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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. :

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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:

THOMAS C. HORNE, ESQ., Attorney General of Arizona, Phoenix, Arizona; on behalf of Petitioners.

PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf of Respondents.

SRI SRINIVASAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-71, Arizona v. the Inter Tribal Council of Arizona.

General Horne.

ORAL ARGUMENT OF THOMAS C. HORNE

ON BEHALF OF THE PETITIONERS

MR. HORNE: Thank you, Mr. Chief Justice, and may it please the Court:

The NVRA should not be construed to preempt Arizona's Proposition 200 for three reasons. First, prohibiting a State from effectively enforcing the citizenship requirement is so far-reaching that if Congress had intended that, it would have put the prohibition in the statute expressly, which it did not do. Congressional silence should not disable States from taking sensible precautions to exclude noncitizens from voting.

Second, when Congress wanted to expressly prohibit something, it knew how to do it. It expressly prohibited notarization and other forms of authentication. This Court has frequently held that statutory language that indicates -- that prohibits one 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  
12 the amici explain that many people don't have the  
13 documents 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 have done  
18 something to the Federal form, and that essentially  
19 creates a new 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 a  
15 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 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 States  
12 can come to it and tell it what it needs and the EAC can  
13 take action. But the EAC is driving the bus, according  
14 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 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.

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 distinction  
22 which we do not find in the statute between using  
23 external evidence that we already have and asking  
24 someone to write down the -- the number on his driver's  
25 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 -- 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 her 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 after  
17 they had already registered to vote. Other people were  
18 caught in their applications to citizenship when they  
19 checked and found that they had previously registered to  
20 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 I take you  
7 back to this distinction that you're making. You said  
8 you can't append an additional form, you can't use an  
9 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.

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 purpose and objectives of the Act by

1 relying on the findings of the trial court that relate  
2 exactly to that question, finding that it was a minimal  
3 burden, overcome by a major interest that the State has  
4 in protecting the integrity of the system, where the --  
5 where the trial judge found a lot of evidence to show  
6 that there was voter fraud going on, although not the  
7 fault of the individuals, the fault of the organizations  
8 that often fool people into signing the form when they  
9 don't intend to or they don't intend to break the law;  
10 but as -- but as against that, that the -- that the  
11 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, could  
21 only find one person out of six million people that  
22 could not satisfy -- who was entitled to vote, who could  
23 not satisfy the requirements of the Act; and a lot of  
24 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 in the direct line of  
16 accountability between individual citizens and their  
17 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: Mr. Gonzalez did that as well  
11 and the naturalization certificate got bounced because  
12 the naturalization certificate, when put into the  
13 computer, does not produce records. It is a mistake in  
14 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  
11 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  
15 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.

25 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.

5 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 --

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

13 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 boy looks like he is 13 years old  
17 and he is carrying school books, he is wearing a middle  
18 school t-shirt, but he has filled out the form properly.

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

23 MS. MILLETT: They may not require anything  
24 else from the applicant but they can certainly apply  
25 their own evidence that they obtain, whether it's from

1 their own eyeballs or whether it is through records or  
2 databases that they run these through which is the more  
3 common one, and make a decision.

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

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

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

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

23 MS. MILLETT: My answer is when you look at  
24 26H it's talking about the form. And first, we know  
25 that the commission is the one that decides what is

1 necessary on this form, a decision that wasn't  
2 challenged --

3 JUSTICE SCALIA: Is that conclusive or can  
4 that be challenged?

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

8 But it says what is necessary on this form.  
9 Now, when you talk about what's necessary on a form  
10 you're talking about from the applicant. So this  
11 defines what is necessary from the applicant, what can  
12 be requested or demanded from the applicant --

13 JUSTICE BREYER: On the form.

14 MS. MILLETT: On the form, exactly. On the  
15 form. And that is the necessary information to let them  
16 apply their own tools and make the decisions that the  
17 States make --

18 JUSTICE BREYER: But his problem is how do  
19 you get to that conclusion? He says you can't get there  
20 from the language because the language doesn't say that.  
21 It says what the Commission can put on the form. It  
22 doesn't say anything about whether some other agency,  
23 such as a State or sovereign, can add something.

24 Now, that's his problem. And I would like  
25 to hear very succinctly, the reason he is wrong about

1 that is.

