I notice that in this Federal law in 7(b), it says what the registration 13 14 form shall contain. 15 MR. HORNE: Yes. 16 JUSTICE BREYER: Now, there are four subsections and only one of those refers to a particular 17 18 thing, and that is, identifying information. It shall 19 include a statement, including citizenship, saying --20 that contains an attestation the applicant meets that 21 requirement. 22 MR. HORNE: Yes, Your Honor. 23 JUSTICE BREYER: And under perjury. 24 MR. HORNE: Yes.

JUSTICE BREYER: It says that. Then I look

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- 1 at the Arizona law and it says in Arizona, you have to
- 2 include like in immigration -- you know, a passport, a
- 3 birth certificate, and then you have a couple of other
- 4 things that show you're a citizen, correct?
- 5 MR. HORNE: Yes, those are very unusual.
- 6 Normally, you just write down the number from your
- 7 driver's license.
- 8 JUSTICE BREYER: Yes, okay. That's not my
- 9 question.
- 10 MR. HORNE: Okay, Your Honor.
- JUSTICE BREYER: I'm saying given these five
- 12 or six specific things --
- MR. HORNE: Yes, Your Honor.
- 14 JUSTICE BREYER: -- that show you're a
- 15 citizen --
- MR. HORNE: Yes, Your Honor.
- 17 JUSTICE BREYER: -- what use does Arizona
- 18 make of that attestation under perjury?
- 19 MR. HORNE: Well, there have been --
- 20 actually, there have been prosecutions for perjury, Your
- 21 Honor. But it's not -- it's not at all a verification
- 22 of the eligibility of the citizen because --
- JUSTICE BREYER: I didn't say it wasn't. I
- 24 just want to know, since you have right in front of you
- 25 a birth certificate or the equivalent, what use are you

- 1 making of the Federal provision that's there in the
- 2 form: I am a citizen. What use are you making of that?
- 3 MR. HORNE: Well, Your Honor, we are making
- 4 use of it and I just mentioned --
- 5 JUSTICE BREYER: Well, I know -- I'm sure
- 6 you are and then my question is how?
- 7 MR. HORNE: By prosecuting -- there have
- 8 been ten prosecutions in one year alone of people who
- 9 swore falsely. Out of the hundreds that were caught
- 10 swearing falsely, ten, in fact, were prosecuted.
- JUSTICE BREYER: By?
- 12 MR. HORNE: But that -- but that is not a --
- 13 that is not a sufficient use or that is not a sufficient
- 14 measure of determining eligibility because literally
- 15 hundreds have been caught swearing jury -- jury
- 16 commissioner forms -- swearing they are not citizens
- 17 after they had already registered to vote. Other people
- 18 were caught in their applications to citizenship when
- 19 they checked and found that they had previously
- 20 registered to vote and voted.
- 21 So -- so we are making use of it, but it is
- 22 not a -- it is not a functional way to determine
- 23 eligibility. And in 7(a)(1), Congress said that -- that
- 24 both the Federal form and the State form as incorporated
- 25 under Section 4 may ask for such additional information,

- 1 only such additional information as is necessary to
- 2 determine the eligibility of the voter. That shows that
- 3 Congress did not intend to prohibit us from getting
- 4 additional information as is necessary to determine the
- 5 eligibility of the voter.
- 6 JUSTICE KAGAN: General, could -- could I
- 7 take you back to this distinction that you're making.
- 8 You said you can't append an additional form, you can't
- 9 use an additional form, but you can require additional
- 10 information.
- 11 MR. HORNE: Yes, Your Honor.
- 12 JUSTICE KAGAN: So how do -- what's the
- 13 difference between requiring additional information and
- 14 requiring an additional form? Isn't -- when you say you
- 15 need information A, B, C, D, E, that's just a form,
- 16 isn't it?
- 17 MR. HORNE: No, Your Honor, it's not a form.
- 18 It's -- it's an instruction to -- to write down on the
- 19 Federal form a number. And there is -- item six on the
- 20 Federal form has a block where you write down the number
- 21 and if you don't have either number -- you can write
- 22 down a -- a driver's license, you can write down a
- 23 naturalization number, you can write down an Indian
- 24 tribal identification number. If you don't have any of
- 25 those numbers, then you can send in one of these

- 1 additional documents.
- 2 But that is not an additional form. The
- 3 reason -- the distinction I draw between the --
- 4 incorporating another form or the State form and asking
- 5 for additional information is the purposes and
- 6 objectives of the Act. The Act indicates that the State
- 7 form is an alternative to the Federal form, but cannot
- 8 take its place. So I'm saying it would not be
- 9 consistent with the purpose and objectives of the Act to
- 10 attach the form, but it is consistent --
- 11 JUSTICE KAGAN: Well, what is the -- what
- 12 would be the purpose of requiring a Federal form if you
- 13 could just say, and in addition to that, you have to
- 14 give ten more items of information? I mean, then the
- 15 Federal form just becomes another hoop to jump through.
- MR. HORNE: No, Your Honor. I -- I don't
- 17 think that's correct. First of all -- for two reasons.
- 18 First of all, the Federal form does provide minimums.
- 19 You must -- you must answer the questions set forth in
- 20 the Federal form.
- 21 But secondly, to the extent we add things to
- the Federal form, those things must be consistent with
- 23 the purposes and objectives of the Act. And I -- and
- 24 I -- and I justify my assertion that Prop 200 is
- 25 consistent with the purposes and objectives of the Act

- 1 by relying on the findings of the trial court that
- 2 relate exactly to that question, finding that it was a
- 3 minimal burden, overcome by a major interest that the
- 4 State have -- has in protecting the integrity of the
- 5 system, where the -- where the trial judge found a lot
- of evidence to show that there was voter fraud going on,
- 7 although not the fault of the individuals, the fault of
- 8 the organizations that often fool people into signing
- 9 the form when they don't intend to -- or they don't
- 10 intend to break the law; but as -- but as against that,
- 11 that the -- that the burdens are minimal.
- 12 And the trial court, the district court, had
- 13 a lot of findings justifying the statement that the
- 14 burdens are minimal, including the fact, for example,
- 15 that if all the rejected forms had been accepted, the
- 16 increase in Hispanic registration would have only have
- 17 been .1 percent, which is statistically insignificant,
- including the fact that out of a population of \$6
- 19 million, the plaintiffs, who have all the resources one
- 20 can imagine, if you look at the list of plaintiffs,
- 21 could only find one person out of six million people
- 22 that could not satisfy -- who was entitled to vote, who
- 23 could not satisfy the requirements of the Act; and a lot
- 24 of other findings by the trial court.
- 25 And this Court instructed the Ninth Circuit

