

Nos. 14-3062, 14-3072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, *et al.*,
Plaintiffs-Appellees

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,
Defendants-Appellants
and
PROJECT VOTE, INC., *et al.*,
Intervenors-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS, No. 5:13-cv-4095
THE HONORABLE ERIC F. MELGREN

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

Edith Hakola
Counsel of Record for Amicus Curiae
American Unity Legal Defense Fund
7250 Baldwin Ridge Rd.
P.O. Box 420
Warrenton, VA 20187
540-347-4766
ehakola@cfau.org

Barnaby Zall
Weinberg, Jacobs & Tolani
10411 Motor City Dr. #500
Bethesda, MD 20817
301-231-6943
bzall@bzall.com

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TABLE OF AUTHORITIES

<i>Arizona v. Intertribal Council of Arizona</i> , ___ U.S. ___, 133 S.Ct. 2247 (2013).....	<i>Passim</i>
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<i>Crawford v. Marion County Elections</i> , 553 U.S. 181(2008).....	<i>Passim</i>
<i>Disabled in Action of Metropolitan New York v. Hammons</i> , 202 F.3d 110 (2 nd Cir. 2000)	27
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	4
<i>Gonzalez v. Arizona</i> , 485 F.3d 1041 (9 th Cir. 2007)	21
<i>Horne v. Flores</i> , 557 U.S. 433 (2009)	1
<i>John Doe No.1 v. Reed</i> , 561 U.S. 186 (2010).....	6, 28
<i>Lake v. Neal</i> , 585 F.3d 1059 (7 th Cir. 2009)	27
<i>McKay v. Thompson</i> , 226 F.3d 752 (6 th Cir. 2000)	26
<i>Project Vote/Voting for America v. Long</i> , 682 F.3d 331 (4 th Cir. 2012)	26, 27
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	3, 4, 5, 14, 23, 28
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	4
<i>Simmons v. Jones</i> , 838 S.W.2d 298 (Tex. App. 1992)	20
<i>United States v. Knight</i> , 490 F.3d 1268 (11 th Cir. 2007)	20
<i>U.S. Student Ass’n Foundation v. Land</i> , 546 F.3d 373 (6 th Cir. 2008).....	27

5 U.S.C. § 706(1)3

42 U.S.C. § 1973gg2

42 U.S.C. § 1973gg(b)(1)23, 24

42 U.S.C. § 1973gg(b)(2)23, 24, 28

42 U.S.C. § 1973gg(b)(3)23, 24, 25, 28

42 U.S.C. § 1973gg(b)(4)23, 24, 25

42 U.S.C. § 1973gg-7(b)(1)3, 25

Fed. R. App. P. 26.1i

Fed. R. App. P. 29(a)1

Fed. R. App. P. 29(c)(5).....1

Fed. R. App. P. 32(a)(5).....31

Fed. R. App. P. 32(a)(6).....31

Fed. R. App. P. 32(a)(7)(B)31

H. Rpt. 105-416 (1998).....15, 16

H.R. Rep. 110-101 (2007).....21

- 4 On Your Side Exposes Illegal Voting in New Mexico*, KOB-TV ALBUQUERQUE NEW MEXICO (Nov. 6, 2012), available at <http://www.kob.com/article/stories/S2824713.shtml?cat=500>11, 13, 15
- ACORN Workers Indicted on Alleged Voter Fraud*, KMBC-TV, KANSAS CITY, MISSOURI (Nov. 1, 2006), available at <http://www.kmbc.com/politics/10214492/detail.html> 19
- Mike Beaudet, *Non-citizens Registered to Vote in Lawrence, but Officials Shrug*, MY FOX BOSTON (Nov. 5, 2012), available at <http://www.myfoxboston.com/story/20001618/2012/11/05/non-citizens-registered-to-vote-in-lawrence-but-officials-shrug> 16, 17
- Jennifer Brooks, *Votes Miscast in House District 8B Election*, MINNEAPOLIS STAR-TRIBUNE (Nov. 19, 2012), available at www.startribune.com/politics/statelocal/179988481.html22
- Collier County Elections Letter to Andy Pierotti*, COLLIER COUNTY SUPERVISOR OF ELECTIONS (June 7, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/Collierletter1.pdf> 18
- Contested Contest*, ONLINE FOCUS (Oct. 22, 1997), available at www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html 16
- Glenn Cook, *How Many Noncitizens Are Registered to Vote?*, LAS VEGAS REVIEW JOURNAL (Nov. 4, 2012), <http://www.lvrj.com/opinion/how-many-noncitizens-are-registered-to-vote-177141441.html> 14
- Cops Open Criminal Probe Of New Mexico Republican Who Enrolled His Labrador As A Democrat*, The Smoking Gun (Mar. 1, 2012), available at <http://www.thesmokinggun.com/buster/registered-voter-dog-investigated-879412>..... 11, 35
- Dar Danielson, *DCI Arrests 3 Non-citizens for Illegally Voting in Pottawattamie County [Iowa]*, RADIO IOWA (Sept. 20, 2012), available at www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/20
- Department of Justice Letter*, DEPARTMENT OF JUSTICE (June 11, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/Justiceletter1.pdf> 18

Dog Voter Registration Form, KOR-TV ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502051-dog-voter-registration-form.html> 11

Keith Ervin, *Three Plead Guilty in Fake Voter Scheme*, SEATTLE TIMES (Oct. 30, 2007), available at http://seattletimes.nwsourc.com/html/localnews/2003982533_acorn30m.html?syndication=rss 19

Michael Falcone, *Group’s Tally of New Voters Was Vastly Overstated*, THE NEW YORK TIMES (Oct. 24, 2008), A1, available at www.nytimes.com/2008/10/24/us/politics/24acorn.html..... 19

Female Non-Citizen Voter Info, KOR-TV, ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html>..... 13, 36

FL, Feds File Lawsuits Involving Voter Purge, NBC2 June 12, 2012, available at <http://www.nbc-2.com/story/18770353/fl-and-feds-file-lawsuits-involving-voter-purge>..... 18

Julie Foster, *Non-citizens Vote with ‘Clinton Card’?*, WORLDNET DAILY (Nov. 7, 2000), available at www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=18000 15

Richard Hasen, *A Détente Before the Election*, THE NEW YORK TIMES (Aug. 5, 2012), available at <http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion> 20

Wesley P. Hester, *Voter-Registration Group Fights Calls for Investigation*, RICHMOND TIMES-DISPATCH (Jan. 17, 2013), available at http://www.timesdispatch.com/news/voter-registration-group-fights-call-for-investigation-into-mailings/article_16bc3d03-40f7-5485-b4bf-79e0bcb4ac22.html 12

Joe Kimball, *Two non-citizens Charged with Voter Fraud in Austin, Minn*, MINNPOST (Dec. 4, 2012), available at www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn..... 20

Ewa Kochanska, *Deceased Dog Receives Voter Registration Form in Georgia*, Examiner.com (July 17, 2012), available at <http://www.examiner.com/article/deceased-dog-receives-voter-registration-form-georgia> 12

Tony Lee, *Watchdog Group Calls on IRS to Investigate Re-Branded TX ACORN Branch*, BREITBART.COM (July 20, 2012), available at <http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch> 20