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

4 JUSTICE BREYER: 26H.

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

10 JUSTICE BREYER: Yes.

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

13 JUSTICE BREYER: Correct.

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

19 JUSTICE SCALIA: Excuse me, they may require  
20 it. It doesn't say they must require it. So it leaves  
21 it open to the Commission, does it not, to decline to  
22 require some materials that is necessary to enable the  
23 appropriate State election official to assess  
24 eligibility? Isn't that, isn't that what the language  
25 means?

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

4 JUSTICE SCALIA: May means may.

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

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

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

18 MS. MILLETT: The relevant phraseology is  
19 may require only, and that is not your normal permissive  
20 language. It's actually Congress -- it is language of  
21 limitation when used that way. "You may require only"  
22 does not mean that you may -- that you may do what you  
23 want, and they have further down --

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

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

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

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

22 So I'm putting words in your mouth but don't  
23 accept them because I put them there.

24 MS. MILLETT: I would just like to add to  
25 that, Justice Breyer, two points, and that is with

1 respect to citizenship in particular, not only does the  
2 statute, the NVRA flag it, but the Help America Vote Act  
3 in 2002.

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

11 JUSTICE SOTOMAYOR: Ms. Millett, I want to  
12 give up --

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

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

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

21 MS. MILLETT: Oh, I'm sorry. And then the  
22 second thing is the information that's required there is  
23 information for the most part that is -- that the Help  
24 America Vote Act allows States to require of  
25 individuals. Now, in the Help America to Vote Act, it's



1 an either do it at the polls or do it in the  
2 registration.

3 Maybe the Commission thought it could  
4 forward it, but at least there you have two profound  
5 differences and that is it's at least information that a  
6 separate statute has said States can require from  
7 individuals.

8 JUSTICE GINSBURG: And those are --

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

10 JUSTICE GINSBURG: What are they?

11 MS. MILLETT: That is the --

12 JUSTICE GINSBURG: What are the  
13 additional -- the question here is, is proof of  
14 citizenship an additional thing the State can ask. Now  
15 you're telling us that there are some additional things.

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

20 JUSTICE GINSBURG: Can you -- can you  
21 explain -- it's puzzling. You have all these  
22 State-specific and pages of State-specific requirements.  
23 What State-specific requirements are permitted and what  
24 State-specific requirements are not permitted? You're  
25 putting the citizenship on the not permitted side of the

1 line. What is permitted and what is not permitted and  
2 what's the difference in the two categories?

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

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

22 JUSTICE SCALIA: Is all that stuff required  
23 by the Vote America Act? All that stuff?

24 MS. MILLETT: No, no --

25 JUSTICE SCALIA: Just the first thing you

1 mentioned for us.

2 MS. MILLETT: Just the  
3 identification number.

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

5 MS. MILLETT: Well, there's two -- those are  
6 things that are in the State -- when you look at those  
7 State-specific instructions, they are not add-ons. They  
8 are not adding attachments.

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

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

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

21 MS. MILLETT: But the Act, I think, by -- by  
22 its own plain language and by its normal -- it can't  
23 have no -- there is only two ways to look at this  
24 statute. It either created a form that is simply to be  
25 the servant of every State and they can pile on to it

1 anything else they want, and that is utterly  
2 irreconcilable to Congress's findings and the entire  
3 purpose of this statute or this is Congress's  
4 registration mechanism that it shows exercising its  
5 power.

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

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

18 JUSTICE SCALIA: This is not proof at all.

19 MS. MILLETT: Statements under oath,  
20 statements under oath in a criminal case --

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

23 MS. MILLETT: Statements under oath in a  
24 criminal case are proof beyond a reasonable doubt by  
25 which we execute them.

1 JUSTICE ALITO: What do you make of the fact  
2 that --

3 MS. MILLETT: It's a very serious oath --  
4 I'm sorry.

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

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

18 MS. MILLETT: Well, there is two responses.  
19 One, it's an open question whether what -- whether the  
20 State form for purposes of Federal elections can add new  
21 requirements, but we haven't challenged it, we haven't  
22 challenged here and I think it's --

23 JUSTICE ALITO: What statutory provision  
24 would you challenge that under? There's -- there's a  
25 provision under the statute, the numbers are complicated

1 and I don't have it on the tip of my tongue, it says  
2 what the State form must do and I didn't see anything in  
3 that that would -- that would preclude their requiring  
4 this additional proof.