- 1 to give deference to the factual findings of the trial
- 2 court in the Purcell case, and the Ninth Circuit ignored
- 3 that. And what I'm saying is if you look at the factual
- 4 findings of the trial court, our position is consistent
- 5 with the purpose and objectives of the Act.
- 6 And I'd like to --
- JUSTICE SOTOMAYOR: General --
- 8 MR. HORNE: Could I reserve time for
- 9 rebuttal, Your Honor?
- 10 CHIEF JUSTICE ROBERTS: Yes.
- JUSTICE SOTOMAYOR: -- I'm still having a
- 12 problem.
- MR. HORNE: Yes, Your Honor.
- 14 JUSTICE SOTOMAYOR: Both the Federal law and
- 15 the State law require an individual to be a citizen.
- MR. HORNE: Yes, Your Honor.
- 17 JUSTICE SOTOMAYOR: That's the basic
- 18 qualification.
- 19 MR. HORNE: Yes, Your Honor.
- JUSTICE SOTOMAYOR: Both agree that that's
- 21 essential.
- MR. HORNE: Yes, Your Honor.
- 23 JUSTICE SOTOMAYOR: How do you fit in the
- 24 question of what documents you use to prove that with
- 25 establishing the qualification? Meaning citizenship,

- 1 you either have it or you don't. That's why the Federal
- 2 form says are you or aren't you.
- MR. HORNE: Yes.
- 4 JUSTICE SOTOMAYOR: So there's -- that
- 5 qualification has been set by Arizona and the Federal
- 6 system.
- 7 MR. HORNE: The qualification has, but
- 8 our -- our objection to the Ninth Circuit decision
- 9 preempting Proposition 200 is that it leaves us unable
- 10 to enforce our qualification requirement, which under
- 11 the Constitution clearly is a State function.
- 12 JUSTICE SOTOMAYOR: Counsel, you have proof,
- there are people that you have rejected, even without
- 14 these forms?
- MR. HORNE: It's extremely inadequate, Your
- 16 Honor. It's essentially an honor system. It does not
- 17 do the job.
- JUSTICE SOTOMAYOR: Well, that's what the
- 19 Federal system decided was enough.
- MR. HORNE: That's what they decided as a
- 21 minimum in the Federal form, but they did not say that
- 22 we could not ask for additional information. Congress
- 23 could have said that, just as they said we can't ask for
- 24 notarization. They chose not to say that.
- JUSTICE SOTOMAYOR: Well, you admit that it

- 1 doesn't let you add things. You have to accept and use
- 2 that form.
- 3 MR. HORNE: We have to accept and use the
- 4 form and we can't change the form, but we can ask for
- 5 additional evidence to perform our function of
- 6 determining that citizens --
- 7 JUSTICE SOTOMAYOR: I go back to Justice
- 8 Kagan. If you don't have a driver's license to put a
- 9 number down --
- 10 MR. HORNE: Yes.
- 11 JUSTICE SOTOMAYOR: -- this list of things
- 12 says you have to append to the form other items: A copy
- of your birth certificate, a copy of your naturalization
- 14 certificate. Why isn't that just creating another form?
- MR. HORNE: Your Honor, incidentally, there
- 16 have been references to a postcard. The EAC itself says
- 17 put the form in an envelope. And -- and just as you put
- 18 the form in an envelope, you can put a copy of your
- 19 birth certificate in an envelope. But I would point out
- 20 under Crawford v. Marion County, the holding in this
- 21 case, if there's a minimal burden on the great majority
- of the people and a somewhat higher burden on a few
- 23 people, that does not negate the interests of the State
- 24 and the integrity of the system.
- 25 May I reserve time for rebuttal, Your Honor?

1	CHIEF JUSTICE ROBERTS: Yes, you may.
2	MR. HORNE: Thank you.
3	CHIEF JUSTICE ROBERTS: Ms. Millett?
4	ORAL ARGUMENT OF PATRICIA A. MILLETT
5	ON BEHALF OF THE RESPONDENTS
б	MS. MILLETT: Mr. Chief Justice, and may it
7	please the Court:
8	Arizona simply disagrees with the balance
9	that Congress drew. And when it comes to registration,
10	Justice Kennedy and Justice Kagan, you're both correct,
11	the whole point of the Federal form is that Congress had
12	to draw a different balance. It confronted a situation
13	in which 40 percent of eligible voters were not
14	registered because State procedures and burdens were
15	standing as an obstacle, a barrier between in the
16	direct line of accountability between individual
17	citizens and their Federal government.
18	JUSTICE SCALIA: And enclosing your driver's
19	license number is that immense barrier, right?
20	MS. MILLETT: First
21	JUSTICE SCALIA: That's what's keeping 40
22	percent of eligible voters away?
23	MS. MILLETT: First of all, with with
24	respect to the driver's license, it's only driver's
25	licenses issued after 1996, October 1996, and those that

- 1 were not -- that someone did not obtain when they became
- 2 naturalized. So you have to be about 33 years of age.
- 3 Anyone older than that, their driver's license isn't
- 4 going to work. And, in fact, Mr. Gonzalez in this case
- 5 used his driver's license number and got bounced.
- 6 JUSTICE SCALIA: I still think that's a
- 7 relatively few number, and -- and if you don't have the
- 8 driver's license, then you can use your naturalization
- 9 certificate.
- 10 MS. MILLETT: You can -- Mr. Gonzalez did
- 11 that as well and the naturalization certificate got
- 12 bounced because the naturalization certificate, when put
- into the computer, does not produce records. It is a
- 14 mistake in Arizona's Proposition 200. Neither way is --
- 15 JUSTICE SCALIA: Well, you can say that
- 16 about any certification procedure that, now and then
- 17 there will be a mistake. I mean the fact that there is
- 18 one person where -- where the computer spit out the
- 19 wrong number or something, that is the basis for
- 20 rejecting the entire system that Arizona proposes?
- 21 MS. MILLETT: Joint appendix page 263, the
- 22 district court found that 31,550 people were rejected
- 23 from voting because of Proposition 200. Even on that
- 24 same page he finds that 11,000 of them subsequently
- 25 registered, but they had to do the double gauntlet that