Male Non-Citizen Voter Info, KOR-TV, ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502053-male-non-citizen-voter-info.html>..... 13, 37

Man Could Be Charged For Registering His Dog to Vote, KOAT-TV, ALBURQUERQUE (Mar. 2, 2012), available at <http://www.koat.com/Man-Could-Be-Charged-For-Registering-His-Dog-To-Vote/9707264#!0ANVf>..... 11

Paula Mitchell Marks, *AND DIE IN THE WEST* (1996), P. 108..... 21

NBC2 Investigates: Voter Fraud, NBC2 (Feb. 2, 2012), available at <http://www.nbc-2.com/story/16662854/2012/02/02/nbc2-investigates-voter-fraud> 17

Secretary of State Ken Detzner Announces New Initiative to Remove Non-citizens from Florida Voter Rolls, DOS PRESS OFFICE (May 9, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/FLrelease1.pdf>..... 17

Eric Shawn, *ACORN Pleads Guilty to Voter Registration Fraud in Nevada*, FOXNEWS.COM (Apr. 6, 2011), available at www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/ 19

Patrick Svitek, *Dead Dog Receives Voter Registration Forms*, THE HUFFINGTON POST (June 19, 2012), available at http://www.huffingtonpost.com/2012/06/19/dead-dog-voter-registration-virginia_n_1609897.html..... 11

Ian Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, THE NEW YORK TIMES (May 12, 2008), available at www.nytimes.com/2008/05/12/us/politics/12vote.html21

Voter Fraud – Associated Documents, NBC2, available at <http://www.nbc-2.com/category/242056/voter-fraud> (last visited June 19, 2014)17

Laura Vozzella, *Democrat wins Virginia Senate Recount, giving Gov. Terry McAuliffe’s Agenda a Crucial Boost*, THE WASHINGTON POST (Jan. 28, 2014), available at http://www.washingtonpost.com/local/virginia-politics/monday-recount-will-decide-control-of-the-va-senate--and-fate-of-mcauliffe-agenda/2014/01/27/e93a2846-8756-11e3-833c-33098f9e5267_story.html22

Laura Vozzella, *Herring Wins Virginia Attorney General Race, Elections Board Announce*, THE WASHINGTON POST (Nov. 25, 2013), available at http://www.washingtonpost.com/local/virginia-politics/herring-wins-virginia-attorney-general-race-elections-board-announces/2013/11/25/7b661082-55e7-11e3-835d-e7173847c7cc_story.html22

Laura Vozzella, *In Va., Dogs and the Dead are Invited to Vote*, THE WASHINGTON POST (July 25, 2012), available at http://www.washingtonpost.com/blogs/virginia-politics/post/in-va-dogs-and-the-dead-are-invited-to-vote/2012/07/24/gJQA17Rk7W_blog.html13

Errin Whack, *Virginia AG to Investigate Possible ‘Duplicate’ Registrations*, THE WASHINGTON POST (Apr. 4, 2013), available at http://www.washingtonpost.com/local/va-politics/virginia-ag-to-investigate-possible-duplicate-voting/2013/04/04/e55f5cc2-9d4c-11e2-a941-a19bce7af755_story.html23

GLOSSARY

ACORN	The Association of Community Organizations for Reform Now
AULDF	<i>Amicus</i> American Unity Legal Defense Fund
<i>Crawford</i>	<i>Crawford v. Marion County Elections Board</i> , 553 U.S. 181 (2008)
EAC	Defendant-Appellant United States Election Assistance Commission
EAC Staff Memo	<i>Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form</i> , Attachment A to EAC's Opening Brief.
<i>ITCA</i>	<i>Arizona v. Intertribal Council of Arizona</i> , ___ U.S. ___, 133 S.Ct. 2247 (2013)
NVRA	42 U.S.C. § 1973gg, <i>et seq</i>
<i>Purcell</i>	<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)
VPC	Voter Participation Center

INTEREST OF *AMICUS CURIAE*

Amicus curiae American Unity Legal Defense Fund (“AULDF”) is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.¹ www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. Intertribal Council of Arizona* (“ITCA”), ___ U.S. ___, 133 S.Ct. 2247 (2013); *Horne v. Flores*, 557 U.S. 433, 461 n. 10 (2009) (*citing* AULDF’s *amici* brief), and *Crawford v. Marion County Elections Board* (“Crawford”), 553 U.S. 181 (2008).

All parties have given consent for the filing of this brief. Fed. R. App. P. 29(a).

AULDF agrees with the positions of the Appellees in this case, but files this brief to discuss two elements not sufficiently treated in the opening briefs or by the court below:

1) Appellant United States Election Assistance Commission’s (“EAC”) dismissal of the extent of likely voter registration fraud as “not significant” was improper under the Supreme Court’s standards for finding voter registration fraud sufficient to support a State’s imposition of voter identification requirements; and,

¹ Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2) The EAC's consideration of only a single goal – ease of registration – for the National Voter Registration Act, 42 U.S.C. § 1973gg, *et seq.*, (“NVRA”) was improper, because the NVRA has four statutory goals, all of which contain requirements to protect the integrity of the voting process and none of which is less important than ease of registration.

INTRODUCTION AND STANDARD FOR REVIEW

This is an Administrative Procedure Act case, brought pursuant to direction from the Supreme Court of the United States in *ITCA*: “Arizona may, however, request anew that the EAC include such a requirement among the Federal Form's state-specific instructions, and may seek judicial review of the EAC’s decision under the Administrative Procedure Act.” *ITCA*, 133 S.Ct. at 2260.

Should the EAC’s inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona’s concrete evidence requirement on the Federal Form. *See* 5 U.S.C. § 706(1). Arizona might also assert (as it has argued here) that it would be arbitrary for the EAC to refuse to include Arizona’s instruction when it has accepted a similar instruction requested by Louisiana.

Id.

Neither the EAC nor the Intervenors (nor their supporting *amici*) address the cases setting the standard to be used to judge whether “a mere oath will [] suffice to effectuate its citizenship requirement” or whether “it would be arbitrary for the EAC to refuse to include” the State’s requested instructions. *Id.* That standard was set in the NVRA itself,² and interpreted in several cases, including most importantly, *Crawford* and *Purcell v. Gonzalez* (“*Purcell*”), 549 U.S. 1 (2006)(per curiam).

² “[S]uch identifying information . . . as is *necessary* to enable the appropriate State official to assess the eligibility of the applicant”. 42 U.S.C. §1973gg-7(b)(1).

A) *Purcell*: “Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government.”

Many of the parties here were also parties in *Purcell*, which involved Arizona’s Proposition 200, the same initiative statute at issue in this case. Yet none of the Appellants’ opening briefs cite or mention *Purcell*. This is because their positions are incompatible with the Supreme Court’s long-standing finding that there is a separate and constitutionally significant State interest in protecting the integrity of election processes, which is incorporated into the NVRA, but wholly absent from their briefs (or those of their *amici*).

