

Nos. 08-17094, 08-117115

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

MARIA M. GONZALEZ, *et al.*
Appellants

v.

STATE OF ARIZONA, *et al.*
Appellees,

INTERTRIBAL COUNCIL OF ARIZONA, INC., *et al.*
Appellants

v.

STATE OF ARIZONA, *et al.*
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Nos. 06-cv-01268-PHX-ROS; 06-cv-01362-ROS

**BRIEF OF *AMICUS CURIAE*
AMERICAN UNITY LEGAL DEFENSE FUND, INC.
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF INTEREST

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. www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Chicanos Por La Causa, Inc. v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), and *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S.Ct. 1610 (2008).

On January 27, 2009, all parties to this case, through counsel, consented to the filing of this brief. Fed. R. App. P. 29(a).

AULDF will not repeat the statutory and constitutional analyses in Appellees’ Opening Briefs, with which it agrees. It is unfortunate that the Appellants focus solely on alleged burdens on some Arizonans, and ignore the disenfranchisement of most citizens by voter fraud, especially in light of the Supreme Court’s express framing of the issues in an earlier proceeding in this case: “[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.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Purcell set the standard for review of Arizona’s voter identification requirements, one part of which was not addressed fully by any party thus far: “the prevalence and character of the fraudulent practices that allegedly justify those requirements.” *Purcell*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring). As shown *infra*, the evidence of voter fraud in Arizona and elsewhere is sufficient to show that Arizonans’ votes are being affected, and, absent active measures such as the Arizona law at issue here, the problem is likely to get worse.

ARGUMENT

I. THIS CASE REQUIRES A REVIEW OF THE PREVALENCE AND CHARACTER OF VOTER FRAUD.

A. The Prevalence and Character of Voter Fraud Is Part of the Standard of Review of this Case:

This case has already been to the Supreme Court of the United States. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Court posited the issues as:

“A State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. San Francisco County Democratic Central Comm.* 489 U.S. 214, 231 (1989). 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). *Purcell*, 549 U.S. at 4.

Justice Stevens, more succinctly, posed the two-part standard which governs this challenge: “At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements.” *Id.*, 549 U.S. at 6. In their opening briefs, the Appellants seem to have focused on the first two of these tests, and ignored the second – the prevalence and character of voter fraud by non-citizens.

The question of voter fraud is central to many cases involving voter identification requirements, and this Court should not let it slip by easily. Voting by non-citizens effectively denies the right of suffrage of most Arizonans. *Purcell*,

549 U.S. at 6. “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Id.* The threshold question in this case is how to judge evidence of voting by non-citizens in Arizona.

B. Appellants and Their Amici Erroneously Suggest a High Standard for Recognizing Voter Fraud:

In this case (as in other recent cases involving voter identification requirements), Appellants and their *amici* have suggested that there is no problem with voter fraud by non-citizens. *See, e.g.*, Opening Brief of Maria Gonzalez, *et al.*, (“Gonzalez Br.”), at 28 (“Although there have been only a handful of documented incidents of noncitizen voter registration or voting in Arizona, and none established that the improper registration was intentional or fraudulent. . .”); Brief Amicus Curiae of the Brennan Center for Justice at NYU School of Law In Support of Plaintiffs/Appellants and Reversal, in Nos. 06-16521, 06-16702, 06-16706, (“Brennan Center Am. Br.”) at Pp. 3 (“There is no serious problem with voting by non-citizens.”), 4 (“Voting by non-citizens is an extremely rare occurrence. Where it does occur, the evidence shows that it is usually not the result of intentional voter fraud, but a misunderstanding of eligibility requirements by non-citizens who mistakenly believe they are eligible to vote.”).

As shown in more detail *infra*, Appellants' and their supporters' "handful of documented incidents", "not intentional fraud" position is at odds with the record below, and with other, independent assessments of noncitizen voting registration in Arizona. The *New York Times*, for example, reported last year:

In Arizona, the only state that requires proof of citizenship to register to vote, more than 38,000 voter registration applications have been thrown out since the state adopted its measure in 2004. That number was included in election data obtained through a lawsuit filed by voting rights advocates and provided to the *New York Times*. More than 70 percent of those registrations came from people who stated under oath that they were born in the United States, the data showed.