- 1 Congress was trying to eliminate. The other 20,000
- 2 swore under oath that they were citizens and Mr. Horne,
- 3 before the Ninth Circuit, conceded he had no evidence
- 4 that they were not citizens --
- 5 JUSTICE ALITO: The statute --
- 6 MS. MILLETT: -- of the United States.
- 7 JUSTICE ALITO: The statute says that
- 8 Arizona must accept and use the Federal form. What does
- 9 that mean? Let me give you two possible definitions:
- 10 One, the person must be registered if the Federal form
- is properly completed and submitted; two, the State may
- 12 not make any further inquiry of the person who submits
- 13 the form.
- 14 Maybe you have other definitions, but what
- is the -- what do you interpret "accept and use" to
- 16 mean?
- 17 MS. MILLETT: We interpret "accept and use,"
- 18 it's mainly the latter, your second one, and that is
- 19 that it is a limitation on what can be asked of the
- 20 individual and that's not just from the Section 4
- 21 language where accept and use comes from. But what's
- 22 critical here is Section gg-7 which is on 26H of the
- 23 petition appendix here. And that's where they say on
- 24 this form.
- The form may require only, may require

- 1 only -- from the applicant, I'm adding that in -- such
- 2 identifying information essentially as the Commission
- 3 determines is necessary to allow the State to make its
- 4 decision.
- Now this is not just a ticket into the
- 6 State's own registration process so they can go thank
- 7 you very much for throwing it in the garbage can, now do
- 8 what we would like you to do. It is a registration
- 9 form, and when filled out completely and submitted under
- 10 oath, it has the same legal --
- JUSTICE ALITO: Well, let me give you this
- 12 example --
- MS. MILLETT: -- as the registration form.
- 14 JUSTICE ALITO: A person rides up to a place
- 15 to register on a bicycle and gets out and hands in the
- 16 Federal form. This -- this boy looks like he is 13
- 17 years old and he is carrying school books, he is wearing
- 18 a middle school t-shirt, but he has filled out the form
- 19 properly.
- 20 Are they required to register him or can
- 21 they ask him, could you show me some proof of age, like
- 22 he would have to if he tried to buy alcohol or
- 23 cigarettes?
- MS. MILLETT: They may not require anything
- 25 else from the applicant, but they can certainly apply

- 1 their own evidence that they obtain, whether it's from
- 2 their own eyeballs or whether it is through records or
- 3 databases that they run these through, which is the more
- 4 common one, and make a decision.
- Now a decision, the decision isn't simply we
- 6 would like more from you. That's not an appropriate
- 7 decision.
- 8 JUSTICE BREYER: His point is, he keeps
- 9 making the point, your colleague, and he says, no, that
- 10 isn't what it says. What the statute says is it may
- 11 require only such identifying information as is
- 12 necessary to assess eligibility. In other words, it's
- 13 telling the people who write the form what they can put
- 14 on it. And they can't put other things on it. But it
- 15 nowhere says that the State can't do other things.
- Now that's his point. And when I asked him,
- 17 well, how are you -- how are you using -- you have to be
- 18 able to use, oh, he says, we use it. We use the citizen
- 19 part and these things on the form to prosecute people
- 20 for perjury. So we're doing what it says, we're using
- 21 it and it doesn't say we can't add a few other things.
- Okay. Now, that's his argument. Now, your
- answer, which would be very helpful to me, is?
- MS. MILLETT: My answer is when you look at
- 25 26H it's talking about the form. And first, we know

- 1 that the commission is the one that decides what is
- 2 necessary on this form, a decision that wasn't
- 3 challenged --
- 4 JUSTICE SCALIA: Is that conclusive or can
- 5 that be challenged?
- 6 MS. MILLETT: It can certainly be challenged
- 7 under the Administrative Procedure Act. It was not in
- 8 this case.
- 9 But it says what is necessary on the form.
- 10 Now, when you give a -- now when you say what's
- 11 necessary on a form you're talking about from the
- 12 applicant. So this defines what is necessary from the
- 13 applicant, what can be requested or demanded from the
- 14 applicant --
- 15 JUSTICE BREYER: On the form.
- MS. MILLETT: -- on the form, exactly. On
- 17 the form. And that is the necessary information to let
- 18 them apply their own tools and make the decisions that
- 19 the States make --
- JUSTICE BREYER: But his problem is how do
- 21 you get to that conclusion? He says you can't get there
- 22 from the language because the language doesn't say that.
- 23 It says what the Commission can put on the form. It
- 24 doesn't say anything about whether some other agency,
- 25 such as a State or -- you know, sovereign, can add

- 1 something.
- Now, that's his problem. And I would like
- 3 to hear very succinctly, the reason he is wrong about
- 4 that is?
- 5 MS. MILLETT: The Commission, let me just --
- 6 if we turn to 26H at the very top line --
- 7 JUSTICE BREYER: 26H.
- 8 MS. MILLETT: 26H, where it has a number 1,
- 9 let's insert the Commission before I get to the word
- 10 "may." And that's all you need to do. We know from the
- 11 prior page the Commission is the one doing this. The
- 12 Commission may require only from the applicant.
- 13 JUSTICE BREYER: Yes.
- MS. MILLETT: That's all the Commission is
- 15 allowed to require from the applicant.
- 16 JUSTICE BREYER: Correct.
- 17 MS. MILLETT: And then the burden shifts to
- 18 the State to do it. If, Justice Breyer, if the question
- 19 is they may require that, and then the State can require
- 20 anything else it wants, it is an utterly pointless form.
- 21 And what we know from six --
- JUSTICE SCALIA: Excuse me, they may require
- 23 it. It doesn't say they must require it. So it leaves
- 24 it open to the Commission, does it not, to decline to
- 25 require some materials that is necessary to enable the