The per curiam decision in *Purcell* considered, *inter alia*, whether Arizona’s Proposition 200 could “combat voter fraud by requiring voters to present proof of citizenship when they register to vote ...” *Id.* at 2. The Court summed up the competing issues:

Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Countering the State’s compelling interest in preventing voter fraud is the plaintiffs’ strong interest in exercising the “fundamental political right” to vote. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (internal quotation marks omitted).

Id. at 4. Given the imminence of that election, the Court decided not to disturb the decision of the District Court in *Purcell* to uphold the requirement of showing

evidence of citizenship for voter registration. *Id.* at 5-6. But the Court’s summary of the issues remains viable.

B) *Crawford*: Evidence of three types of fraud justify voter identification requirements: “flagrant examples” nationwide throughout history; “occasional” recent examples; and even a single example of evidence of other methods of fraud.

Shortly after *Purcell*, Justice Stevens wrote the opinion in *Crawford*, upholding a state’s requirement to show photo identification to vote:

There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Crawford, 553 U.S. at 196.

The *Crawford* standard for evaluating a State’s anti-fraud measures does not require evidence of “any such fraud actually occurring in [the State] at any time in its history.” *Id.* at 194. Nor does the existence of criminal penalties diminish the State’s interests in its own chosen prevention methods. *Id.* at 194-95.

Instead, the Court looked to three other examples of fraud to see if a State’s imposition of identification requirements on prospective voters was justified:

- 1) “flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists,”

2) “occasional examples have surfaced in recent years, and”

3) “Indiana’s own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor — though perpetrated using absentee ballots and not in-person fraud — demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.”

Id. at 195-96.

Even a single example of fraud seemed enough to justify a State’s fraud prevention efforts of requiring a person to show photo identification at the polling places.³ *Id.* at 195 n. 12 (“one voter was confirmed to have committed in-person voting fraud”).

The Supreme Court used a similar analysis in a later case in the context of fraud in ballot measure elections: “The threat of fraud in this context is not merely hypothetical; respondents and their amici cite a number of cases of petition-related fraud across the country to support the point.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 197-98 (2010).

³ This showing, however, does not require automatic approval of all anti-fraud measures. Against this strong statement of State interests, the *Crawford* Court placed the likely burdens of obtaining and using identification documents. “Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State’s broad interests in protecting election integrity.” *Crawford*, 553 U.S. at 200.

Thus, to find sufficient fraud to justify a State's anti-fraud action, under *Crawford*, the question was whether there was specific credible evidence the trial court had tested and found sufficient to demonstrate that the particular type of fraud addressed by the specific State action was more than merely hypothetical. *Crawford*, 553 U.S. at 195-96. The evidence could be historical, from another jurisdiction, or even from a single instance of another, but related, type of election fraud. *Id.*

C) The EAC Staff's Analysis: Hundreds of fraud cases were "not significant."

After *ITCA*, Kansas and Arizona filed requests with the EAC to amend their state-specific instructions to include language variously describing the need to provide evidence that the applicant was a citizen. The chronology and substance of these requests and the response of the EAC Staff is provided in the parties' briefs. *See, e.g.*, EAC Opening Br. 8-9, 12, 39, and Attachment A to EAC Opening Br., *Memorandum of Decision Concerning State Requests to Include Additional Proof-of-Citizenship Instructions on the National Mail Voter Registration Form* ("EAC Staff Memo").

The EAC staff did not use *Crawford*-type examples, or even conduct a *Crawford* analysis of any sort, but did review the evidence submitted by both Kansas and Arizona. *See, e.g.*, EAC Staff Memo at 31-34, EAC Opening Br. Attachment A at 95-98, Doc. 132-17 Pp. 92-95. It apparently did not review any

other evidence, including court records, congressional records or other records.

“Declining to resolve disputed questions of fact about the States’ evidentiary submission, the Commission accepted the States’ contention that they had uncovered 196 noncitizens registered to vote in Arizona and 21 who had registered or attempted to register in Kansas (Aplt. App. at 1306).” EAC Opening Br. at 37.

The EAC staff rejected as “insufficient” this showing that the States’ requested inclusion of additional information was “necessary.” *Id.* at 11 (“When the Commission [staff] considered the evidence of necessity the States submitted, along with other evidence in the record, it found the States’ evidentiary showing insufficient.”).

The States responded to the EAC staff report by claiming that the EAC staff “ignored” much of the evidence. Brief in Support of Plaintiff’s Notice of Adverse Agency Decision and Motion for Relief, Pp. 14-17. For example, the States pointed out, the EAC did not credit the specific findings of the District Court in the *ITCA* litigation, which held a six-day bench trial, finding far more non-citizen registrations than credited by the EAC staff. *Id.* at P. 16-17. The States contended that the EAC staff instead adopted “conclusory” statements submitted by others. *Id.* at pp. 18-19.

The EAC staff asserted that, based on its review of its evidentiary record, the problem of voter registration fraud is “exceedingly small,” “tiny” and “not

significant.” EAC Opening Br. at 12, 39. “The bottom line, the Commission found, was that the small number of improper registrations the States pointed to was within the range that was ‘inevitable’ due to ‘human error.’” *Id.* at 12.

The District Court below assumed, without deciding, that the EAC staff could make the decisions statutorily reserved for a majority vote of the Commission. Slip op. at *3. The District Court rejected the EAC staff’s assertion of unilateral power to determine what information is “necessary” to a State’s exercise of Voter Qualification Clause authority, *id.* at *12, and held that “the *ITCA* opinion establishes that there is a point at which the EAC loses whatever discretion it possesses to determine the contents of the state-specific instructions.” *Id.* at *12.

In the absence of clear discussion by the District Court below, and in response to the assertions of the EAC staff and its supporting *amici* that voter registration fraud is neither significant, nor a concern of the NVRA, this brief offers additional information to the Court concerning both the magnitude of voter registration fraud and the purposes of the NVRA to address fraud as well as ease of registration.

ARGUMENT

I. VOTER REGISTRATION FRAUD IS A SIGNIFICANT AND CONTINUING PROBLEM, JUSTIFYING STATE RESPONSES.

This appeal involves voter registration fraud, which can be defined narrowly for this case as a non-citizen registering to vote. As shown above, the question is whether voter registration fraud by non-citizens is more than hypothetical, and sufficient evidence can be offered by “flagrant” examples of past fraud or by recent “occasional” examples, even from other jurisdictions. *Crawford*, 553 U.S. at 195-96. Even a single incident would be sufficient. *Id.* at 195 n. 12.

The *Crawford* test is well-satisfied in this case. In the record of this case and in the public record (the use of which is permitted under *Crawford*), there are examples of all three of the types of evidence discussed in *Crawford*:

- “flagrant” examples, even historical, of voter registration fraud across the country;
- examples of recent widespread voter registration fraud; and
- examples, including more than a single instance, of voter registration fraud in the Plaintiff States.

A) Many Documented Examples of “Flagrant” Voter Registration Fraud Nationwide.