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

A big part of the clash over the standard to be used in this review is definitional. The proponents of the "no serious problem" position, for example, define voter fraud very narrowly, using phrases like "no systematic evidence of the kind of impersonation voter fraud that would support the need for a voter identification law." Brief of Amicus Curiae Professor Richard L. Hasen in Support of Petitioners, *Crawford*, 2007 WL 3353103, Nov. 9, 2007, at P. 29.

This narrow and shifting definition is echoed in this case: “[T]here have been only a handful of documented incidents of noncitizen voter registration or voting in Arizona . . .”. Gonzalez Br., at 28. In other words, Appellants concede there have been “documented incidents of noncitizen voter registration or voting in Arizona,” *id.*, as they must, since, as shown *infra*, the record evidence of such voter fraud by aliens is uncontradicted. *See, e.g.*, ER 3 at 16. But Appellants and their supporters contend that such fraud should not be considered because they believe it can be defined away as not really fraud: “none established that the improper registration was intentional or fraudulent.” Gonzalez Br., at 28.

Appellants do not explain how “improper registration” by non-citizens can be anything but “fraudulent.” As they admit, federal law requires that even the “Motor Voter” mail-in voter registration forms require an affirmation that a person is a citizen. Gonzalez Br., at 30. A non-citizen who tries to register or vote violates federal law, 18 U.S.C. §§ 611(a) and 1015(f), and becomes inadmissible and removable. 8 U.S.C. § 1182(a)(10)(D)(i).

Those who contend that voter fraud is a significant problem, on the other hand, argue that, given the difficulty of revealing fraud, some anecdotal evidence is sufficient: “Some voter impersonation has been found (though not much, for

remember that it is difficult to detect).” *Crawford v. Marion County Election Board*, 472 F.3d 949, 953-54 (7th Cir. 2007). The *New York Times* estimate of thousands of non-citizens attempting to register, Urbina, *supra*, is more than a “handful.” In addition, as shown in more detail *infra*, there is substantial record and anecdotal evidence of non-citizens committing voter fraud in Arizona and elsewhere.

C. The Supreme Court and Other Circuits Use a Relaxed Standard for Showing Voter Fraud:

The same clash over voter fraud evidence was apparent in the recent Supreme Court case upholding Indiana’s photo identification requirement for voters. *Crawford v. Marion County Election Board*, ___ U.S. ___, 128 S.Ct. 1610 (2008). The briefing in *Crawford* was substantial and intense, with several *amici* arguing vociferously about the existence of voter fraud. *Compare, e.g.*, Brief of the American Unity Legal Defense Fund As Amicus Curiae Supporting Affirmance, 2007 WL 4340893 (Dec. 10, 2007) (demonstrating numerous instances of voter registration and voter fraud across the country) *with* Brief of Amici Curiae the Brennan Center for Justice, *et alia*, in Support of Petitioners, 2007 WL 4102238 (Nov. 13, 2007) (no evidence of fraud).

The Supreme Court came down on the side of the Seventh Circuit’s liberal, “difficult to detect” analysis, *Crawford*, 472 F.3d at 953-54, saying: “It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists, that occasional examples have surfaced in recent years, and that 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.*

Footnote 12 in *Crawford*, __ U.S. at __, 128 S.Ct. at 1619, n. 12, in particular, rejects the Appellants’ position in this case that voter fraud by illegal immigrants can be discounted because it is rare and can be defined away. After reciting the examples in the record, and noting that even the Brennan Center’s brief includes “scattered instances of in-person voter fraud,” the Court discussed “a hotly contested gubernatorial election in 2004,” in which “one voter was confirmed to have committed in-person voter fraud.” *Id.*, citing *Borders v. King County*, No. 05-2-0027-3 (Super. Ct. Chelan Cty., Wash., June 6, 2005).