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

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

19 JUSTICE ALITO: Well, I've read all those  
20 provisions and -- all right. Let's assume for the sake  
21 of argument that Arizona could do this on its own form.  
22 You haven't argued that their form is illegal.

23 MS. MILLETT: Correct.

24 JUSTICE ALITO: This seems to me like a  
25 crazy system. This is like the, you know, the IRS

1 creating two different tax returns with different --  
2 with different tax rates and different tax tables and  
3 how much you pay would depend on which particular form  
4 you happened to pick up and submit.

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

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

19 CHIEF JUSTICE ROBERTS: It's not just  
20 different forms. You'd have different voter rolls then,  
21 right, depending on which form?

22 MS. MILLETT: No.

23 CHIEF JUSTICE ROBERTS: No?

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

25 CHIEF JUSTICE ROBERTS: I would have thought

1 since you allow -- contemplate a State form that has  
2 different requirements than the Federal form, you would  
3 then end up with two different voter rolls.

4 MS. MILLETT: No --

5 CHIEF JUSTICE ROBERTS: Some people that  
6 registered under the State form, some people that  
7 registered under the Federal form.

8 MS. MILLETT: As -- as of now, Arizona is  
9 doing it as a unitary system. Because anyone who fills  
10 out the State form necessarily satisfies the requirement  
11 of the Federal form.

12 CHIEF JUSTICE ROBERTS: Yeah, but it doesn't  
13 work the other way.

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

15 CHIEF JUSTICE ROBERTS: You can satisfy the  
16 Federal form, so you're on the Federal list, but not  
17 satisfy the State form, so you're not on the State list.

18 MS. MILLETT: It doesn't work the other way  
19 at least for State elections. For Federal -- for  
20 Federal elections, it has to be the same. And so for  
21 Federal elections, it's a single roll. It's up to  
22 States to decide how they want to deal with the State  
23 form. At the time the Congress enacted this statute,  
24 about half of the States in 1993, including Arizona, had  
25 a postcard form where you just attested to citizenship



1 under oath.

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

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

21 But I think the Election Clause is going to  
22 be very different in this sense -- in two critical  
23 senses. And that is that the Elections Clause involves  
24 an authority in the States that is conferred by the  
25 Constitution itself.

1           May I finish?

2           CHIEF JUSTICE ROBERTS: Please.

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

12           CHIEF JUSTICE ROBERTS: Thank you, counsel.

13           MS. MILLETT: Thank you.

14           CHIEF JUSTICE ROBERTS: Mr. Srinivasan?

15           ORAL ARGUMENT OF SRI SRINIVASAN,

16           FOR THE UNITED STATES, AS AMICUS CURIAE,

17           SUPPORTING THE RESPONDENTS

18           MR. SRINIVASAN: Thank you, Mr. Chief

19 Justice, and may it Please the Court:

20           The National Voter Registration Act aims to  
21 streamline the process of registration for applicants,  
22 and the provisions that provide for the establishment of  
23 a Federal form embody that objective.

24           And I'd like to point to three features of  
25 the relevant statutory language that I think support our

1 reading. And the particular critical provision is at  
2 page 22A of the appendix to the Government's brief. And  
3 I'm sorry, I know that the provisions are located in a  
4 number of areas, but the gray brief at page 22A has the  
5 critical provision in our view, which is one that  
6 Ms. Millett was pointing to. And that's gg-7(b)(1).

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

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

18 JUSTICE SCALIA: Mr. Srinivasan, the problem  
19 that I have with that is that the provision you're  
20 alluding to says that -- not that the State shall -- not  
21 that the commission "shall" require the information  
22 necessary to enable the appropriate State election  
23 official to assess eligibility, but it simply says that  
24 it "may" require only that information. Now, is it  
25 conceivable that Congress intended that the Commission

1 may not require some information that is necessary to  
2 enable the appropriate State election official to assess  
3 eligibility, but that the State may not require it  
4 either?

5 Is that a conceivable disposition of  
6 Congress?

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

14 JUSTICE SCALIA: You think "may require  
15 only" means shall require only? Is that -- is that your  
16 submission? "May require only" means shall require  
17 only?