There are many documented examples of “flagrant” voter registration fraud. Two dogs have been registered to vote in Bernalillo County, New Mexico in the

recent past.⁴ A copy of a recent New Mexico federal voter registration form submitted for a Labrador Retriever named “Buddy W. Tolbert” is attached to this brief as Appendix A.⁵ Though Thomas Tolbert, Buddy’s owner who filled out the federal mail-in registration card, was investigated for a fourth-class felony,⁶ there is no record that he was ever prosecuted.⁷

At least those dogs were alive when registered; other dogs in other states received voter registration applications when they reached their 18th birthdays, even if they were not alive. For example, “Mozart,” a poodle from Bedford County, Virginia, had passed away at 16, two years before he received a mailed request from the “Voter Participation Center” (“VPC”) that he fill out more information on the enclosed pre-populated voter registration form.⁸ The VPC was

⁴ *4 On Your Side Exposes Illegal Voting in New Mexico*, KOB-TV ALBUQUERQUE NEW MEXICO (Nov. 6, 2012), available at <http://www.kob.com/article/stories/S2824713.shtml?cat=500>.

⁵ *Dog Voter Registration Form*, KOR-TV ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502051-dog-voter-registration-form.html>.

⁶ *Cops Open Criminal Probe Of New Mexico Republican Who Enrolled His Labrador As A Democrat*, THE SMOKING GUN (Mar. 1, 2012), available at <http://www.thesmokinggun.com/buster/registered-voter-dog-investigated-879412>.

⁷ The person who registered the other dog to vote pled guilty and received two years’ probation. *Man Could Be Charged For Registering His Dog to Vote*, KOAT-TV, ALBURQUERQUE (Mar. 2, 2012), available at <http://www.koat.com/Man-Could-Be-Charged-For-Registering-His-Dog-To-Vote/9707264#!0ANVf>.

⁸ Patrick Svitek, *Dead Dog Receives Voter Registration Forms*, THE HUFFINGTON POST (June 19, 2012), available at

the subject of 750 public complaints about, and an official investigation into, its registration activities in Virginia.⁹ The Virginia State Board of Elections found that the organization sent forms to non-citizens, and to already registered voters, including the Vice-Chairman of the elections board:

Kimberly Bowers, vice chairman of the [Virginia] State Board of Elections, had received one of the VPC's voter-registration mailings, and, like hundreds of other Virginians, had no idea what to make of it.

Bowers knew she was already registered, [Virginia State Board of Elections Chairman Charles] Judd said, but wondered if something might be amiss. "If a member of the state board is confused, you can imagine what it's like to the average person," he said.

Hester, *supra*, n. 9.

The VPC also mailed another voter registration application to a deceased West Highland Terrier named McGregor in Georgia.¹⁰ The VPC was not prosecuted. Its defense: "We have nothing to do with that issue, voter fraud. We send people applications to fill out in the mail," [VPC President Page] Gardner

http://www.huffingtonpost.com/2012/06/19/dead-dog-voter-registration-virginia_n_1609897.html.

⁹ Wesley P. Hester, *Voter-Registration Group Fights Calls for Investigation*, RICHMOND TIMES-DISPATCH (Jan. 17, 2013), *available at* http://www.timesdispatch.com/news/voter-registration-group-fights-call-for-investigation-into-mailings/article_16bc3d03-40f7-5485-b4bf-79e0bcb4ac22.html.

¹⁰ Ewa Kochanska, *Deceased Dog Receives Voter Registration Form in Georgia*, EXAMINER.COM (July 17, 2012), *available at* <http://www.examiner.com/article/deceased-dog-receives-voter-registration-form-georgia>.

said. “It’s up to them to fill out the form and obey all the state laws and federal laws.”¹¹

It was a simple handwritten note left for the Sandoval County [New Mexico] clerk that read, “I would like to have my voter registration card cancelled, please and thank you.” The note was short and polite, but it immediately raised red flags about the woman who left it. It didn’t take long before election officials learned the reason for the request: The woman was not a United States citizen.

A review of the woman’s voting record showed she had cast a ballot in nearly every election since registering as a Republican inside a Motor Vehicle Office in 2005. She is not alone. *4 On Your Side* [KOB-TV, Albuquerque, NM] also tracked down a Mexican National who has been voting since 1998, casting his ballot a total of 26 times.

4 On Your Side Exposes Illegal Voting in New Mexico, KOB-TV ALBUQUERQUE

NEW MEXICO (Nov. 6, 2012), *available at*

<http://www.kob.com/article/stories/S2824713.shtml?cat=500>.

Copies of the federal mail-in voter registration forms for these two non-citizens, obtained by the television station KOB-TV in Albuquerque, New Mexico, are attached as appendices to this brief. App. B,¹² C.¹³ All three of these forms,

¹¹ Laura Vozzella, *In Va., Dogs and the Dead are Invited to Vote*, THE WASHINGTON POST (July 25, 2012), *available at* http://www.washingtonpost.com/blogs/virginia-politics/post/in-va-dogs-and-the-dead-are-invited-to-vote/2012/07/24/gJQA17Rk7W_blog.html.

¹² *Female Non-Citizen Voter Info*, KOR-TV, ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), *available at* <http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html>.

¹³ *Male Non-Citizen Voter Info*, KOR-TV, ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), *available at* <http://www.documentcloud.org/documents/502053-male-non-citizen-voter-info.html>.

including the dog Buddy Tolbert's reprinted in Appendix A, were "signed" as declaring the applicant to be a citizen and eligible to vote.

Some of the confusion about the existence of voter registration fraud may stem from a belief that, since the non-citizens did not intend to commit fraud, their voter registrations are not fraudulent. This evidence of non-citizen voter participation does not necessarily mean that there is criminal intent on the part of the aliens.¹⁴ But it still "drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell*, 549 U.S. at 4.

¹⁴ See, e.g., Glenn Cook, *How Many Noncitizens Are Registered to Vote?*, LAS VEGAS REVIEW JOURNAL (Nov. 4, 2012), <http://www.lvrj.com/opinion/how-many-noncitizens-are-registered-to-vote-177141441.html>:

Last week, I met with two immigrant noncitizens who are not eligible to vote, but who nonetheless are active registered voters for Tuesday's election. They said they were signed up by Culinary Local 226.

They speak and understand enough English to get by. But they don't read English especially well. They say the Culinary official who registered them to vote didn't tell them what they were signing and didn't ask whether they were citizens. The immigrants said they trusted that the union official's request was routine, thought nothing of it and went about their work.

Then the election drew closer. Then the Culinary canvassers started seeking them out and ordering them to go vote. One of the immigrants was visited at home by a Culinary representative and said the operative made threats of deportation if no ballot was cast. They didn't understand how, as noncitizens, they could be registered to vote if it's illegal for them to vote in a U.S. election. They didn't understand that, upon being signed up, not only is their registration public record, but the record of whether they've voted is public as well.

In some cases, the non-citizens are aware that they should not register, but are encouraged or misled by others who should know better:¹⁵

On the last day to register to vote this year, Four On Your Side secretly recorded several third-party agents to find out how familiar they are with the law. At a Walmart in Albuquerque, two registration agents seemed confused about immigration issues. Our producer told them he was from Canada, but living here legally. “I don’t know the immigration stuff,” a registrar told him. “You said you’re here legally?” Eventually, after re-reading the form, our producer was told he should not register.