The Court first used anecdotal evidence of “occasional examples of” voter fraud as sufficient to support the State’s interest in preventing fraud. Then the Supreme Court found that evidence of even “one voter” who committed fraud in another state was sufficient to support an in-person voter photo identification requirement. The Court did not require evidence that the fraud was intentional.

Other circuits have followed this standard. The Eleventh Circuit used this standard to review a photo identification case. *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). “Nor do the more recent decisions in *Burdick*, . . . and *Crawford*, [citations omitted] place an evidentiary burden on the state when defending a voting regulation. . . . The Supreme Court did not require Indiana to prove specific instances of voter fraud, and we decline to impose that burden on Georgia.” 554 F.3d at 1353. The Tenth Circuit earlier used the same low standard. *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008)(“Just as the Supreme Court did not require Indiana to present specific instances of past conduct to justify its photo identification requirements, we do not require Albuquerque to make such a showing.”).

Under the Supreme Court’s standards, record evidence, media reports, and other anecdotal information from Arizona and elsewhere, both historical and current, can be accepted by this Court to demonstrate the existence of voter fraud.

Evidence of even “one voter” acting fraudulently was sufficient to substantiate a photo identification requirement, arguably a more difficult obstacle than simply proving citizenship. Evidence of intent to defraud is not required. This is a relaxed standard for evidence of the “prevalence and character of the fraudulent practices.” Therefore, even in the absence of detailed argument from the parties, to determine the validity of the Arizona voter identification requirements, this Court should look at the “prevalence and character of the fraudulent practices that allegedly justify those requirements.” *Purcell*, 549 U.S. at 6.

II. VOTER FRAUD BY NON-CITIZENS EXISTS IN ARIZONA AND ELSEWHERE

A. The Record Below Demonstrates Non-Citizen Voter Registration and Voting in Arizona:

The District Court below, on the basis of record evidence, found that non-citizens had registered to vote in Arizona, and that some of them had voted:

In 2005, Maricopa County Recorder Helen Purcell referred 159 matters to the Maricopa County Attorney Andrew Thomas based on evidence that non-citizens had registered to vote. (Osborne Dep. Ex. 3 at 4, July 31, 2006). In August 2005, Thomas announced that ten non-citizens had been charged in felony criminal complaints for falsely filing voter registration forms

claiming they were in fact United States citizens, four of which had voted in an election. *Id.* . . .

In Pima and Maricopa counties, 208 individuals had their voter registrations cancelled after they swore under oath to the Jury Commissioner that they were not citizens, 56 of whom are alleged to have voted in a [*sic*] election. (Exs. 1108, 1351). Pima County has also referred several instances of non-citizens either attempting to register to vote or cast votes to the Pima County Attorney. (Ex. 1108 at 2-3 & ex. A).

Excerpts of Record, (“ER”) 3, at 16; *see, also*, Answering Brief in Appeal No. 08-17094 of Defendants-Appellees State of Arizona and Arizona Secretary of State Ken Bennett (“Arizona Br.”), at 5-6 (references to evidence of fraud in the record).

These findings have not been appealed. The record below thus conclusively supports measures to prevent future voter fraud by non-citizens.

B. There Have Been Other Documented Instances of Non-Citizens

Registering to Vote and Voting in Arizona:

Even before Arizona became a State, newspapers reported 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’”. Paula Mitchell Marks, *AND DIE IN THE WEST*, 1996, P. 108.

As noted *supra*, the *New York Times* estimated last year that thousands of non-citizens tried to register to vote in Arizona in the last five years. Urbina, *supra*. Another recent study estimated that between 41,000 and 86,000 non-citizens actually did vote in Arizona in 2006. David Simcox, “How Many Non-Citizen Voters? Enough to Make a Difference,” *The Social Contract*, Oct. 7, 2008, at 8 (Table 3 - low estimate), 9 (Table 4 - high estimate), *available at* www.thesocialcontract.com/docs/tsc_how_many_non_citizen_voters_simcox_2008oct7.pdf. The estimate was based on Census data and public opinion polling¹ of voter registration and party affiliation among minority populations. *Id.*

There is, in addition, however, evidence of actual incidents of voter registration or voting by non-citizens in Arizona:

¹ The Simcox study estimate may not be entirely accurate, as the polling data was from Los Angeles, and not from Arizona. *Id.*, at 7. Even though the Supreme Court relied on media reports in *Crawford*, it also warned: “Supposition based on extensive Internet research is not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication.” ___ U.S. at ___, n. 20, 128 S.Ct. at 1623, n. 20.