- 1 appropriate State election official to assess
- 2 eligibility? Isn't that -- isn't that what the language
- 3 means?
- 4 MS. MILLETT: I don't think that's a fair
- 5 reading of what Congress would have assigned to them.
- 6 But even if it were, Justice Scalia --
- 7 JUSTICE SCALIA: May means may.
- 8 MS. MILLETT: -- that's something to be
- 9 challenged through the Administrative Procedure Act --
- JUSTICE SCALIA: No, no, we're talking
- 11 about -- right now we are talking about the consequences
- 12 of that language, not -- and the consequence of the may
- is may. It does not even require the Commission to
- 14 include within the form everything that's necessary for
- 15 the State to determine eligibility.
- Now, why would Congress ever create such a
- 17 system where the Commission need not require what's
- 18 necessary for eligibility, and nonetheless, the State
- 19 cannot, cannot require anything further than what the
- 20 Commission says?
- 21 MS. MILLETT: The relevant phraseology is
- 22 may require only, and that is not your normal permissive
- 23 language. It's actually Congress -- it is language of
- limitation when used that way. "You may require only"
- 25 does not mean that you may -- that you may do what you

1	want, and they have further down
2	JUSTICE SCALIA: It says what you only may
3	require. It doesn't say what you only shall require.
4	MS. MILLETT: But you may require what is
5	necessary to enable. So the language here, I think any
6	fair reading and we don't strain the language in this
7	context the natural reading is that they may require
8	only the information from the applicant that's necessary
9	essentially to shift the burden.
10	JUSTICE BREYER: Where you're going is this,
11	as I heard you before: It is true that there is no
12	specific language saying the State can't do this, can't
13	add things. But it does make a huge point approving
14	citizenship in a particular way on the form. What would
15	the point of that be if the State could add things?
16	So we must look back to the purpose, not
17	necessarily exclusively the language, of deciding what
18	that particular provision be, in particularly one as you
19	quote adding to, what could it have been? And there the
20	legislative history in my view is helpful because it
21	makes clear, for example, in at least one place that
22	Congress did think they shouldn't add a provision that
23	allows the State to do just what it's doing here because
24	that wouldn't be consistent with the purpose of the Act.
25	So I'm putting words in your mouth, but

- 1 don't accept them because I put them there.
- 2 (Laughter.)
- 3 MS. MILLETT: I would just like to add to
- 4 that, Justice Breyer, two points, and that is with
- 5 respect to citizenship in particular, not only does the
- 6 statute, the NVRA flag it, but the Help America Vote Act
- 7 in 2002.
- 8 So even if you don't want to go just with
- 9 the legislative history, Justice Scalia, in 2002
- 10 Congress revisited the citizenship requirement for the
- 11 Federal form and it added a box that you have to check
- 12 that you are a citizen -- that you are a citizen. So
- 13 Congress revisited this issue after the statute had been
- in effect for nine years.
- JUSTICE SOTOMAYOR: Ms. Millett, I want to
- 16 give up --
- 17 CHIEF JUSTICE ROBERTS: Ms. Millett, is
- 18 there -- I take it under your theory what the EAC
- 19 allowed Louisiana to do was wrong.
- MS. MILLETT: It's unclear. It's a little
- 21 different in that context, in two ways. First of all,
- 22 the Commission made the decision so they have that.
- 23 CHIEF JUSTICE ROBERTS: Yes, I know. I'm
- 24 assuming that, and I'm saying they were wrong.
- MS. MILLETT: Oh, I'm sorry. And then the

- 1 second thing is the information that's required there is
- 2 information, for the most part, that is -- that the Help
- 3 America Vote Act allows States to require of
- 4 individuals. Now, in the Help America to Vote Act, it's
- 5 an either do it at the polls or do it in the
- 6 registration.
- 7 Maybe the Commission thought it could
- 8 forward it, but at least there you have two profound
- 9 differences and that is it's at least information that a
- 10 separate statute has said States can require from
- 11 individuals.
- 12 JUSTICE GINSBURG: And those are --
- MS. MILLETT: But I think it's --
- JUSTICE GINSBURG: What are they?
- MS. MILLETT: That is the --
- 16 JUSTICE GINSBURG: What are the
- 17 additional -- the question here is, is proof of
- 18 citizenship an additional thing the State can ask. Now
- 19 you're telling us that there are some additional things.
- MS. MILLETT: No, it's not proof of
- 21 citizenship. What it is, is an identification
- 22 requirement that can be applied at the polls or the Help
- 23 America Vote Act says at the time of registration.
- JUSTICE GINSBURG: Can you -- can you
- 25 explain -- it's puzzling. You have all these

- 1 State-specific and pages of State-specific requirements.
- 2 What State-specific requirements are permitted and what
- 3 State-specific requirements are not permitted? You're
- 4 putting the citizenship on the not permitted side of the
- 5 line. What is permitted and what is not permitted and
- 6 what's the difference in the two categories?
- 7 MS. MILLETT: Okay. First of all, the State
- 8 requirement of citizenship, it's permitted in the sense
- 9 that Congress requires in three different ways that
- 10 citizenship be affirmed. It's simply disagreeing about
- 11 proof. So it's not as though citizenship is left off
- this form, it's simply a question of how it's proved.
- 13 But the Help America -- just to get right to your
- 14 question -- there's two aspects to the Help America Vote
- 15 Act that change this form a little bit.
- When you go through those instructions, what
- 17 you will see -- here's what those State-specific
- 18 instructions are: They are the requirement that you put
- in an ID number that is required by the Help America
- 20 Vote Act required. Required. So clearly, that is to be
- 21 on the form because another statute requires it. And
- 22 then you put on -- it says to put on party
- 23 identification for the States that have it. Some States
- 24 have race identified, and then the instructions tell you
- 25 about the different filing deadlines --