4 On Your Side Exposes Illegal Voting in New Mexico, KOB-TV ALBUQUERQUE

NEW MEXICO (Nov. 6, 2012), *available at*

<http://www.kob.com/article/stories/S2824713.shtml?cat=500..>

In the 1996 election in California’s 46th Congressional District, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. Comm. on House Oversight, “Dismissing the Election Contest Against Loretta Sanchez,” H. Rpt. 105-416, at 15. The congressional investigation found “significant vote fraud and

¹⁵ On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake “Voter Identification Cards” to lists which included non-citizens. Julie Foster, *Non-citizens Vote with ‘Clinton Card’?*, WORLDNET DAILY (Nov. 7, 2000), *available at* www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=18000. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton’s signature, which read: “Here is your personal Voter Identification Card. Sign your name, then detach your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly.” *Id.* A copy of the Clinton letter can be found at:

http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg.

vote irregularities.” *Id.* at 16. The Committee nevertheless determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez’s margin of victory, so the election challenge was dismissed. *Id.*

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

The organization admitted having registered illegal immigrants.¹⁶ There was no prosecution.

And when a television station in Boston, Massachusetts, undertook a similar investigation, officials just “shrugged.”¹⁷ ““What kind of reaction did you get from the authorities when you went to them with these allegations of voter fraud?”

Beudet [the reporter] asked Hayes [who filed complaints with various officials].

¹⁶ *Contested Contest*, ONLINE FOCUS (Oct. 22, 1997), available at www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html (“And Lopez of Hermandad Mexicana admits his group registered non-citizens.”).

¹⁷ Mike Beudet, *Non-citizens Registered to Vote in Lawrence, but Officials Shrug*, MY FOX BOSTON (Nov. 5, 2012), available at <http://www.myfoxboston.com/story/20001618/2012/11/05/non-citizens-registered-to-vote-in-lawrence-but-officials-shrug>.

‘It varied from, “Not my job” to no response at all,’ Hayes replied.’¹⁸

Potentially more revealing is the federal government’s recent reaction to some efforts to uncover non-citizens’ voter registrations. In February, 2012, a Florida television station broadcast a series of fifteen video reports based on its two-month investigation of non-citizen voter registration and voting.¹⁹ “No one knows how widespread this problem is, because county election supervisors have no way to track non-citizens who live here. So NBC2 did something election officials never thought to do, and found them on our own.”²⁰ The NBC station found 94 registered and voting non-citizens,²¹ which triggered an effort by Florida to remove non-citizens from its voter rolls.²²

¹⁸ Mike Beudet, *Non-citizens Registered to Vote in Lawrence, but Officials Shrug*, MY FOX BOSTON (Nov. 5, 2012), available at <http://www.myfoxboston.com/story/20001618/2012/11/05/non-citizens-registered-to-vote-in-lawrence-but-officials-shrug>.

¹⁹ *Voter Fraud – Associated Documents*, NBC2, available at <http://www.nbc-2.com/category/242056/voter-fraud> (last visited June 19, 2014).

²⁰ *NBC2 Investigates: Voter Fraud*, NBC2 (Feb. 2, 2012), available at <http://www.nbc-2.com/story/16662854/2012/02/02/nbc2-investigates-voter-fraud>.

²¹ *Id.*

²² *Secretary of State Ken Detzner Announces New Initiative to Remove Non-citizens from Florida Voter Rolls*, DOS PRESS OFFICE (May 9, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/FLrelease1.pdf>.

The Collier County (Florida) Supervisor of Elections penned a personal note of thanks for the station's investigation.²³ "As a result of your investigative findings, policies and procedures throughout the State of Florida have been enhanced due to recognition of the need for State access to Federal databases that reflect citizenship status to ensure that Florida's voting rolls are even more accurate." wrote Elections Supervisor Jennifer J. Edwards.²⁴

But the federal Department of Homeland Security refused to allow Florida to review its alien registration database.²⁵ And the U.S. Department of Justice sued Florida and Collier County to stop the voter registration roll correction efforts.²⁶

This federal opposition seems to conflict with the EAC staff's position in this appeal that the States could utilize some background method of determining whether an applicant is entitled to register to vote under State law. EAC Staff Memorandum, pp. 36-41; Opening Br. of Intervenor-Appellants, at 17 ("ability to identify potential non-citizens and thereby enforce their voter qualifications relating to citizenship, even in the absence of the additional instructions.").

²³ *Collier County Elections Letter to Andy Pierotti*, COLLIER COUNTY SUPERVISOR OF ELECTIONS (June 7, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/Collierletter1.pdf>.

²⁴ *Id.*

²⁵ *FL, Feds File Lawsuits Involving Voter Purge*, NBC2 June 12, 2012, available at <http://www.nbc-2.com/story/18770353/fl-and-feds-file-lawsuits-involving-voter-purge>.

²⁶ *Department of Justice Letter*, DEPARTMENT OF JUSTICE (June 11, 2012), available at <http://ftpcontent.worldnow.com/wbbh/documents/Justiceletter1.pdf>.

B) Widespread – Not Just “Occasional” – Examples of Voter Registration Fraud.

These are not isolated frauds, but are similar to allegations of fraudulent voter registration incidents nationwide. Some of these allegations are significant in their magnitude, particularly those involving the now-defunct advocacy group, the Association of Community Organizations for Reform Now (“ACORN”).²⁷ Of 1.3 million voters ACORN claimed to have registered, only 450,000 were actually legitimate new voter registrations.²⁸ ACORN officials admitted that up to 30 percent of the registrations they submitted were “faulty.”²⁹

²⁷ See, e.g., *Busefink v. Nevada*, 286 P.3d 599, 601-02 (Nev. 2012) (describing ACORN’s “blackjack” incentive program to pay for voter registrations in violation of state law); Eric Shawn, *ACORN Pleads Guilty to Voter Registration Fraud in Nevada*, FOXNEWS.COM (Apr. 6, 2011), available at www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/; “Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN.” Keith Ervin, *Three Plead Guilty in Fake Voter Scheme*, SEATTLE TIMES (Oct. 30, 2007), available at http://seattletimes.nwsourc.com/html/localnews/2003982533_acorn30m.html?syndication=rss. “Federal indictments allege the four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation,” *ACORN Workers Indicted on Alleged Voter Fraud*, KMBC-TV, KANSAS CITY, MISSOURI (Nov. 1, 2006), available at: <http://www.kmbc.com/politics/10214492/detail.html>.

²⁸ Michael Falcone, *Group’s Tally of New Voters Was Vastly Overstated*, The New York Times (Oct. 24, 2008), A1, available at www.nytimes.com/2008/10/24/us/politics/24acorn.html.

²⁹ *Id.*

ACORN worked in Arizona and was an original plaintiff in *ITCA*. ACORN off-shoots are still conducting voter registration drives.³⁰

Even those who generally deny the existence of vote fraud acknowledge that voter registration fraud does exist, including the Brennan Center for Justice, which admitted in its Supreme Court briefs that “much of the [in-person] fraud was actually absentee ballot fraud or **voter registration fraud.**” *Crawford*, 553 U.S. at 195 n. 12 (emphasis added).

