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IN THE SUPREME COURT OF THE UNITED STATES

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ARIZONA, ET AL., :

Petitioners : No. 12-71

v. :

THE INTER TRIBAL COUNCIL :

OF ARIZONA, INC., ET AL. :

- - - - - x

Washington, D.C.

Monday, March 18, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:

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Phoenix, Arizona; on behalf of Petitioners.

PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf
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States, as amicus curiae, supporting Respondents.

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1 P R O C E E D I N G S

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?

20 MR. HORNE: I would say, Your Honor, that
21 neither takes precedence over the other. They're both
22 equally important. And so --

23 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?

14 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.

24 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
13 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.

20 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 --

3 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 added something
18 to the Federal form, and that essentially creates a new
19 set of requirements and a new form.

20 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.

25 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.

21 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 --

10 MR. HORNE: Accept and use.

11 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 eligible. The argument is, they say we can
22 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 --

1 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?

22 MR. HORNE: Your Honor, that -- that was
23 under a predecessor of mine, so I don't know the reason.

24 JUSTICE SCALIA: Oh. Okay.

25 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
24 person is qualified we must accept the application. We
25 then pointed out in our brief that that would mean that

1 even if we had documentary proof that the person was not
2 a citizen, we'd still have to accept the application.

3 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
17 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.

22 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
13 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 guess 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?

3 MR. HORNE: Well, some States require the
4 Social Security number --

5 JUSTICE SCALIA: Okay.

6 MR. HORNE: -- which is not -- which is not
7 provided for in the statute.

8 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 --

24 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.

5 JUSTICE KAGAN: But -- but, General, doesn't
6 the -- the statute make the EAC the decision maker 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 --

19 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 a 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.

15 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
13 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.

3 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.

19 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 --

2 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.)

9 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
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?

20 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."

15 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 --

22 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
6 point, and that is that the sponsor of the bill was
7 opposed to that amendment in conference committee,
8 saying it wasn't necessary, that the States could
9 already verify applicants under the existing law, as it
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
13 this Federal law in 7(b), it says what the registration
14 form shall contain.

15 MR. HORNE: Yes.

16 JUSTICE BREYER: Now, there are four
17 subsections and only one of those refers to a particular
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.

25 JUSTICE BREYER: It says that. Then I look

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.

11 JUSTICE BREYER: I'm saying given these five
12 or six specific things --

13 MR. HORNE: Yes, Your Honor.

14 JUSTICE BREYER: -- that show you're a
15 citizen --

16 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 --

23 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.

11 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 number, you can write down
23 a 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.

16 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
22 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
6 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,
18 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 --

7 JUSTICE SOTOMAYOR: General --

8 MR. HORNE: Could I reserve time for
9 rebuttal, Your Honor?

10 CHIEF JUSTICE ROBERTS: Yes.

11 JUSTICE SOTOMAYOR: -- I'm still having a
12 problem.

13 MR. HORNE: Yes, Your Honor.

14 JUSTICE SOTOMAYOR: Both the Federal law and
15 the State law require an individual to be a citizen.

16 MR. HORNE: Yes, Your Honor.

17 JUSTICE SOTOMAYOR: That's the basic
18 qualification.

19 MR. HORNE: Yes, Your Honor.

20 JUSTICE SOTOMAYOR: Both agree that that's
21 essential.

22 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.

3 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,
13 there are people that you have rejected, even without
14 these forms?

15 MR. HORNE: It's extremely inadequate, Your
16 Honor. It's essentially an honor system. It does not
17 do the job.

18 JUSTICE SOTOMAYOR: Well, that's what the
19 Federal system decided was enough.

20 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.

25 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
13 of your birth certificate, a copy of your naturalization
14 certificate. Why isn't that just creating another form?

15 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
22 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

6 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
13 into the computer, does not produce records. It is a
14 mistake in Arizona's Proposition 200. Neither one of
15 these worked.

16 JUSTICE SCALIA: Well, you can say that
17 about any certification procedure that, now and then
18 there will be a mistake. I mean the fact that there is
19 one person where -- where the computer spit out the
20 wrong number or something, that is the basis for
21 rejecting the entire system that Arizona proposes?

22 MS. MILLETT: Joint appendix page 263, the
23 district court found that 31,550 people were rejected
24 from voting because of Proposition 200. Even on that
25 same page he finds that 11,000 of them subsequently

1 registered, but they had to do the double gauntlet that
2 Congress was trying to eliminate. The other 20,000
3 swore under oath that they were citizens and Mr. Horne,
4 before the Ninth Circuit, conceded he had no evidence
5 that they were not citizens --

6 JUSTICE ALITO: The statute --

7 MS. MILLETT: -- of the United States.

8 JUSTICE ALITO: The statute says that
9 Arizona must accept and use the Federal form. What does
10 that mean? Let me give you two possible definitions:
11 One, the person must be registered if the Federal form
12 is properly completed and submitted; two, the State may
13 not make any further inquiry of the person who submits
14 the form.