18 MR. SRINIVASAN: It "may require only" in  
19 effect means shall require information that's necessary,  
20 but may only require that information. I think the  
21 statute would make very little sense if the EAC  
22 discharged its statutory responsibility by having a  
23 Federal form that required nothing other than the name.  
24 That wouldn't be within anybody's conceivable conception  
25 of a rational objective of Congress that would enable

1 the EAC to --

2 JUSTICE SCALIA: It would not be a problem  
3 if the State could require it. It would not be a  
4 problem. When -- when the commission fails to do what  
5 enables the State to assess qualifications, the State'll  
6 do it. No problemo.

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

17 JUSTICE BREYER: And that's the grand -- to  
18 go back to your -- I see that as your grand purpose.  
19 That's the grand purpose argument. And then there is  
20 the subsidiary purpose argument, which you started to  
21 make, which I wanted to hear, which has to do with (b).  
22 It says may require only such identifying information.  
23 So I thought, well, they could require less, less than  
24 what's necessary. They could. It says you can't  
25 require more. They could require less.

1                   But suppose they put a statement in and they  
2 say, in respect to this qualification, nothing to do  
3 with citizenship: This is what is necessary. No more.  
4 But we've done everything that is necessary. Then could  
5 a State come along and say, we think more is necessary?

6                   MR. SRINIVASAN: I don't think so, Justice  
7 Breyer.

8                   JUSTICE BREYER: And it's the word  
9 "necessary" that you thought -- that that would be  
10 dependent upon?

11                   MR. SRINIVASAN: Coupled with the statutory  
12 objective, because what this provision says is that the  
13 EAC, in consultation with the States, is supposed to  
14 create a form that imposes the following burden on  
15 individuals, on individuals. That's the key.

16                   JUSTICE BREYER: Well, I know I'm not -- I'm  
17 just not quite -- the last step of what I wanted you to  
18 think of was this --

19                   MR. SRINIVASAN: Sure.

20                   JUSTICE BREYER: It does say "may require  
21 only" --

22                   MR. SRINIVASAN: Correct.

23                   JUSTICE BREYER: -- "that which is  
24 necessary." So if they said -- and this what is  
25 necessary. Fine. Pretty tough for the State to say I'm

1 going to add some things. But the very next subsection  
2 does use the words "shall include." So I wonder -- and  
3 that has to do with citizenship. So I wonder if that is  
4 a statement by Congress that in respect to citizenship,  
5 that is what is necessary.

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

17 Congress made that responsibility --

18 JUSTICE GINSBURG: Mr. Srinivasan, I think  
19 General Horne told us that -- that the State did ask the  
20 Commission, but the Commission had only two members; the  
21 Commission didn't act on it. Only the legal director.  
22 So how could they get court review of an agency decision  
23 that was never made?

24 MR. SRINIVASAN: No, Justice Ginsburg, to be  
25 clear, I don't -- I don't think General Horne would

1 disagree with this -- the executive director initially  
2 responded to the request by rejecting it, but it did go  
3 to the full Commission, and at that point, there was a  
4 fully-constituted Commission. The Commission divided by  
5 a vote of 2-2.

6 And so in that instance, the Commission took  
7 no action. But a 2-2 vote is a -- qualifies as a  
8 rejection. And that is something that could --  
9 potentially could have been the subject of judicial  
10 review. Now, I'm obviously not going to give away any  
11 Federal offenses but --

12 JUSTICE SCALIA: Yes. And since you believe  
13 that "may require only" means "shall require only," in  
14 judicial review, a determination before the -- the Court  
15 would be whether indeed this information is necessary to  
16 enable the State to assess the qualifications, right?

17 MR. SRINIVASAN: Well, that --

18 JUSTICE SCALIA: And the district court here  
19 certainly thought that was necessary. So you're going  
20 to be in -- in bad shape -- the government is going to  
21 be -- the next time somebody does challenge the  
22 Commission determination in court under the  
23 Administrative Procedure Act.

24 MR. SRINIVASAN: I mean, obviously, I'd  
25 respectfully disagree with that. I think we'll be in



1 perfectly good shape. And I think part of the reason is  
2 that this -- requiring a statement under penalty of  
3 perjury is the traditional way in which States enforce  
4 their qualifications.

5 The legislative history shows that Congress  
6 understood that that was the traditional way. What the  
7 State seeks to do here is do something over and above  
8 the traditional way to enforce qualifications.