Nor is there any real question about the existence of voter registration fraud involving non-citizens in particular.³¹ Another prominent fraud denier, Prof. Richard Hasen, wrote: “Unlike impersonation fraud, noncitizen voting cannot be dismissed as a Republican fantasy.”³²

³⁰ See, e.g., Tony Lee, *Watchdog Group Calls on IRS to Investigate Re-Branded TX ACORN Branch*, BREITBART.COM (July 20, 2012), available at <http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch>.

³¹ See, e.g., *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007) (upholding conviction of a Jamaican citizen who voted in the 2000 Presidential election); *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992) (“Simmons lost one vote because one person voted for him who was not a citizen of the United States.”); Joe Kimball, *Two non-citizens Charged with Voter Fraud in Austin*, MINNPOST (Dec. 4, 2012), available at www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn; Dar Danielson, *DCI Arrests 3 Non-citizens for Illegally Voting in Pottawattamie County [Iowa]*, RADIO IOWA (Sept. 20, 2012), available at www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/.

³² Richard Hasen, *A Détente Before the Election*, THE NEW YORK TIMES (Aug. 5, 2012), available at <http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion>.

C) Examples of Voter Registration Fraud in the Plaintiff-Appellee States.

Arizona has a similar record: “between 1996 and [2006], as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens.” *Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9th Cir. 2007). Even before Arizona became a State, newspapers reported non-citizen voter fraud: “In 1868, the *Arizona Miner* had reported ‘hundreds of non-citizens of Mexican origin at Tucson, Tubac, and other places’ voting for the same United States congressional candidate ‘as many as three times in one day.’”³³

The New York Times estimated in 2008 that thousands of non-citizens tried to register to vote in Arizona in the prior five years.³⁴ And a congressional committee reported:

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

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

³³ Paula Mitchell Marks, *And Die In The West* (1996), P. 108.

³⁴ Ian Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, *The New York Times* (May 12, 2008), available at www.nytimes.com/2008/05/12/us/politics/12vote.html.

Thus, each of the three types of evidence the Supreme Court held sufficient in *Crawford* to justify a State's voter identification requirement is present for voter registration fraud: "flagrant examples" documented nationwide throughout history; "occasional" recent examples nationwide; and a State's own experience with similar fraud that might affect a close election. *Crawford*, 553 U.S. at 195-96.

The EAC may consider these reports of election-related fraud to be "exceedingly small," "tiny" and "not significant." EAC Opening Br. at 12, 39. But recent elections have been decided by only a few votes.³⁵ The partisan composition of the 2014 Virginia state Senate was decided by a recount which resulted in a victory by eleven votes.³⁶ The 2013 Virginia Attorney General's election was decided by 165 votes, out of 2.2 million votes cast, a difference of 0.007%.³⁷ In 2013, a check of Virginia voter registrations against those in other states found

³⁵ "The closest election in Minnesota in 2012 was the House District 8B contest between incumbent Rep. Mary Franson, R-Alexandria, and Democratic challenger Bob Cunniff. Franson won by a single vote." Jennifer Brooks, *Votes Miscast in House District 8B Election*, MINNEAPOLIS STAR-TRIBUNE (Nov. 19, 2012), available at www.startribune.com/politics/statelocal/179988481.html.

³⁶ Laura Vozzella, *Democrat wins Virginia Senate Recount, giving Gov. Terry McAuliffe's Agenda a Crucial Boost*, THE WASHINGTON POST (Jan. 28, 2014), available at http://www.washingtonpost.com/local/virginia-politics/monday-recount-will-decide-control-of-the-va-senate--and-fate-of-mcauliffe-agenda/2014/01/27/e93a2846-8756-11e3-833c-33098f9e5267_story.html.

³⁷ Laura Vozzella, *Herring Wins Virginia Attorney General Race, Elections Board Announce*, THE WASHINGTON POST (Nov. 25, 2013), available at http://www.washingtonpost.com/local/virginia-politics/herring-wins-virginia-attorney-general-race-elections-board-announces/2013/11/25/7b661082-55e7-11e3-835d-e7173847c7cc_story.html.

308,000 “duplicate” registrations, of which more than 97,000 voted in recent elections.³⁸

Voter registration fraud is a known, widespread danger. Courts, following *Crawford*, routinely uphold the use of identification to prevent the less-likely voter impersonation fraud. But, at a time when dogs register and advocacy organizations admit that they have submitted hundreds of thousands of “faulty” voter registration applications, the EAC staff suggests that the only protection against fraud a State is permitted to use on a federal form that must be accepted is whether the applicants “attested to being U.S. citizens.”

This willful blindness toward fraud cannot be consistent with the “language and structure” of the NVRA. 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4). It is certainly not consistent with the Supreme Court’s constitutional concern that voter fraud undercuts the integrity of the entire election process. *Purcell*, 549 U.S. at 4.

II. THE NVRA REQUIRES THE EAC TO CONSIDER FOUR

STATUTORY GOALS, BUT THE EAC STAFF CONSIDERED ONLY EASE OF REGISTRATION.

³⁸ Errin Whack, *Virginia AG to Investigate Possible ‘Duplicate’ Registrations*, THE WASHINGTON POST (Apr. 4, 2013), available at http://www.washingtonpost.com/local/va-politics/virginia-ag-to-investigate-possible-duplicate-voting/2013/04/04/e55f5cc2-9d4c-11e2-a941-a19bce7af755_story.html.

The NVRA contains express recognition of the *Purcell* concern about election integrity. Each of the four statutory purposes of the NVRA includes a reference to eligibility, integrity or accuracy:

to “increase the number of **eligible citizens** who register to vote”;³⁹
to “enhance[] the participation of **eligible citizens** as voters”;⁴⁰
to “**protect the integrity** of the electoral process”;⁴¹ and,
to “ensure that **accurate and current** voter registration rolls are maintained.”⁴²

In contrast, the EAC staff and its Intervenors here recognize only a single “goal,” – “the NVRA’s **stated goal** of encouraging voter registration in federal elections.” Opening Br. for Intervenor-Appellants at 8.

Congress delegated to the EAC the decision of how to balance both the need “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” **and** the need to protect “the integrity of the electoral process,” 42 U.S.C. § 1973gg(b)(1), (3). The EAC struck this balance by requiring mail registration applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship.

³⁹ 42 U.S.C. § 1973gg(b)(1) (emphasis added).

⁴⁰ 42 U.S.C. § 1973gg(b)(2) (emphasis added).

⁴¹ 42 U.S.C. § 1973gg(b)(3) (emphasis added).

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

As noted above, the continuing and recent examples of voter registration fraud by those who will sign false assertions of their citizenship demonstrate this is simply not an effective mechanism to “**protect the integrity** of the electoral process”⁴³ and to “ensure that **accurate and current** voter registration rolls are maintained.”⁴⁴ As the States point out here, this does not provide them with the ability to comply with their own laws. This cannot be consistent with congressional intent because it is not consistent with the express language of the NVRA.

A. The EAC Staff’s Analysis Would Rewrite the Text of the NVRA.

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

The EAC staff interprets that provision to read: “may require only ... the signature of the applicant.” This would, in effect, delete the remainder of the sentence so as not to suggest that information other than the signature might be requested.

⁴³ 42 U.S.C. § 1973gg(b)(3) (emphasis added).