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.

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

Under the *Crawford* standard, Arizona could consider this type of evidence of noncitizen voter fraud “documented throughout . . . history,” __ U.S. at __, 128 S.Ct. at 1618-19, in determining whether to protect itself.

C. There Are Numerous Similar Other Examples from Other States:

In *Crawford*, the Supreme Court recognized that a reviewing court may consider examples of voter fraud from other jurisdictions. “Judge Barker cited record evidence containing examples from California, Washington, Maryland, Wisconsin, Georgia, Illinois, Pennsylvania, Missouri, Miami, and St. Louis.” *Crawford*, __ U.S. at __, n. 12, 128 S.Ct. at 1619, n. 12. There are many such examples from other jurisdictions.

Cases and reports over many years indicate that non-citizens have voted illegally across the country. In 1954, for example, the Senate Committee on Rules and Administration noted that illegal immigrants had voted in the 1952 New Mexico Senate election. Comm. on Rules and Administration, Report of the Subcomm. on Privileges and Elections, “General Findings and Conclusions,” 83rd Cong., 2nd Sess. (1954), at 1.

These problems continue. In *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007), the Eleventh Circuit upheld the conviction of a Jamaican citizen who voted in the 2000 Presidential election. In *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992), the Court of Appeals of Texas, El Paso, reported that “Simmons lost one vote because one person voted for him who was not a citizen of the United States.”

In 2005, the Government Accountability Office reported that, from January 2001 to May 2004, “the California investigative unit opened for investigation 29 allegations of non-citizens either registering or voting.” Govt. Accountability Off., “Elections: Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists,” GAO-05-478, June 10, 2005, at 59, App. III. During the same period, GAO reported that “[a]t the federal level, DOJ

attorneys initiated at least 61 election fraud investigations or matters; of those cases, 15 involved voter registration or ineligible voters.” *Id.*

D. Organized Efforts May Be Increasing the Incidence of Non-Citizen Registration and Voting:

The prevalence of voter registration and voter fraud may be increasing, in part because of organized efforts to stimulate more registration and voting.

Appellants’ amici argued, for example, that “the evidence shows that [voting by non-citizens] is usually not the result of intentional voter fraud, but a misunderstanding of eligibility requirements by non-citizens who mistakenly believe they are eligible to vote.” Brennan Center Am. Br., at 4.

Some of this fraud apparently does stem from encouragement of non-citizens to vote. In June 2006, Francine Busby lost the special election to replace convicted Cong. Randy “Duke” Cunningham (R-CA) in part because she was seen to have encouraged voting by illegal immigrants. “At the end of the event, a man asked Busby a question in Spanish, which was translated for her: ‘I want to help, but I don’t have papers.’ Busby responded: ‘Everybody can help, yeah, absolutely, you can all help. You don’t need papers for voting, you don’t need to be a registered voter to help.’” John Gizzi, “GOP Moderate Scrapes by After Democrat

Panders to Illegals,” *Human Events*, June 12, 2006,

www.humanevents.com/article.php?print=yes&id=15479.

The behavior of some voter registration organizations, however, indicates that something more than “misunderstanding” is behind the high number of fraudulent registrations in Arizona and elsewhere. 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*, November 7, 2000, www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=4619. 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:

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

A more contentious example was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. R. Rep. 105-416 (1998). In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities." *Id.*, at 16. The Committee 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 was alleged to have encouraged non-citizen voter registration and voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the voter registrations by the advocacy group, Hermandad Mexicano Nacional, 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. PBS Online Newshour, "Contested Contest," *Online Focus*, October 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."). There was no prosecution.