15 Maybe you have other definitions, but what
16 is the -- what do you interpret "accept and use" to
17 mean?

18 MS. MILLETT: We interpret "accept and use,"
19 it's mainly the latter, your second one, and that is
20 that it is a limitation on what can be asked of the
21 individual and that's not just from the Section 4
22 language where accept and use comes from. But what's
23 critical here is Section gg-7 which is on 26H of the
24 petition appendix here. And that's where they say on
25 this form.

1 The form may require only, may require
2 only -- from the applicant, I'm adding that in -- such
3 identifying information essentially as the Commission
4 determines is necessary to allow the State to make its
5 decision.

6 Now this is not just a ticket into the
7 State's own registration process so they can go thank
8 you very much for throwing it in the garbage can, now do
9 what we would like you to do. It is a registration
10 form, and when filled out completely and submitted under
11 oath, it has the same legal --

12 JUSTICE ALITO: Well, let me give you this
13 example --

14 MS. MILLETT: -- as the registration form.

15 JUSTICE ALITO: A person rides up to a place
16 to register on a bicycle and gets out and hands in the
17 Federal form. This -- this boy looks like he is 13
18 years old and he is carrying school books, he is wearing
19 a middle school t-shirt, but he has filled out the form
20 properly.

21 Are they required to register him or can
22 they ask him, could you show me some proof of age, like
23 he would have to if he tried to buy alcohol or
24 cigarettes?

25 MS. MILLETT: They may not require anything

1 else from the applicant, but they can certainly apply
2 their own evidence that they obtain, whether it's from
3 their own eyeballs or whether it is through records or
4 databases that they run these through, which is the more
5 common one, and make a decision.

6 Now a decision, the decision isn't simply we
7 would like more from you. That's not an appropriate
8 decision.

9 JUSTICE BREYER: His point is, he keeps
10 making the point, your colleague, and he says, no, that
11 isn't what it says. What the statute says is it may
12 require only such identifying information as is
13 necessary to assess eligibility. In other words, it's
14 telling the people who write the form what they can put
15 on it. And they can't put other things on it. But it
16 nowhere says that the State can't do other things.

17 Now that's his point. And when I asked him,
18 well, how are you -- how are you using -- you have to be
19 able to use, oh, he says, we use it. We use the citizen
20 part and these things on the form to prosecute people
21 for perjury. So we're doing what it says, we're using
22 it and it doesn't say we can't add a few other things.

23 Okay. Now, that's his argument. Now, your
24 answer, which would be very helpful to me, is?

25 MS. MILLETT: My answer is when you look at

1 26H it's talking about the form. And first, we know
2 that the commission is the one that decides what is
3 necessary on this form, a decision that wasn't
4 challenged --

5 JUSTICE SCALIA: Is that conclusive or can
6 that be challenged?

7 MS. MILLETT: It can certainly be challenged
8 under the Administrative Procedure Act but was not in
9 this case.

10 But it says what is necessary on the form.
11 Now, when you give a -- now when you say what's
12 necessary on a form you're talking about from the
13 applicant. So this defines what is necessary from the
14 applicant, what can be requested or demanded from the
15 applicant --

16 JUSTICE BREYER: On the form.

17 MS. MILLETT: -- on the form, exactly. On
18 the form. And that is the necessary information to let
19 them apply their own tools and make the decisions that
20 the States make --

21 JUSTICE BREYER: But his problem is how do
22 you get to that conclusion? He says you can't get there
23 from the language because the language doesn't say that.
24 It says what the Commission can put on the form. It
25 doesn't say anything about whether some other agency,

1 such as a State or -- you know, a sovereign, can add
2 something.

3 Now, that's his problem. And I would like
4 to hear very succinctly, the reason he is wrong about
5 that is?

6 MS. MILLETT: The Commission, let me just --
7 if we turn to 26H at the very top line --

8 JUSTICE BREYER: 26H.

9 MS. MILLETT: 26H, where it has a number 1,
10 let's insert the Commission before I get to the word
11 "may." And that's all you need to do. We know from the
12 prior page the Commission is the one doing this. The
13 Commission may require only from the applicant.