- 1 JUSTICE SCALIA: Is all that stuff required
- 2 by the Vote America Act? All that stuff?
- 3 MS. MILLETT: No, no --
- 4 JUSTICE SCALIA: Just the first thing you
- 5 mentioned for us.
- 6 MS. MILLETT: Just the
- 7 identification number.
- JUSTICE SCALIA: And the rest is -- is what?
- 9 MS. MILLETT: Well, there's two -- those are
- 10 things that are in the State -- when you look at those
- 11 State-specific instructions, they are not add-ons. They
- 12 are not adding attachments.
- JUSTICE KAGAN: Ms. Millett, I mean, suppose
- 14 it were true that the EAC has been inconsistent in this
- 15 respect. That would be a different kind of lawsuit.
- MS. MILLETT: That would be a very different
- 17 lawsuit that was never brought in this case. And this
- 18 just -- the Louisiana thing just happened in --
- 19 CHIEF JUSTICE ROBERTS: You've got a great
- 20 deal of reliance on what the EAC has done, and I'm
- 21 saying if it's not doing a very good job, I'd be -- I'd
- 22 question whether or not the fact that the EAC is going
- 23 to implement it is sufficient assurance that the Act
- 24 reads the way you say it does.
- MS. MILLETT: But the Act, I think, by -- by

- 1 its own plain language and by its normal -- it can't
- 2 have no -- there is only two ways to look at this
- 3 statute. It either created a form that is simply to be
- 4 the servant of every State and they can pile on to it
- 5 anything else they want, and that is utterly
- 6 irreconcilable to Congress's findings and the entire
- 7 purpose of this statute, or this is Congress's
- 8 registration mechanism that it shows exercising its
- 9 power.
- 10 JUSTICE SCALIA: Not anything else that they
- 11 want. Not anything else that they want. But what is,
- 12 in the words of the statute, necessary to enable the
- 13 appropriate State election official to assess the
- 14 eligibility of the applicant? It's clear that the
- 15 statute intends the States to be able to do that. And
- 16 you say, well, the -- you know, the Commission has --
- 17 has required its -- its own proof and the State wants a
- 18 different kind of proof. The proof the Commission
- 19 requires is simply the statement, I'm a citizen. This
- 20 is proof?
- 21 MS. MILLETT: This is -- statements --
- JUSTICE SCALIA: This is not proof at all.
- 23 MS. MILLETT: Statements under oath,
- 24 statements under oath in a criminal case --
- 25 JUSTICE SCALIA: Under oath is not proof at

- 1 all. It's just a statement.
- MS. MILLETT: Statements under oath in a
- 3 criminal case are proof beyond a reasonable doubt by
- 4 which we execute them.
- JUSTICE ALITO: What do you make of the fact
- 6 that --
- 7 MS. MILLETT: It's a very serious oath --
- 8 I'm sorry.
- JUSTICE ALITO: I didn't mean to interrupt
- 10 your sentence. What -- what do you make of the fact
- 11 that States can create their own forms? Arizona has its
- 12 own form, right? And I don't believe you argue that its
- 13 form is illegal. Maybe you think it is and you'll
- 14 explain that.
- 15 But what -- how -- and Arizona could put on
- 16 its own form a demand for the information that it -- it
- 17 wants to apply to people who submit the Federal form.
- 18 It seems like a very strange system. So, if somebody
- 19 happens to fill out the Arizona form, their application
- 20 may be rejected; whereas if they had filled out the
- 21 Federal form, it would be accepted. How can that be?
- MS. MILLETT: Well, there is two responses.
- 23 One, it's an open question whether what -- whether the
- 24 State form, for purposes of Federal elections, can add
- 25 new requirements, but we haven't challenged it, we

- 1 haven't challenged here and I think it's --
- JUSTICE ALITO: What statutory provision
- 3 would you challenge that under? There's -- there's a
- 4 provision under the statute, the numbers are complicated
- 5 and I don't have it on the tip of my tongue, it says
- 6 what the State form must do and I didn't see anything in
- 7 that that would -- that would preclude their requiring
- 8 this additional proof.
- 9 MS. MILLETT: I think -- I think it's
- 10 actually a very complicated question. And so to be
- 11 clear, there is statutory language, I think, going both
- 12 ways on this question. There is in 4(a)(2), which says
- 13 the State form has to meet the criteria of 7(b), but
- 14 then -- and then there is in 5(a)(6), which says, if
- 15 you're going to be handing it out as your public office,
- 16 it's the public agencies that have to provide the form,
- 17 it has to be equivalent.
- 18 But then in Section 2 -- I'm sorry to throw
- 19 all these numbers, but I'm just trying to show you how
- 20 it's complicated. In Section 2, the very background for
- 21 the Federal form is that it's in -- it's in addition to
- 22 whatever the States are already doing --
- 23 JUSTICE ALITO: Well, I've read all those
- 24 provisions and -- all right. Let's assume for the sake
- 25 of argument that Arizona could do this on its own form.

- 1 You haven't argued that their form is illegal.
- 2 MS. MILLETT: Correct.
- JUSTICE ALITO: This seems to me like a
- 4 crazy system. This is like the -- you know, the IRS
- 5 creating two different tax returns with different --
- 6 with different tax rates and different tax tables and
- 7 how much you pay would depend on which particular form
- 8 you happened to pick up and submit.
- 9 MS. MILLETT: No, not -- not in this sense.
- 10 First of all, it would be very respectful of the States
- 11 and Congress to arrive at a balance here, if it did
- 12 that. But Congress has made clear that there is this
- 13 essentially safe harbor role for the Federal form and
- 14 that -- and they can't hide it away. It has to be
- 15 available for the -- the driver's license and motor
- 16 voter process.
- 17 It has to be handed out at the relevant
- 18 public agencies, and the mail form is available to be
- 19 handed out or online for people to find. And so yes,
- 20 could it be different -- it's an open question whether
- 21 that's what Congress wanted for Federal elections or not
- 22 or whether --
- 23 CHIEF JUSTICE ROBERTS: It's not just
- 24 different forms. You'd have different voter rolls then,
- 25 right, depending on which form?