9 CHIEF JUSTICE ROBERTS: As -- as Louisiana  
10 has done.

11 MR. SRINIVASAN: Well, Louisiana is not --  
12 is not situation-specific here, Your Honor, as  
13 Ms. Millett was pointing out --

14 CHIEF JUSTICE ROBERTS: But it's certainly  
15 things that were not required in the Federal form.

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

19 CHIEF JUSTICE ROBERTS: How is that  
20 consistent with the statutory purpose to streamline  
21 registration?

22 MR. SRINIVASAN: Because the statute -- the  
23 statute seeks to streamline registration, but it's not  
24 directed to the exclusion of all other objectives. And  
25 the EAC is charged with balancing the various competing

1 statutory objectives. And it concluded in -- with  
2 respect to the Louisiana submission -- that that one was  
3 okay. I do think that's different. A, because the EAC  
4 approved of it; and B, because the specific forms of  
5 identification that are outlined in Louisiana addition  
6 were exactly those forms of identification that Congress  
7 already said was okay at either the registration stage  
8 or the voting stage.

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

12 MR. SRINIVASAN: Well, I think we are  
13 talking about two different things, Justice Scalia. I'm  
14 talking about Louisiana.

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

16 MR. SRINIVASAN: I was trying to answer the  
17 Chief Justice's question.

18 In Arizona, it was 2-2.

19 Now, I want to point out one other critical  
20 feature of the statute, and General Horne alluded to  
21 this and said that there's no way to look in the statute  
22 and see a distinction between on one hand what the  
23 individuals can be required to provide, and on the other  
24 hand what the State can then do with the individual  
25 information to crosscheck it.

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

10           This provision that's in subsection (g) at  
11 the top of the page, which is 1973gg-6(g), what this  
12 does is it tells the United States Attorney's Offices  
13 that when there is a Federal conviction of a felony, the  
14 U.S. Attorney's Office is supposed to give written  
15 notice of that conviction to the chief State election  
16 official.

17           And what's the State -- chief State election  
18 official going to do with that? Well of course, what  
19 they're going to do is they're going to take a look at  
20 the Federal form, they're going to see what the  
21 individual said about their felony history, and they're  
22 going to crosscheck it -- this information that they got  
23 from the United States Attorney -- to make sure that the  
24 information on the form is accurate.

25           JUSTICE ALITO: May I ask you a question

1 that I asked Ms. Millett? Does the United States think  
2 that the Arizona form is illegal? And if it is not,  
3 what sense does it make to have a system in which  
4 whether or not someone will successfully register  
5 depends on the happenstance of the particular form that  
6 the person fills out.

7 MR. SRINIVASAN: Here is the sense it would  
8 make -- even if -- if Arizona had the authority to add  
9 to the Federal requirements on its own State form, the  
10 sense it would make is this: That the Federal form  
11 always operates as a form.

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

23 And they can use the Federal form, and the  
24 Federal form would suffice.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 General Horne, two minutes.

2 REBUTTAL ARGUMENT OF THOMAS C. HORNE

3 ON BEHALF OF THE PETITIONERS

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

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

22 They admit that we can reject applications  
23 by reference to other -- by reference to other  
24 documentation but they try to draw a distinction between  
25 that and asking the person to write down the driver's

1 license number. But there is nothing in the statute  
2 that justifies that distinction. A reference to  
3 criminal history has nothing to do with whether or not  
4 there is a distinction with respect to citizenship  
5 between looking at other documents and asking the person  
6 for their driver's license numbers. In both cases it's  
7 something outside of the form and they have admitted we  
8 can go outside the form.

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

15           With respect to HAVA, in HAVA, the Congress  
16 had another opportunity to expressly state that the  
17 State could not look to external evidence and ask for  
18 additional evidence, and they chose not to do that. And  
19 so I would say that HAVA is further evidence that  
20 Congress was not choosing to prohibit us from asking for  
21 additional information to fulfill our function, if it's  
22 necessary, of being sure that the applicant is eligible  
23 to vote.

24           With respect to the Siebold case, the court  
25 in Siebold specifically said there will be no preemption

1 unless there is a direct conflict and only to the extent  
2 of that conflict, and in that connection -- one last  
3 sentence, Your Honor -- if there are two plausible  
4 interpretations, ordinary principles of Federalism say  
5 one should not choose the interpretation that results in  
6 preemption, and the same thing applies with respect to  
7 the canon of constitutional accordance.

8 Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

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

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