14 JUSTICE BREYER: Yes.

15 MS. MILLETT: That's all the Commission is
16 allowed to require from the applicant.

17 JUSTICE BREYER: Correct.

18 MS. MILLETT: Exactly. And then the burden
19 shifts to the State to do it. If, Justice Breyer, if the
20 question is they may require that, and then the State can
21 require anything else it wants, it is an utterly pointless
22 form. And what we know from six --

23 JUSTICE SCALIA: Excuse me, they may require
24 it. It doesn't say they must require it. So it leaves
25 it open to the Commission, does it not, to decline to

1 require some materials that is necessary to enable the
2 appropriate State election official to assess
3 eligibility? Isn't that -- isn't that what the language
4 means?

5 MS. MILLETT: I don't think that's a fair
6 reading of what Congress would have assigned to them.
7 But even if it were, Justice Scalia --

8 JUSTICE SCALIA: May means may.

9 MS. MILLETT: -- that's something to be
10 challenged through the Administrative Procedure Act --

11 JUSTICE SCALIA: No, no, no, we're talking
12 about -- right now we are talking about the consequences
13 of that language, not -- and the consequence of the may
14 is may. It does not even require the Commission to
15 include within the form everything that's necessary for
16 the State to determine eligibility.

17 Now, why would Congress ever create such a
18 system where the Commission need not require what's
19 necessary for eligibility, and nonetheless, the State
20 cannot, cannot require anything further than what the
21 Commission says?

22 MS. MILLETT: The relevant phraseology is
23 may require only, and that is not your normal permissive
24 language. It's actually Congress -- it is language of
25 limitation when used that way. "You may require only"

1 does not mean that you may -- that you may run freely
2 and do what you want, and they have further down --

3 JUSTICE SCALIA: It says what you only may
4 require. It doesn't say what you only shall require.

5 MS. MILLETT: But you may require that is
6 necessary to enable. So the language here, I think any
7 fair reading -- and we don't strain the language in this
8 context -- the natural reading is that they may require
9 only the information from the applicant that's necessary
10 essentially to shift the burden.

11 JUSTICE BREYER: No, no. Where you're going
12 is this, as I heard you before: It is true that there is
13 no specific language saying the State can't do this, can't
14 add things. But it does make a huge point approving
15 citizenship in a particular way on the form. What would
16 the point of that be if the State could add things?

17 So we must look back to the purpose, not
18 necessarily exclusively the language, of deciding what
19 that particular provision be, in particularly one as you
20 quote adding to, what could it have been? And there the
21 legislative history in my view is helpful because it
22 makes clear, for example, in at least one place that
23 Congress did think they shouldn't add a provision that
24 allows the State to do just what it's doing here because
25 that wouldn't be consistent with the purpose of the Act.

1 So I'm putting words in your mouth, but
2 don't accept them because I put them there.

3 (Laughter.)

4 MS. MILLETT: I would just like to add to
5 them, Justice Breyer, two points, and that is with
6 respect to citizenship in particular, not only does the
7 statute, the NVRA flag it, but the Help America Vote Act
8 in 2002.

9 So even if you don't want to go just with
10 the legislative history, Justice Scalia, in 2002
11 Congress revisited the citizenship requirement for the
12 Federal form and it added a box that you have to check
13 that you are a citizen -- that you are a citizen. So
14 Congress revisited this issue after the statute had been
15 in effect for nine years.

16 JUSTICE SOTOMAYOR: Ms. Millett, I want to
17 give up --

18 CHIEF JUSTICE ROBERTS: Ms. Millett, is
19 there -- I take it under your theory what the EAC
20 allowed Louisiana to do was wrong.

21 MS. MILLETT: It's unclear. It's a little
22 different in that context, in two ways. First of all,
23 the Commission made the decision so they have that.

24 CHIEF JUSTICE ROBERTS: Yes, I know. I'm
25 assuming that, and I'm saying they were wrong.

1 MS. MILLETT: Oh, I'm sorry. And then the
2 second thing is the information that's required there is
3 information, for the most part, that is -- that the Help
4 America Vote Act allows States to require of
5 individuals. Now, in the Help America to Vote Act, it's
6 an either do it at the polls or do it in the
7 registration.

8 Maybe the Commission thought it could
9 forward it, but at least there you have two profound
10 differences and that is it's at least information that a
11 separate statute has said States can require from
12 individuals.

13 JUSTICE GINSBURG: And those are what?

14 MS. MILLETT: But I think it's --

15 JUSTICE GINSBURG: What are they?

16 MS. MILLETT: That is the --

17 JUSTICE GINSBURG: What are the
18 additional -- the question here is, is proof of
19 citizenship an additional thing the State can ask. Now
20 you're telling us that there are some additional things.

21 MS. MILLETT: No, it's not proof of
22 citizenship. What it is, is an identification
23 requirement that can be applied at the polls or the Help
24 America Vote Act says at the time of registration.