Arizona is affected by this organized voter fraud problem. One of the most controversial actors in the modern American electoral system, for example, is the Association of Community Organizations for Reform Now, known commonly as ACORN. www.acorn.org. ACORN is a plaintiff in this case, First Amended Complaint, ¶ 17, although it apparently did not appear at trial. Arizona Br. at 25, n. 20. Allegations of voter fraud by ACORN have been widespread for many years. “The Acorn Indictments,” *The Wall Street Journal*, Nov. 3, 2006, www.opinionjournal.com/editorial/feature.html?id=110009189 (“allegations of fraud have tainted Acorn voter drives across the country”).

In 2008, those allegations multiplied. “Over the last few weeks, the Acorn registration drive has become a flash point in the campaign when the flood of new voter registrations prompted complaints from election officials about the high number of improper submissions.” 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. “More than 2,000 voter registration forms filed in northern Indiana’s Lake County by a liberal activist group this week have turned out to be bogus, officials said Thursday.” Drew Griffin, “Thousands of Voter Registration Forms Faked, Officials Say,” CNN.com,

Oct. 9, 2008,

www.cnn.com/2008/POLITICS/10/09/acorn.fraud.claims/?iref=hpmostpop.

“We’ve been told that some of the allegedly erroneous applications even included the names of players from the Dallas Cowboys football team, Miller said.” Mary Manning, “Las Vegas Office Raided in Voter Fraud Probe,” *Las Vegas Sun*, Oct. 7, 2008, www.lasvegassun.com/news/2008/oct/08/acorn-office-vegas-raided-voter-fraud-probe.

Of 1.3 million voters ACORN claimed to have registered, only 450,000 were actually legitimate new voter registrations. Falcone, *supra*. ACORN officials admitted that up to 30 percent of the registrations they submitted were “faulty.” *Id.* ACORN argued that “it remained technically difficult to weed out duplications without better access to election records, and that their internal auditing identified many of the fraudulent registrations, which they flagged for election officials to review.” *Id.*

ACORN’s efforts, however, have burdened the election officials who have to sift the organization’s registrations to determine which are genuine and which are “faulty.” “Clark County [Nevada] Registrar of Voters Larry Lomax said he has never seen such a deluge . . . Lomax said while he supports the goal of getting more people registered to vote, he sees rampant fraud in the 2,000 to 3,000

registrations ACORN turns in every week.” Molly Ball, “Rising Registration: New Voter Sign-Ups Up,” *Las Vegas Review-Journal*, July 7, 2008, www.lvrj.com/news/24004424.html.

Even ACORN’s supporters are now rethinking the organization’s actions. “In a startling partisan shift, House Judiciary Committee Chairman John Conyers Jr. on Thursday proposed holding hearings on claims the liberal activist group ACORN engaged in a pattern of crimes ranging from voter fraud to a mob-style ‘protection’ racket.” S.A. Miller, “Conyers Suggests Probe of ACORN,” *The Washington Times*, March 20, 2009, A5, www.washingtontimes.com/news/2009/mar/20/conyers-suggests-probe-of-acorn/.

ACORN works in Arizona, with “offices in Mesa, Glendale, Tucson and Phoenix.” First Amended Complaint, ¶ 17; Reuters, *Arizona ACORN Notifies Secretary Brewer That State May Face Lawsuit Over Noncompliance With Federal National Voter Registration Act*, Jan. 30, 2008, <http://www.reuters.com/article/pressRelease/idUS225637+30-Jan-2008+PRN20080130>. ACORN claims that, in 2008, it collected 12,018 Arizona voter registrations, of which 8,413 were “successful.” ACORN, “In 2008, ACORN Completed the Largest Non-Partisan Voting Registration Drive in Our

Nation's History,”

www.acorn.org/fileadmin/Vote/ACORN_post_08_election_final.low_res.pdf.

Arizona's Secretary of State even issued a specific release addressing concerns about ACORN's practices in Arizona:

Too often I have seen groups like ACORN who disenfranchise voters and file fraudulent voter registration forms here in Arizona. The truth of the matter is something needs to be done about private organizations like ACORN that attempt to knowingly deceive the election system.