1	MS. MILLETT: No.
2	CHIEF JUSTICE ROBERTS: No?
3	MS. MILLETT: Oh, I'm sorry.
4	CHIEF JUSTICE ROBERTS: I would have though
5	since you allow contemplate a State form that has
6	different requirements than the Federal form, you would
7	then end up with two different voter rolls.
8	MS. MILLETT: No
9	CHIEF JUSTICE ROBERTS: Some people that
L O	registered under the State form, some people that
L1	registered under the Federal form.
L2	MS. MILLETT: As as of now, Arizona is
L3	doing it as a unitary system. Because anyone who fills
L 4	out the State form necessarily satisfies the requirement
L 5	of the Federal form.
L6	CHIEF JUSTICE ROBERTS: Yes, but it doesn't
L 7	work the other way.
L8	MS. MILLETT: It doesn't work the other way
L9	CHIEF JUSTICE ROBERTS: You can satisfy the
20	Federal form, so you're on the Federal list, but not
21	satisfy the State form, so you're not on the State list
22	MS. MILLETT: It doesn't work the other way
23	at least for State elections. For Federal for
24	Federal elections, it has to be the same. And so for

Federal elections, it's a single roll. It's up to

25

- 1 States to decide how they want to deal with the State
- 2 form. At the time the Congress enacted this statute,
- 3 about half of the States in 1993, including Arizona, had
- 4 a postcard form where you just attested to citizenship
- 5 under oath.
- 6 JUSTICE KENNEDY: The Court of Appeals said
- 7 that there's a different preemption test under -- for
- 8 this law under this Constitutional provision than there
- 9 is under the Supremacy Clause. It seems to me that that
- 10 ignores the proposition that the State has a very strong
- 11 and vital interest in the integrity of its elections,
- 12 even when those, and perhaps especially when those are
- 13 elections of Federal officials. And it seems to me the
- 14 Ninth Circuit's new test did not give sufficient weight
- 15 to that interest.
- 16 MS. MILLETT: Well, first of all, the Ninth
- 17 Circuit's test came out of this Court's language in
- 18 Siebold. It had both conflict language and
- 19 harmonization, both of which appear in this Court's
- 20 decision in Siebold. But to get directly to your
- 21 question of whether there should be a different test, I
- 22 don't think it matters on the outcome in this case
- 23 because the preemption is in those 31,550 people who
- 24 couldn't register.
- 25 But, I think the Election Clause is going to

1	be very different in this sense in two critical
2	senses. And that is that the Elections Clause involves
3	an authority in the States that is conferred by the
4	Constitution itself.
5	May I finish?
6	CHIEF JUSTICE ROBERTS: Please.
7	MS. MILLETT: It it has no reserve power
8	that's being protected there, and by the very nature of
9	the Election Clause is that Congress only acts when it
10	means to displace or change what the States are doing.
11	And so the necessity of having a presumption makes no
12	sense in this context, particularly when you're talking
13	again about a Federal form for Federal elections of
14	Federal officials by Federal voters who need a direct

- 16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- MS. MILLETT: Thank you.

line of accountability.

15

- 18 CHIEF JUSTICE ROBERTS: Mr. Srinivasan?
- 19 ORAL ARGUMENT OF SRI SRINIVASAN,
- FOR THE UNITED STATES, AS AMICUS CURIAE,
- 21 SUPPORTING THE RESPONDENTS
- MR. SRINIVASAN: Thank you, Mr. Chief
- 23 Justice, and may it Please the Court:
- 24 The National Voter Registration Act aims to
- 25 streamline the process of registration for applicants,

- 1 and the provisions that provide for the establishment of
- 2 a Federal form embody that objective.
- 3 And I'd like to point to three features of
- 4 the relevant statutory language that I think support our
- 5 reading. And the particular critical provision is at
- 6 page 22A of the appendix to the government's brief. And
- 7 I'm sorry, I know that the provisions are located in a
- 8 number of areas, but the gray brief at page 22A has the
- 9 critical provision in our view, which is one that
- 10 Ms. Millett was pointing to. And that's gg-7(b)(1).
- 11 Now, what this provision embodies is this
- 12 understanding: That the EAC is the one who determines
- 13 what the content of the Federal form is. Not the
- 14 States, but the EAC. The States do have a role in this
- 15 scheme, and I think it's important to understand what
- 16 that role is.
- 17 The States have a consultative role at the
- 18 front end. And this is back at page 21A -- I'm sorry
- 19 for skipping back. But at page 21A at the bottom of the
- 20 page, the EAC is to develop a form in consultation with
- 21 the chief election officers of the States.
- 22 JUSTICE SCALIA: Mr. Srinivasan, the problem
- 23 that I have with that is that the provision you're
- 24 alluding to says that -- not that the State shall -- not
- 25 that the commission "shall" require the information

- 1 necessary to enable the appropriate State election
- 2 official to assess eligibility, but it simply says that
- 3 it "may" require only that information. Now, is it
- 4 conceivable that Congress intended that the Commission
- 5 may not require some information that is necessary to
- 6 enable the appropriate State election official to assess
- 7 eligibility, but that the State may not require it
- 8 either?
- 9 Is that a conceivable disposition of
- 10 Congress?
- 11 MR. SRINIVASAN: I don't think it is,
- 12 Justice Scalia, but I think the problem with that is in
- 13 the premise. I grant you that the statute says "may
- 14 require, "but it says "may require only," and I think
- 15 the only fair way to read this provision is that the
- 16 commission is to require the information that's
- 17 necessary, but --
- JUSTICE SCALIA: You think "may require
- 19 only" means shall require only? Is that -- is that your
- 20 submission? "May require only" means shall require
- 21 only?
- MR. SRINIVASAN: It "may require only," in
- 23 effect, means shall require information that's
- 24 necessary, but may only require that information. I
- 25 think the statute would make very little sense if the