25 JUSTICE GINSBURG: Can you -- can you

1 explain -- it's puzzling. You have all these
2 State-specific and pages of State-specific requirements.
3 What State-specific requirements are permitted and what
4 State-specific requirements are not permitted? You're
5 putting the citizenship on the not permitted side of the
6 line. What is permitted and what is not permitted and
7 what's the difference in the two categories?

8 MS. MILLETT: Okay. First of all, the State
9 requirement of citizenship, it's permitted in the sense
10 that Congress requires in three different ways that
11 citizenship be affirmed. It's simply disagreeing about
12 proof. So it's not as though citizenship is left off
13 this form, it's simply a question of how it's proved.
14 But the Help America -- just to get right to your
15 question -- there's two aspects to the Help America Vote
16 Act that change this form a little bit.

17 When you go through those instructions, what
18 you will see -- here's what those State-specific
19 instructions are: They are the requirement that you put
20 in an ID number that is required by the Help America
21 Vote Act required. Required. So clearly, that is to be
22 on the form because another statute requires it. And
23 then you put on -- it says to put on party
24 identification for the States that have it. Some States
25 have race identified, and then the instructions tell you

1 about the different filing deadlines -

2 JUSTICE SCALIA: Is all that stuff required
3 by the Vote America Act? All that stuff?

4 MS. MILLETT: No, no --

5 JUSTICE SCALIA: Just the first thing you
6 mentioned for us.

7 MS. MILLETT: Just the
8 identification number.

9 JUSTICE SCALIA: And the rest is -- is what?

10 MS. MILLETT: Well, there's two -- those are
11 things that are in the State -- when you look at those
12 State-specific instructions, they are not add-ons. They
13 are not adding attachments.

14 JUSTICE KAGAN: Ms. Millett, I mean, suppose
15 it were true that the EAC has been inconsistent in this
16 respect. That would be a different kind of lawsuit.

17 MS. MILLETT: That would be a very different
18 lawsuit that was never brought in this case. And this
19 just -- the Louisiana thing just happened in --

20 CHIEF JUSTICE ROBERTS: You've got a great
21 deal of reliance on what the EAC has done, and I'm
22 saying if it's not doing a very good job, I'd be -- I'd
23 question whether or not the fact that the EAC is going
24 to implement it is sufficient assurance that the Act
25 reads the way you say it does.

1 MS. MILLETT: But the Act, I think, by - by
2 its own plain language and by its normal -- it can't
3 have no -- there is only two ways to look at this
4 statute. It either created a form that is simply to be
5 the servant of every State and they can pile on to it
6 anything else they want, and that is utterly
7 irreconcilable to Congress's findings and the entire
8 purpose of this statute, or this is Congress's
9 registration mechanism that it chose exercising its
10 power.

11 JUSTICE SCALIA: Not anything else that they
12 want. Not anything else that they want. But what is,
13 in the words of the statute, necessary to enable the
14 appropriate State election official to assess the
15 eligibility of the applicant? It's clear that the
16 statute intends the States to be able to do that. And
17 you say, well, the -- you know, the Commission has --
18 has required its -- its own proof and the State wants a
19 different kind of proof. The proof the Commission
20 requires is simply the statement, I'm a citizen. This
21 is proof?

22 MS. MILLETT: This is -- statements --

23 JUSTICE SCALIA: This is not proof at all.

24 MS. MILLETT: Statements under oath,
25 statements under oath in a criminal case --

1 JUSTICE SCALIA: Under oath is not proof at
2 all. It's just a statement.

3 MS. MILLETT: Statements under oath in a
4 criminal case are proof beyond a reasonable doubt by
5 which we execute them.

6 JUSTICE ALITO: What do you make of the fact
7 that --

8 MS. MILLETT: It's a very serious oath --
9 I'm sorry.

10 JUSTICE ALITO: I didn't mean to interrupt
11 your sentence. What -- what do you make of the fact
12 that States can create their own forms? Arizona has its
13 own form, right? And I don't believe you argue that its
14 form is illegal. Maybe you think it is and you'll
15 explain that.

16 But what -- how -- and Arizona could put on
17 its own form a demand for the information that it -- it
18 wants to apply to people who submit the Federal form.
19 It seems like a very strange system. So, if somebody
20 happens to fill out the Arizona form, their application
21 may be rejected; whereas if they had filled out the
22 Federal form, it would be accepted. How can that be?

23 MS. MILLETT: Well, there is two responses.
24 One, it's an open question whether what -- whether the
25 State form, for purposes of Federal elections, can add

1 new requirements, but we haven't challenged it, we
2 haven't challenged here and I think it's --

3 JUSTICE ALITO: What statutory provision
4 would you challenge that under? There's -- there's a
5 provision under the statute, the numbers are complicated
6 and I don't have it on the tip of my tongue, it says
7 what the State form must do and I didn't see anything in
8 that that would -- that would preclude their requiring
9 this additional proof.