ACORN has been active in Arizona for several years, and just as in other states, this group has turned in fraudulent and untimely voter registration forms. In each instance, these registration forms were referred to the Arizona Attorney General's Office and relevant County Attorney's offices for further investigation.

Kevin Tyne, Office of the Secretary of State of Arizona, “Sec. of State Brewer Addresses Concerns Over ACORN Voter Reg. Practices,” Oct. 15, 2008, (“Brewer Statement”),

<http://www.gwu.edu/~action/2008/chrneday08/azsos101508pr.html>.

In *Crawford*, the Supreme Court said that the State has important interests in “counting only the votes of eligible voters” and in “orderly administration and

accurate recordkeeping”, *Crawford*, ___ U.S. at ___, 128 S.Ct. at 1620. The flood of registrations across the country, many of which are by organizations which have submitted large numbers of fraudulent or “faulty” registrations, implicates both those interests. ACORN’s efforts in Arizona seem to highlight both those interests, and to support Arizona’s efforts to protect against voter fraud.

Contrary to Appellants dismissal of a “handful” of incidents, the record in this case and documented instances in Arizona and across the country amply demonstrate that non-citizens do try to register and to vote. The examples of widespread and increasingly-serious organization-sponsored fraud suggest that this problem will only get worse.

III. THIS FRAUD JUSTIFIES ARIZONA’S REQUIREMENT THAT PROSPECTIVE VOTERS DEMONSTRATE THAT THEY ARE CITIZENS

“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*, ___ U.S. at ___, 128 S.Ct. at 1619.

Similarly, the State has a substantial interest in protecting voter confidence:

Finally, the State contends that it has an interest in protecting public confidence “in the integrity and legitimacy of representative government.” Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

Crawford, __ U.S. at __, 128 S.Ct. at 1620.

There are thus three specific state interests at stake, two involving prevention of voter fraud (“counting only the votes of eligible voters” and “orderly administration and accurate recordkeeping”), and one involving the protection of public confidence in the integrity of the voting process by deterring fraud and “confirm[ing] the identity of voters.” *Id.* Each of these three interests is implicated in this case and protected by the Arizona identification requirement.

A. Arizona Met the *Crawford* Standard for Establishing Legitimate Interest in Preventing Voter Fraud:

In *Crawford*, the Supreme Court established the standard for determining whether voter fraud was a legitimate concern:

[T]hat flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that [Arizona]'s own experience with fraudulent voting . . . demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

__ U.S. at __, 128 S.Ct. at 1618-19.

As shown *supra*, each of those elements is present here: historical accounts of fraud, recent examples of fraud, and Arizona's own evidence in the trial record of fraud significant enough to affect close elections. That record evidence is unrefuted. Arizona's interest in preventing voter fraud is legitimate and strong.

B. Arizona Met the *Crawford* Standard for Establishing Legitimate Interest in Protecting Public Confidence in the Electoral System:

Arizona’s separate, though related, concern about public confidence in the electoral system is also legitimate and strong. The Supreme Court, in an earlier stage of this case, said: “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.” *Purcell*, 549 U.S. at 4.

Arizona has perhaps one of the strongest indications that the public lacked confidence in the electoral system: Arizona’s voters overwhelmingly voted to change the system and replace it with one in which they had more confidence. In response to increasing concerns about the level of voter fraud in Arizona and elsewhere, in 2004, the voters of Arizona adopted Proposition 200. “The measure sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day.” *Purcell*, 549 U.S. at 2.

Even Appellants recognize these voter concerns in adopting the initiative:

The statements supporting Proposition 200's voting provisions, published in the Secretary of State's voter information pamphlet, invoke the specter of immigrants defrauding the election system by registering to vote without U.S. citizenship. *See, e.g.*, "The citizens of Arizona have spoken: they have had enough . . . [Proposition 200's] passage is vital to the security of this state and the sovereignty of our country," "it is not fair or lawful for non-citizens to reap the benefits of citizenship at the expense of law-abiding taxpayers," "Proposition 200 [ensures] that illegal aliens who are not entitled to vote or obtain certain benefits cannot subvert the law to access them."