- 1 EAC discharged its statutory responsibility by having a
- 2 Federal form that required nothing other than the name.
- 3 That wouldn't be within anybody's conceivable conception
- 4 of a rational objective of Congress that would enable
- 5 the EAC to satisfy --
- 6 JUSTICE SCALIA: It would not be a problem
- 7 if the State could require it. It would not be a
- 8 problem. When -- when the commission fails to do
- 9 what -- what enables the State to assess qualifications,
- 10 the State will do it. No problem.
- 11 MR. SRINIVASAN: But I think the whole point
- 12 of this, Justice Scalia -- and this is where I started,
- 13 with all due respect -- is to come forward with a
- 14 Federal form that streamlines the process of
- 15 registration for applicants. And if the regime that
- 16 resulted were one in which the Federal form served very
- 17 little purpose other than to set a floor, but then each
- 18 of the 50 States could superimpose whatever additional
- 19 requirements they wanted to, I think that would largely
- 20 defeat the entire purpose of the Federal form.
- 21 JUSTICE BREYER: And that's the grand
- 22 purpose -- to go back to your -- I see that as your
- 23 grand purpose. That's the grand purpose argument. And
- then there is the subsidiary purpose argument, which you
- 25 started to make, which I wanted to hear, which has to do

- 1 with (b). It says may require only such identifying
- 2 information. So I thought, well, they could require
- 3 less, less than what's necessary. They could. It says
- 4 you can't require more. They could require less.
- 5 But suppose they put a statement in and they
- 6 say, in respect to this qualification, nothing to do
- 7 with citizenship: This is what is necessary. No more.
- 8 But we've done everything that is necessary. Then could
- 9 a State come along and say, we think more is necessary?
- 10 MR. SRINIVASAN: I don't think so, Justice
- 11 Breyer.
- 12 JUSTICE BREYER: And it's the word
- 13 "necessary" that you thought -- that that would be
- 14 dependent upon?
- MR. SRINIVASAN: Coupled with the statutory
- 16 objective because what this provision says is that the
- 17 EAC, in consultation with the States, is supposed to
- 18 create a form that imposes the following burden on
- 19 individuals, on individuals. That's the key.
- JUSTICE BREYER: Well, I know I'm not -- I'm
- 21 just not quite -- the last step of what I wanted you to
- 22 think up was this --
- MR. SRINIVASAN: Sure.
- JUSTICE BREYER: It does say "may require
- 25 only" --

1	MR. SRINIVASAN: Correct.
2	JUSTICE BREYER: "that which is
3	necessary." So if they said and this what is
4	necessary. Fine. Pretty tough for the State to say I'm
5	going to add some things. But the very next subsection
6	does use the words "shall include." So I wonder and
7	that has to do with citizenship. So I wonder if that is
8	a statement by Congress that in respect to citizenship,
9	that is what is necessary.
10	MR. SRINIVASAN: I do think that that's what
11	Congress contemplated was necessary, but it's not to the
12	exclusion of this, which is that if a State comes
13	forward to the EAC, which is a body that's charged with
14	responsibility for defining the contents of the Federal
15	form, and says we think something more is necessary.
16	Take a look at what we want to submit to you, and you
17	should amend the Federal form, or you should at least
18	amend our State-specific portion of the Federal form to
19	include this requirement in it, the EAC could make that
20	determination.
21	Congress made that responsibility
22	JUSTICE GINSBURG: Mr. Srinivasan, I think
23	General Horne told us that that the State did ask the

Commission didn't act on it. Only the legal director.

24

25

Commission, but the Commission had only two members; the

- 1 So how could they get court review of an agency decision
- 2 that was never made?
- 3 MR. SRINIVASAN: No, Justice -- Justice
- 4 Ginsburg, to be clear, I don't -- I don't think General
- 5 Horne would disagree with this, the executive director
- 6 initially responded to the request by rejecting it, but
- 7 it did go to the full Commission, and at that point,
- 8 there was a fully-constituted Commission. The
- 9 Commission divided by a vote of 2-2.
- 10 And so in that instance, the Commission took
- 11 no action. But a 2-2 vote is a -- qualifies as a
- 12 rejection. And that is something that could --
- 13 potentially could have been the subject of judicial
- 14 review. Now, I'm obviously not going to give away any
- 15 Federal defenses, but --
- 16 JUSTICE SCALIA: Yes. And since you believe
- 17 that "may require only" means "shall require only," in
- 18 judicial review, a determination before the -- the Court
- 19 would be whether indeed this information is necessary to
- 20 enable the State to assess the qualifications, right?
- 21 MR. SRINIVASAN: Well, that --
- JUSTICE SCALIA: And the district court here
- 23 certainly thought that was necessary. So you're going
- 24 to be in -- in bad shape -- the government is going to
- 25 be -- the next time somebody does challenge the

- 1 Commission determination in court under the
- 2 Administrative Procedure Act.
- 3 MR. SRINIVASAN: I mean, obviously, I'd
- 4 respectfully disagree with that. I think we'll be in
- 5 perfectly good shape. And I think part of the reason is
- 6 that this -- requiring a statement under penalty of
- 7 perjury is the traditional way in which States enforce
- 8 their qualifications.
- 9 The legislative history shows that Congress
- 10 understood that that was the traditional way. What the
- 11 State seeks to do here is do something over and above
- 12 the traditional way to enforce qualifications.
- 13 CHIEF JUSTICE ROBERTS: As -- as Louisiana
- 14 has done.
- 15 MR. SRINIVASAN: Well, Louisiana is not --
- 16 is not citizenship-specific here, Your Honor, as
- 17 Ms. Millett was pointing out --
- 18 CHIEF JUSTICE ROBERTS: But it's certainly
- 19 things that were not required in the Federal form.
- 20 MR. SRINIVASAN: That's correct. And that
- 21 was submitted to the EAC, and the EAC approved of it.
- 22 And I think that's the critical distinction here.
- 23 CHIEF JUSTICE ROBERTS: How is that
- 24 consistent with the statutory purpose to streamline
- 25 registration?