10 MS. MILLETT: I think -- I think it's
11 actually a very complicated question. And so to be
12 clear, there is statutory language, I think, going both
13 ways on this question. There is in 4(a)(2), which says
14 the State form has to meet the criteria of 7(b), but
15 then -- and then there is in 5(a)(6), which says, if
16 you're going to be handing it out as your public office,
17 it's the public agencies that have to provide the form,
18 it has to be equivalent.

19 But then in Section 2 -- I'm sorry to throw
20 all these numbers, but I'm just trying to show you how
21 it's complicated. In Section 2, the very background for
22 the Federal form is that it's in -- it's in addition to
23 whatever the States are already doing --

24 JUSTICE ALITO: Well, I've read all those
25 provisions and -- all right. Let's assume for the sake

1 of argument that Arizona could do this on its own form.
2 You haven't argued that their form is illegal.

3 MS. MILLETT: Correct.

4 JUSTICE ALITO: This seems to me like a
5 crazy system. This is like the -- you know, the IRS
6 creating two different tax returns with different --
7 with different tax rates and different tax tables and
8 how much you pay would depend on which particular form
9 you happened to pick up and submit.

10 MS. MILLETT: No, not -- not in this sense.
11 First of all, it would be very respectful of the States
12 and Congress to arrive at a balance here, if it did
13 that. But Congress has made clear that there is this
14 essentially safe harbor role for the Federal form and
15 that -- and they can't hide it away. It has to be
16 available for the -- the driver's license and motor
17 voter process.

18 It has to be handed out at the relevant
19 public agencies, and the mail form is available to be
20 handed out or online for people to find. And so yes,
21 could it be different -- it's an open question whether
22 that's what Congress wanted for Federal elections or not
23 or whether --

24 CHIEF JUSTICE ROBERTS: It's not just
25 different forms. You'd have different voter rolls then,

1 right, depending on which form?

2 MS. MILLETT: No.

3 CHIEF JUSTICE ROBERTS: No?

4 MS. MILLETT: Oh, I'm sorry.

5 CHIEF JUSTICE ROBERTS: I would have thought
6 since you allow -- contemplate a State form that has
7 different requirements than the Federal form, you would
8 then end up with two different voter rolls.

9 MS. MILLETT: No --

10 CHIEF JUSTICE ROBERTS: Some people that
11 registered under the State form, some people that
12 registered under the Federal form.

13 MS. MILLETT: As -- as of now, Arizona is
14 doing it as a unitary system. Because anyone who fills
15 out the State form necessarily satisfies the requirement
16 of the Federal form.

17 CHIEF JUSTICE ROBERTS: Yes, but it doesn't
18 work the other way.

19 MS. MILLETT: It doesn't work the other way.

20 CHIEF JUSTICE ROBERTS: You can satisfy the
21 Federal form, so you're on the Federal list, but not
22 satisfy the State form, so you're not on the State list.

23 MS. MILLETT: It doesn't work the other way
24 at least for State elections. For Federal -- for
25 Federal elections, it has to be the same. And so for

1 Federal elections, there's a single roll. It's up to
2 States to decide how they want to deal with the State
3 form. At the time the Congress enacted this statute,
4 about half of the States in 1993, including Arizona, had
5 a postcard form where you just attested to citizenship
6 under oath.

7 JUSTICE KENNEDY: The Court of Appeals said
8 that there's a different preemption test under -- for
9 this law under this Constitutional provision than there
10 is under the Supremacy Clause. It seems to me that that
11 ignores the proposition that the State has a very strong
12 and vital interest in the integrity of its elections,
13 even when those, and perhaps especially when those are
14 elections of Federal officials. And it seems to me the
15 Ninth Circuit's new test did not give sufficient weight
16 to that interest.

17 MS. MILLETT: Well, first of all, the Ninth
18 Circuit's test came out of this Court's language in
19 Siebold. It had both conflict language and
20 harmonization, both of which appear in this Court's
21 decision in Siebold. But to get directly to your
22 question of whether there should be a different test, I
23 don't think it matters on the outcome in this case
24 because the preemption is in those 31,550 people who
25 couldn't register.

1 But, I think the Election Clause is going to
2 be very different in this sense -- in two critical
3 senses. And that is that the Elections Clause involves
4 an authority in the States that is conferred by the
5 Constitution itself.

6 May I finish?

7 CHIEF JUSTICE ROBERTS: Please.

8 MS. MILLETT: It -- it has no reserve power
9 that's being protected there, and by the very nature of
10 the Election Clause is that Congress only acts when it
11 means to displace or change what the States are doing.
12 And so the necessity of having a presumption makes no
13 sense in this context, particularly when you're talking
14 again about a Federal form for Federal elections of
15 Federal officials by Federal voters who need a direct
16 line of accountability.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MS. MILLETT: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Srinivasan?