Gonzalez Br., at 15, *citing* to ER 10. The Tenth Circuit, in *Santillanes*, recognized this kind of statement as helping to justify, not undercut, a voter identification measure. *Santillanes*, 546 F.3d at 1323 ("The resolution submitting this measure to the voters echoes those [fraud] concerns.").

The District Court below found that this concern about non-citizen voting was justified by the "demonstrated instances of voter fraud in Arizona." ER 3, at 34. The court below found that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots. . . . As such, Plaintiffs' challenge must fail." ER 3, at 35.

In addition, if the State has an interest in maintaining confidence in the electoral system, the repeated and widespread allegations of voter fraud by groups such as ACORN implicate that interest. Arizona Secretary of State Janice Brewer thought this issue so important that she issued a press release urging Arizona's voters to take specific steps to avoid fraud. "The public needs to be diligent about questioning private organizations like ACORN that are offering to register them to vote." Brewer Statement, *supra*.

Since Arizona's voters have specifically indicated their concern over voter fraud, and enacted a specific and clear scheme for addressing that concern, Arizona's efforts to identify those who are eligible to vote and screen out those who are not eligible are justified by its strong interests. "Prevention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement for local elections." *Santillanes*, 546 F.3d at 1323. "The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than 'sufficient to outweigh the limited burden' of producing photo identification." *Common Cause/Georgia*, 554 F.3d at 1354-55.

C. Arizona’s Citizenship Identification Requirement Meets the *Crawford* Standard for Even-Handed and Appropriate Application:

Proposition 200 is not invidious on its face. *Harper v. Va. Board of Elections*, 383 U.S. 663, 666-67 (1966). The citizenship requirement is tied directly to voter qualifications. *Crawford*, ___ U.S. at ___, 128 S.Ct. at 1615-16. Citizenship is required to vote in Arizona, and in the face of documented concerns that non-citizens are voting, Proposition 200 requires only a demonstration that the prospective voter is a citizen. This is an “evenhanded restriction[] that protect[s] the integrity and reliability of the electoral process itself”. *Id.*, quoting, *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983).

D. Having Met All the *Crawford* Tests, Proposition 200 Should Be Upheld.

The Supreme Court has said that Arizona has two significant interests: preventing voter fraud, and protecting voter confidence. *Crawford*, ___ U.S. at ___, 128 S.Ct. at 1617-20. In Proposition 200, the voters themselves established these concerns as priorities for the State, and posited a specific test designed to target this question narrowly and strictly. As the State’s Answering Brief indicates, Arizona Br., at 38-41, and the recent photo identification cases suggest, the

burdens from Arizona's voter identification requirement are "insignificant" and "outweighed by the interests in detecting and deterring voter fraud." *Common Cause/Georgia*, 554 F.3d at 1354.

Proposition 200 is based on legitimate and supported concerns which go to the heart of the rights of Arizona's citizens. In this case, there is ample evidence of voter fraud in Arizona and elsewhere. "The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than 'sufficient to outweigh the limited burden' of producing [citizenship] identification." *Id.*, 554 F.3d at 1354-55.

The question in this case is not, as Appellants argue, that a limited group of Arizonans will be disenfranchised by having to demonstrate eligibility to vote; no actual such voters were shown at trial. *Arizona Br.*, at 15-29. The greater danger in Arizona is that millions of Arizonans are already being disenfranchised by documented voter fraud and, absent the protection they voted for, will be increasingly injured in the future. Proposition 200 should be upheld.

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests this Court to affirm the decisions below.

/s Barnaby W. Zall

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Amicus respectfully advises the Court that, apart from the case with which this appeal was consolidated (No. 08-17115), Amicus not aware of any related cases pending in the Ninth Circuit.

s/ Barnaby W. Zall

Barnaby W. Zall

CERTIFICATE OF RULE 32 COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,638 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to Microsoft Word 2003, the program which prepared the text.

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 Microsoft Word 2003 in fourteen-point Times New Roman type style.

s/ Barnaby W. Zall

Barnaby W. Zall

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barnaby W. Zall

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