- 1 MR. SRINIVASAN: Because the statute -- the
- 2 statute seeks to streamline registration, but it's not
- 3 directed to the exclusion of all other objectives. And
- 4 the EAC is charged with balancing the various competing
- 5 statutory objectives. And it concluded in -- with
- 6 respect to the Louisiana submission -- that that one was
- 7 okay. I do think that's different. A, because the EAC
- 8 approved of it; and B, because the specific forms of
- 9 identification that are outlined in Louisiana addition
- 10 were exactly those forms of identification that Congress
- 11 already said was okay at either the registration stage
- 12 or the voting stage.
- JUSTICE SCALIA: You got to stop saying the
- 14 Commission approved of it. 2-2 is not approving. You
- 15 could say the Commission was unable to disapprove of it.
- 16 MR. SRINIVASAN: Well, I think we are
- 17 talking about two different things, Justice Scalia. I'm
- 18 talking about Louisiana.
- 19 JUSTICE SCALIA: I'm sorry. I'm sorry.
- MR. SRINIVASAN: I was trying to answer the
- 21 Chief Justice's question.
- 22 In Arizona, it was 2-2.
- Now, I want to point out one other critical
- 24 feature of the statute, and General Horne alluded to
- 25 this and said that there's no way to look in the statute

- 1 and see a distinction between on one hand what the
- 2 individuals can be required to provide, and on the other
- 3 hand what the State can then do with the individual
- 4 information to crosscheck it.
- 5 And the statute presupposes that the State
- 6 can conduct its own investigation to crosscheck the
- 7 information that the individual supplies. And maybe the
- 8 critical provision to see that is at page 19A of the
- 9 appendix to the government's brief. And that's a
- 10 provision that deals with a different qualification,
- 11 felony history. But it operates on this assumption that
- 12 States can conduct their own investigation, which makes
- 13 all the sense in the world.
- 14 This one -- this provision that's in
- 15 subsection (g) at the top of the page, which is 1973
- 16 gg-6(g), what this does is it tells the United States
- 17 Attorney's Offices that when there is a Federal
- 18 conviction of a felony, the U.S. Attorney's Office is
- 19 supposed to give written notice of that conviction to
- 20 the chief State election official.
- 21 And what's the State -- chief State election
- 22 official going to do with that? Well of course, what
- 23 they're going to do is they're going to take a look at
- 24 the Federal form, they're going to see what the
- 25 individual said about their felony history, and they're

- 1 going to crosscheck it -- this information that they got
- 2 from the United States Attorney -- to make sure that the
- 3 information on the form is accurate.
- 4 JUSTICE ALITO: May I ask you a question
- 5 that I asked Ms. Millett? Does the United States think
- 6 that the Arizona form is illegal? And if it is not,
- 7 what sense does it make to have a system in which
- 8 whether or not someone will successfully register
- 9 depends on the happenstance of the particular form that
- 10 the person fills out.
- 11 MR. SRINIVASAN: Here is the sense it would
- 12 make -- even if -- if Arizona had the authority to add
- 13 to the Federal requirements on its own State form, the
- 14 sense it would make is this: That the Federal form
- 15 always operates as a floor.
- 16 It's always there for somebody to use to
- 17 register, regardless of what the State form might do in
- 18 addition. And that has -- I take Your Honor's
- 19 assumption -- if I can just briefly finish -- I
- 20 understand Your Honor's point that there is a practical
- 21 question about whether that would ever be practicable or
- 22 useful, given that an individual would want to use the
- 23 State form for State, local and Federal elections, but
- 24 there is also the -- the well-understood practice of
- 25 organizations that go out to register individuals to

1	vote	
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- 2 And they can use the Federal form, and the
- 3 Federal form would suffice.
- 4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 5 General Horne, two minutes.
- 6 REBUTTAL ARGUMENT OF THOMAS C. HORNE
- 7 ON BEHALF OF THE PETITIONERS
- 8 MR. HORNE: Thank you, Your Honor, and I'll
- 9 apologize in advance for talking really quickly. The --
- 10 my friend says in discussing Section 7(b)(1) that it
- 11 would not be rational to require only the signature.
- 12 But that's exactly what they did. All they required was
- 13 the signature, and 7(b)(1) has nothing to do with that;
- 7(b)(2) requires a signature. So what the EAC chose to
- 15 do under 7(b)(1) was exactly nothing, zero, which --
- 16 which emphasizes the point that this is the
- 17 responsibility of the States, and that's how they
- 18 understood it.
- 19 With respect to the license having -- we
- 20 cited ARA Section 28-3173, an Arizona statute in our
- 21 reply brief that provides that you -- you must renew
- 22 every 12 years. So by 2004, the problem that my friend
- 23 spoke about was completely erased. Everybody had a new
- license which would be sufficient for this purpose, 100
- 25 percent.

1	They admit that we can reject applications
2	by reference to other by reference to other
3	documentation, but they try to draw a distinction
4	between that and asking the person to write down the
5	driver's license number. But there is nothing in the
6	statute that justifies that distinction. A reference to
7	criminal history has nothing to do with with whether
8	or not there is a distinction with respect to
9	citizenship between looking at other documents and
10	asking the person for their driver's license numbers.
11	In both cases, it's something outside of the form and
12	they have admitted we can go outside the form.
13	With respect to legislative history, Your
14	Honor, I think the key thing Mr. Justice Breyer, in
15	your question was, it's only in one place. There are a
16	lot of other places that go the other way. So we cannot
17	conclude from that one place what the majority of
18	Congress expected.
19	With respect to HAVA, in HAVA, the Congress
20	had another opportunity to expressly state that the
21	State could not look to external evidence and ask for
22	additional evidence, and they chose not to do that. And
23	so I would say that HAVA is further evidence that
2.4	Congress was not choosing to prohibit us from asking for

additional information to fulfill our function, if it's

25

Τ	necessary, of being sure that the applicant is eligible
2	to vote.
3	With respect to the Siebold case, the court
4	in Siebold specifically said there will be no preemption
5	unless there is a direct conflict and only to the extent
6	of that conflict, and in that connection one last
7	sentence, Your Honor if there are two plausible
8	interpretations, ordinary principles of Federalism say
9	one should not choose the interpretation that results in
10	preemption, and the same thing applies with respect to
11	the canon of constitutional accordance.
12	Thank you, Your Honor.
13	CHIEF JUSTICE ROBERTS: Thank you, counsel.
14	The case is submitted.
15	(Whereupon, at 11:08 a.m., the case in the
16	above-entitled matter was submitted.)
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