⁴⁴ 42 U.S.C. § 1973gg(b)(4) (emphasis added).

Not even the EAC staff itself, however, applies that logic to other states and their additional documentation requirements. *ITCA*, 133 S.Ct. at 2260 and n. 11 (“Arizona might also assert (as it has argued here) that it would be arbitrary for the EAC to refuse to include Arizona’s instruction when it has accepted a similar instruction requested by Louisiana.”); *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (upholding requirement that voter registration applicants provide valid social security numbers to register). “The NVRA does not specifically forbid use of social security numbers.” *Id.* at 755. Nor, in light of the federal Justice Department’s position on the Florida effort to remove non-citizens from its voter rolls, described above, would a State have a ready and simple means of learning this required information in the absence of asking the applicant.

B. The EAC Staff Opinion Recognizes Only One of the Four Purposes in the NVRA.

The NVRA was a balance of interests with more than one purpose, but in this context, the EAC staff did not recognize most of them. EAC Staff Opening Br. at 2 (“the NVRA’s purpose of making voter registration easier”). This “single-purpose” view of the NVRA is inconsistent with the statutory language and has been rejected by this Court. “In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process.” *Crawford*, 553 U.S. at 192 (emphasis added). *See, also*, *Project Vote/Voting for America v. Long*, 682 F.3d 331, 334 (4th Cir.

2012)(“Congress enacted the NVRA in order to ‘increase the number of eligible citizens who register to vote’ in federal elections, ‘enhance[] the participation of eligible citizens as voters,’ ‘protect the integrity of the electoral process,’ and ‘ensure that accurate and current voter registration rolls are maintained.’”); *Lake v. Neal*, 585 F.3d 1059, 1060 (7th Cir. 2009) (“Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained.”); *U.S. Student Ass’n Foundation v. Land*, 546 F.3d 373, 391 (6th Cir. 2008) (NVRA has “dual objectives” of “increas[ing] the number of eligible citizens who register to vote in elections for federal office,” while also assuring that “*accurate and current* voter registration rolls are maintained.” Emphasis in original.); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2nd Cir. 2000).

None of the highlighted terms fit into a singular “goal” of the NVRA, solely to streamline registration. Like the District Court below, the Second Circuit, for example, rejected an argument that defeat of an amendment by the NVRA conference committee was effective, in the face of statutory text, to show the controlling nature of the purpose of increasing voter registration opportunities. *Id.* at 127.

Each statutory purpose is inconsistent with an interpretation which permits only a signature requirement to account for eligibility concerns. Congress was

apparently as interested in “protect[ing] the integrity of the electoral process,” 42 U.S.C. § 1973gg(b)(3), as in making federal mail-in voter registration easier.

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

Protecting the integrity of the electoral process is necessary to the achievement of the other purposes. For example, Congress recognized that the integrity of the electoral process was crucial to “enhanc[ing] the participation of eligible citizens as voters.” 42 U.S.C. § 1973gg(b)(2). In *Purcell*, the Court agreed with that approach: “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4; *see, also, John Doe No. 1*, 561 U.S. at 197-98 (“The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It ‘drives honest citizens out of the democratic process and breeds distrust of our government’”, *citing, Purcell*, 549 U.S. at 4, and *Crawford*, 553 U.S. at 196). The EAC staff's

conclusion about Congressional intent is tainted by its failure to accept all four purposes of the statute; it should not control the States' request for information they need to enforce their own laws.

In *ITCA*, the case on which the EAC Staff rely, the Court noted that the States here have the option of seeking review of whether “a mere oath will not suffice to effectuate its citizenship requirement.” *ITCA*, 133 S.Ct. at 2260. By focusing solely on a singular “goal” of the NVRA and ignoring the uncontroverted public evidence of hundreds of thousands of faulty voter registrations nationwide, the EAC staff's view does not appear to be supported by either the text of the statute or precedent.

CONCLUSION

For the reasons stated, the District Court's opinion should be affirmed and the Election Assistance Commission's staff ordered to add the States' requested instructions to the state-by-state instructions for the federal voter registration form.

Respectfully Submitted,

/s

Edith Hakola
Counsel of Record for Amicus Curiae
American Unity Legal Defense Fund
7250 Baldwin Ridge Rd.
P.O. Box 420
Warrenton, VA 20187
540-347-4766
ehakola@cfau.org

Barnaby Zall
Weinberg, Jacobs & Tolani
10411 Motor City Dr. #500
Bethesda, MD 20817
301-231-6943
bzall@bzall.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-spaced typeface using Word 2010 in 14-point Times New Roman font.

Dated: June 30, 2014

/s
Barnaby W. Zall
Counsel to *Amicus Curiae*

ECF CERTIFICATIONS

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies that:

1. all required privacy redactions have been made;
2. hard copies of the foregoing brief required to be submitted to the clerk's office are exact copies of the document as filed via ECF; and
3. the document filed via ECF was scanned for viruses with the most recent version of Microsoft Security Essentials (definition version 1.177.320.0), and according to the program is free of viruses.

Dated: June 30, 2014

/s
Barnaby W. Zall
Counsel to *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2014, I electronically filed the foregoing BRIEF OF AMICUS CURIAE with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that on June 30, 2014, I will serve seven paper copies of the same by priority mail delivery to the Court and one paper copy by priority mail delivery to the following counsel of record:

Thomas E. Knutzen
Kansas Secretary of State's Office
Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612

Michele L. Forney
Arizona Attorney General's Office
1275 W. Washington
Phoenix, AZ 85007

Sasha Samberg-Champion
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

John A. Freedman
Arnold & Porter
555 12th Street, NW
Washington, DC 20004

Jose Jorge DeNeve
O'Melveny & Myers
400 South Hope Street, 15th Floor
Los Angeles, CA 90071-2899

Michael C. Keats
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022

Mark A. Posner
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

/s
Barnaby W. Zall
Counsel to *Amicus Curiae*

Appendix A

Federal Voter Registration Form for "Buddy Tolbert" – A Dog

Cops Open Criminal Probe Of New Mexico Republican Who Enrolled His Labrador As A Democrat | The Smoking Gun

Please PRINT Clearly

Protected: See Privacy Notice

THIS INFORMATION NOT TO BE COPIED

PERSONAL INFORMATION

1 NAME Last: **TOLBERT** First: **BUDY** Middle Name or Initial: **W** Gender: **M** Birth Date: **80** Social Security Number: _____

PHYSICAL STREET ADDRESS WHERE YOU LIVE NOW

2 Street Address: **9516 HAINES AVE** Apartment, Unit, or Lot #: _____ City: **AIB** Zip: **87112**

ADDRESS WHERE YOU WANT YOUR MAIL DELIVERED (IF DIFFERENT)

3 Mailing Address: _____ City: _____ Zip: **WALK**

4 If you are changing your name on this application, under what full name were you previously registered? Last Name - First Name - Middle Name or Initial: _____

PARTY

5 NOTE: You must name a major political party to vote in primary elections. Party: **DEM** If you choose NO PARTY, check this box: 6 How the County Clerk make this one number public election purposes? YES NO Would you like to serve as an election day precinct worker? YES NO

7 I hereby authorize you to cancel my previous registration in the following county and state. City or Township: _____ County: _____ State: _____

8 Are you a citizen of the United States? Yes No Will you be 18 years of age on or before election day? Yes No

If you checked "NO" to any of the questions above, do not complete this form. If you have been convicted of a felony and are currently on parole or supervised probation do not complete this form.