20 ORAL ARGUMENT OF SRI SRINIVASAN,

21 FOR THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENTS

23 MR. SRINIVASAN: Thank you, Mr. Chief

24 Justice, and may it Please the Court:

25 The National Voter Registration Act aims to

1 streamline the process of registration for applicants,
2 and the provisions that provide for the establishment of
3 a Federal form embody that objective.

4 And I'd like to point to three features of
5 the relevant statutory language that I think support our
6 reading. And the particular critical provision is at
7 page 22A of the appendix to the government's brief. And
8 I'm sorry, I know that the provisions are located in a
9 number of areas, but the gray brief at page 22A has the
10 critical provision in our view, which is one that
11 Ms. Millett was pointing to. And that's gg-7(b)(1).

12 Now, what this provision embodies is this
13 understanding: That the EAC is the one who determines
14 what the content of the Federal form is. Not the
15 States, but the EAC. The States do have a role in this
16 scheme, and I think it's important to understand what
17 that role is.

18 The States have a consultative role at the
19 front end. And this is back at page 21A -- I'm sorry
20 for skipping back. But at page 21A at the bottom of the
21 page, the EAC is to develop a form in consultation with
22 the chief election officers of the States.

23 JUSTICE SCALIA: Mr. Srinivasan, the problem
24 that I have with that is that the provision you're
25 alluding to says that -- not that the State shall -- not

1 that the commission "shall" require the information
2 necessary to enable the appropriate State election
3 official to assess eligibility, but it simply says that
4 it "may" require only that information. Now, is it
5 conceivable that Congress intended that the Commission
6 may not require some information that is necessary to
7 enable the appropriate State election official to assess
8 eligibility, but that the State may not require it
9 either?

10 Is that a conceivable disposition of
11 Congress?

12 MR. SRINIVASAN: I don't think it is,
13 Justice Scalia, but I think the problem with that is in
14 the premise. I grant you that the statute says "may
15 require," but it says "may require only," and I think
16 the only fair way to read this provision is that the
17 commission is to require the information that's
18 necessary, but --

19 JUSTICE SCALIA: You think "may require
20 only" means shall require only? Is that -- is that your
21 submission? "May require only" means shall require
22 only?

23 MR. SRINIVASAN: It "may require only," in
24 effect, means shall require information that's
25 necessary, but may only require that information. I

1 think the statute would make very little sense if the
2 EAC discharged its statutory responsibility by having a
3 Federal form that required nothing other than the name.
4 That wouldn't be within anybody's conceivable conception
5 of a rational objective of Congress that would enable
6 the EAC to satisfy --

7 JUSTICE SCALIA: It would not be a problem
8 if the State could require it. It would not be a
9 problem. When -- when the commission fails to do
10 what -- what enables the State to assess qualifications,
11 the State will do it. No problem.

12 MR. SRINIVASAN: But I think the whole point
13 of this, Justice Scalia -- and this is where I started,
14 with all due respect -- is to come forward with a
15 Federal form that streamlines the process of
16 registration for applicants. And if the regime that
17 resulted were one in which the Federal form served very
18 little purpose other than to set a floor, but then each
19 of the 50 States could superimpose whatever additional
20 requirements they wanted to, I think that would largely
21 defeat the entire purpose of the Federal form.

22 JUSTICE BREYER: And that's the grand
23 purpose -- to go back to your -- I see that as your
24 grand purpose. That's the grand purpose argument. And
25 then there is the subsidiary purpose argument, which you

1 started to make, which I wanted to hear, which has to do
2 with (b). It says may require only such identifying
3 information. So I thought, well, they could require
4 less, less than what's necessary. They could. It says
5 you can't require more. They could require less.

6 But suppose they put a statement in and they
7 say, in respect to this qualification, nothing to do
8 with citizenship: This is what is necessary. No more.
9 But we've done everything that is necessary. Then could
10 a State come along and say, we think more is necessary?

11 MR. SRINIVASAN: I don't think so, Justice
12 Breyer.

13 JUSTICE BREYER: And it's the word
14 "necessary" that you thought -- that that would be
15 dependent upon?

16 MR. SRINIVASAN: Coupled with the statutory
17 objective because what this provision says is that the
18 EAC, in consultation with the States, is supposed to
19 create a form that imposes the following burden on
20 individuals, on individuals. That's the key.

21 JUSTICE BREYER: Well, I know I'm not -- I'm
22 just not quite -- the last step of what I wanted you to
23 think up was this --

24 MR. SRINIVASAN: Sure.

25 JUSTICE BREYER: It does say "may require

1 only" -

2 MR. SRINIVASAN: Correct.

3 JUSTICE BREYER: -- "that which is
4 necessary." So if they said -- and this what is
5 necessary. Fine. Pretty tough for the State to say I'm
6 going to add some things. But the very next subsection
7 does use the words "shall include." So I wonder -- and
8 that has to do with citizenship. So I wonder if that is
9 a statement by Congress that in respect to citizenship,
10 that is what is necessary.

11 MR. SRINIVASAN: I do think that that's what
12 Congress contemplated was necessary, but it's not to the
13 exclusion of this, which is that if a State comes
14 forward to the EAC, which is a body that's charged with
15 responsibility for defining the contents of the Federal
16 form, and says we think something more is necessary.
17 Take a look at what we want to submit to you, and you
18 should amend the Federal form, or you should at least
19 amend our State-specific portion of the Federal form to
20 include this requirement in it, the EAC could make that
21 determination.

22 Congress made that responsibility --

23 JUSTICE GINSBURG: Mr. Srinivasan, I think
24 General Horne told us that -- that the State did ask the
25 Commission, but the Commission had only two members; the

1 Commission didn't act on it. Only the legal director.
2 So how could they get court review of an agency decision
3 that was never made?

4 MR. SRINIVASAN: No, Justice -- Justice
5 Ginsburg, to be clear, I don't -- I don't think General
6 Horne will disagree with this, the executive director
7 initially responded to the request by rejecting it, but
8 it did go to the full Commission, and at that point,
9 there was a fully-constituted Commission. The
10 Commission divided by a vote of 2-2.

11 And so in that instance, the Commission took
12 no action. But a 2-2 vote is a -- qualifies as a
13 rejection. And that is something that could --
14 potentially could have been the subject of judicial
15 review. Now, I'm obviously not going to give away any
16 Federal defenses, but --

17 JUSTICE SCALIA: Yes. And since you believe
18 that "may require only" means "shall require only," in
19 judicial review, the determination before the -- the Court
20 would be whether indeed this information is necessary to
21 enable the State to assess the qualifications, right?

22 MR. SRINIVASAN: Well, that --

23 JUSTICE SCALIA: And the district court here
24 certainly thought that was necessary. So you're going
25 to be in -- in bad shape -- the government is going to

1 be -- the next time somebody does challenge the
2 Commission determination in court under the
3 Administrative Procedure Act.

4 MR. SRINIVASAN: I mean, obviously, I'd
5 respectfully disagree with that. I think we'll be in
6 perfectly good shape. And I think part of the reason is
7 that this -- requiring a statement under penalty of
8 perjury is the traditional way in which States enforce
9 their qualifications.

10 The legislative history shows that Congress
11 understood that that was the traditional way. What the
12 State seeks to do here is do something over and above
13 the traditional way to enforce qualifications.

14 CHIEF JUSTICE ROBERTS: As -- as Louisiana
15 has done.

16 MR. SRINIVASAN: Well, Louisiana is not --
17 is not citizenship-specific, Your Honor, as Ms. Millett
18 was pointing out --

19 CHIEF JUSTICE ROBERTS: But it's certainly
20 things that were not required on the Federal form.

21 MR. SRINIVASAN: That's correct. And that
22 was submitted to the EAC, and the EAC approved of it.
23 And I think that's the critical distinction here.

24 CHIEF JUSTICE ROBERTS: How is that
25 consistent with the statutory purpose to streamline

1 registration?

2 MR. SRINIVASAN: Because the statute -- the
3 statute seeks to streamline registration, but it's not
4 an objective to the exclusion of all other objectives.
5 And the EAC is charged with balancing the various
6 competing statutory objectives. And it concluded in -
7 with respect to the Louisiana submission -- that that one
8 was okay. I do think that's different. A, because the
9 EAC approved of it; and B, because the specific forms of
10 identification that are outlined in Louisiana addition
11 were exactly those forms of identification that Congress
12 already said was okay at either the registration stage
13 or the voting stage.

14 JUSTICE SCALIA: You got to stop saying the
15 Commission approved of it. 2-2 is not approving. You
16 could say the Commission was unable to disapprove of it.

17 MR. SRINIVASAN: Well, I think we are
18 talking about two different things, Justice Scalia. I'm
19 talking about Louisiana.

20 JUSTICE SCALIA: I'm sorry. I'm sorry.

21 MR. SRINIVASAN: I was trying to answer the
22 Chief Justice's question.

23 In Arizona, it was 2-2.

24 Now, I want to point out one other critical
25 feature of the statute, and General Horne alluded to

1 this and said that there's no way to look in the statute
2 and see a distinction between on one hand what the
3 individuals can be required to provide, and on the other
4 hand what the State can then do with the individual
5 information to crosscheck it.