I swear/affirm that I am a citizen of the United States and a resident of the state of New Mexico; that I have not been denied the right to vote by a court of law by reason of mental incapacity; that I am, or will be at the time of the next election, 18 years of age; and, if I have been convicted of a felony, I have completed all conditions of parole and supervised probation, served the entirety of a sentence or have been granted a pardon by the Governor. I further swear/affirm that I am authorizing cancellation of any prior registration to vote in the jurisdiction of my prior residence; and that all the information I have provided is correct.

TODAY'S DATE: Month Day Year: **21 29 2012**

202005329

9 Name of agent who assisted you in filling out this form: **Marion Valencia** VRA ID #: **12231**

SIGN YOUR FULL NAME OR MARK ON THE LINE BELOW: **Buddy Tolbert**

ATTACH COPY OF ID INFORMATION HERE (IF REQUIRED) SEE "REGISTRATION ID REQUIREMENTS" ON BACK OF RECEIPT

DO NOT ATTACH OR ENCLOSE ORIGINAL ID INFORMATION

NMVR-1 (Rev. 3/2011)

<http://www.thesmokinggun.com/buster/registered-voter-dog-investigated-879412> [6/17/2014 4:00:10 PM]

Cops Open Criminal Probe Of New Mexico Republican Who Enrolled His Labrador As A Democrat, THE SMOKING GUN (Mar. 1, 2012), available at <http://www.thesmokinggun.com/buster/registered-voter-dog-investigated-879412>.

Appendix B

Federal Voter Registration Form for "Susan" – A Non-citizen

N

PERSONAL INFORMATION						
NAME Last	First	Middle Name or Initial	Gender	Birth Date	Social Security Number	
[REDACTED]	SUSAN		F	[REDACTED] 1955	[REDACTED]	
ADDRESS WHERE YOU LIVE NOW						
Street Address		Apartment, Unit, or Lot #		City	Zip	
[REDACTED]				RIO RANCHO	87144	
ADDRESS WHERE YOU GET YOUR MAIL						
Address			City	Zip		
[REDACTED]			RIO RANCHO	87144	OAK	
POLITICAL PARTY			TELEPHONE NUMBER (optional)			
NOTE: To vote in primary elections you must name a major political party. >>>>>>>>			Party <i>Republican</i>	If you choose NO PARTY check this box: <input type="checkbox"/> 5		May the county clerk make this telephone number public for election purposes? <input type="checkbox"/> YES <input type="checkbox"/> NO
I hereby authorize you to cancel my previous registration in the following county and state.						
City or Township		County		State		
CANCELLED		7-13-12		[REDACTED] & Voters Request		
ATTESTATION OF QUALIFICATION						
I swear/affirm that I am a citizen of the United States and a resident of the state of New Mexico; that I have not been denied the right to vote by a court of law by reason of mental incapacity; that I am, or will be at the time of the next election, 18 years of age; and, if I have been convicted of a felony, I have completed all conditions of probation or parole, served the entirety of a sentence or have been granted a pardon by the governor. I further swear/affirm that I am authorizing cancellation of any prior registration to vote in the jurisdiction of my prior residence.						
SIGN YOUR FULL NAME OR MARK ON THE RED LINE BELOW:						
<i>Susan</i>		[REDACTED]				
DATE: 1 24 05		Name of person who assisted you in filing out this form: <i>MVD</i>				
Month Day Year						
DO NOT WRITE IN SHADED AREAS - FOR OFFICIAL USE ONLY						
Accepted for filing in County Registration Records		[REDACTED]		[REDACTED]		CHG
6-8-05 <i>Sally</i>		[REDACTED]		[REDACTED]		REP SCH-94-5 CO-03
Date	Filing Clerk	[REDACTED]		[REDACTED]		RIO RANCHO--IN-R6

SA

Female Non-Citizen Voter Info, KOR-TV, Albuquerque, New Mexico (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html>.

Appendix C

Federal Voter Registration Form for Male Non-citizen

SEP 28 1998 8:17

PERSONAL INFORMATION

1. Write Name or Initial: [Redacted] Middle Name or Initial: [Redacted] Gender: [Redacted]

2. ADDRESS WHERE YOU LIVE NOW
Street Address: [Redacted] Apartment, Unit, or Lot #: [Redacted] City: Santa Fe NM Zip: 87501

3. Address: Same City: Santa Fe NM Zip: 87501

4. POLITICAL PARTY
NOTE: To vote in primary elections you must belong to a major political party. P R D I O T O P
Party: Democrat If you choose NO PARTY, check this box: 5. TELEPHONE NUMBER (optional): [Redacted] May the county clerk make this telephone number public for election purposes? YES NO

6. AFFIRMATION OF QUALIFICATION
I SWEAR OR AFFIRM THAT I am a citizen of the United States, a resident of the State of New Mexico, and on the date of the next ensuing election I shall have attained the age of eighteen years. I further swear or affirm that I have not been convicted of any felony crime or any crime involving moral turpitude, that I have not been adjudged mentally incompetent by a court of law or am not presently charged with any crime, and that I have not been convicted of any felony crime under penalty of perjury. If I have provided false information, I may be subject to a fine or imprisonment or both under Federal or State laws.
SIGN YOUR FULL NAME OR MARK ON THE RED LINE BELOW:
[Redacted Signature Line]
DATE: 9 23 1998
Word this Year

7. Name of person who assisted you in filling out this form: [Redacted]

8. DAY-TIME PHONE NUMBER: To be used by county clerk in mailings only. No numbers please only. [Redacted]

9. Would you like to serve as an election day precinct worker? YES

Provide the information for A, B and C only if these questions apply to you.

A. County: [Redacted] State: [Redacted]

B. Last Name - First Name - Middle Name or Initial: [Redacted]

C. a rural address
 a non-street address
 a non-traditional place
In the space provided to the right you must draw a map of where you live in relation to local landmarks, such as roads, streams, churches, stores, etc. This will help your county clerk to determine your correct voting precinct.
Also in the space below (RURAL ADDRESS DESCRIPTION), please describe the following:
1. The actual number of the state or county road on which your residence is located, and on which side of the road it sits (east, west, north, south);
2. The number of the nearest state roads that cross your road (in both directions from either side of your home), or the names of the other identifiable landmark;
3. The distance and direction you would travel from home to reach each of these roads;
4. The distance you would travel to reach your home if you live on a private road that is an extension of a public road (please note at which end of the public road your road begins - east, west, north or south).
EXAMPLE: RD 878, north side, 1 mile east of RD 816
OR RD 743, west side, 1 mile north of Smith's store and 4 miles south of RD 800

MAP: [Redacted Map Area]

N
W+E
S

Male Non-Citizen Voter Info, KOR-TV, ALBUQUERQUE, NEW MEXICO (Nov. 6, 2012), available at <http://www.documentcloud.org/documents/502053-male-non-citizen-voter-info.html>.