6 And the statute presupposes that the State
7 can conduct its own investigation to crosscheck the
8 information that the individual supplies. And maybe the
9 critical provision to see that is at page 19A of the
10 appendix to the government's brief. And that's a
11 provision that deals with a different qualification,
12 felony history. But it operates on this assumption that
13 States can conduct their own investigation, which makes
14 all the sense in the world.

15 This one -- this provision that's in
16 subsection (g) at the top of the page, which is 1973
17 gg-6(g), what this does is it tells the United States
18 Attorney's Offices that when there is a Federal
19 conviction of a felony, the U.S. Attorney's Offices are
20 supposed to give written notice of that conviction to
21 the chief State election official.

22 And what's the State -- chief State election
23 official going to do with that? Well of course, what
24 they're going to do is they're going to take a look at
25 the Federal form, they're going to see what the

1 individual said about their felony history, and they're
2 going to crosscheck it - against the information that
3 they got from the United States Attorney -- to make sure
4 that the information on the form is accurate.

5 JUSTICE ALITO: May I ask you a question
6 that I asked Ms. Millett? Does the United States think
7 that the Arizona form is illegal? And if it is not,
8 what sense does it make to have a system in which
9 whether or not someone will successfully register
10 depends on the happenstance of the particular form that
11 the person fills out.

12 MR. SRINIVASAN: Here is the sense it would
13 make -- even if -- if Arizona had the authority to add
14 to the Federal requirements on its own State form, the
15 sense it would make is this: That the Federal form
16 always operates as a floor.

17 It's always there for somebody to use to
18 register, regardless of what the State form might do in
19 addition. And that has -- I take Your Honor's
20 assumption -- if I can just briefly finish -- I
21 understand Your Honor's point that there is a practical
22 question about whether that would ever be practical or
23 useful, given that an individual will want to use the
24 State form for State, local and Federal elections, but
25 there is also the -- the well-understood practice of

1 organizations that go out to register individuals to
2 vote.

3 And they can use the Federal form, and the
4 Federal form would suffice.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 General Horne, two minutes.

7 REBUTTAL ARGUMENT OF THOMAS C. HORNE

8 ON BEHALF OF THE PETITIONERS

9 MR. HORNE: Thank you, Your Honor, and I'll
10 apologize in advance for talking really quickly. The --
11 my friend says in discussing Section 7(b)(1) that it
12 would not be rational to require only the signature.
13 But that's exactly what they did. All they required was
14 the signature, and 7(b)(1) has nothing to do with that;
15 7(b)(2) requires a signature. So what the EAC chose to
16 do under 7(b)(1) was exactly nothing, zero, which --
17 which emphasizes the point that this is the
18 responsibility of the States, and that's how they
19 understood it.

20 With respect to the license having -- we
21 cited ARS Section 28-3173, an Arizona statute in our
22 reply brief that provides that you -- you must renew
23 every 12 years. So by 2004, the problem that my friend
24 spoke about was completely erased. Everybody had a new
25 license which would be sufficient for this purpose, 100

1 percent.

2 They admit that we can reject applications
3 by reference to other -- by reference to other
4 documentation, but they try to draw a distinction
5 between that and asking the person to write down the
6 driver's license number. But there is nothing in the
7 statute that justifies that distinction. A reference to
8 criminal history has nothing to do with -- with whether
9 or not there is a distinction with respect to
10 citizenship between looking at other documents and
11 asking the person for their driver's license numbers.
12 In both cases, it's something outside of the form and
13 they have admitted we can go outside the form.

14 With respect to legislative history, Your
15 Honor, I think the key thing -- Mr. Justice Breyer, in
16 your question was, it's only in one place. There are a
17 lot of other places that go the other way. So we cannot
18 conclude from that one place what the majority of
19 Congress expected.

20 With respect to HAVA, in HAVA, the Congress
21 had another opportunity to expressly state that the
22 State could not look to external evidence and ask for
23 additional evidence, and they chose not to do that. And
24 so I would say that HAVA is further evidence that
25 Congress was not choosing to prohibit us from asking for

1 additional information to fulfill our function, if it's
2 necessary, of being sure that the applicant is eligible
3 to vote.

4 With respect to the Siebold case, the court
5 in Siebold specifically said there will be no preemption
6 unless there is a direct conflict and only to the extent
7 of that conflict, and in that connection -- one last
8 sentence, Your Honor -- if there are two plausible
9 interpretations, ordinary principles of Federalism say
10 one should not choose the interpretation that results in
11 preemption, and the same thing applies with respect to
12 the canon of constitutional accordant.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 The case is submitted.

16 (Whereupon, at 11:08 a.m., the case in the
17 above-entitled matter was submitted.)

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