No. 12-71

IN THE
Supreme Court of the United States

ARIZONA, *et al.*,
Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
and JESUS M. GONZALES, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE AMICI[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization established under the laws of New York to assist Black and other people of color in the full, fair, and free exercise of their constitutional rights. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on eliminating racial discrimination in education, economic justice, criminal justice, and political participation.

LDF has been involved in nearly all of the precedent-setting litigation relating to minority voting rights before state and federal courts representing parties or as amicus curiae, including cases involving constitutional and legal challenges to discriminatory state voter registration laws. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Hous. Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*, 425 U.S. 130 (1976);

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

White v. Regester, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Schnell v. Davis*, 336 U.S. 933 (1949) (per curiam); *Smith v. Allwright*, 321 U.S. 649 (1944); *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848 (D.C. Cir. 2012); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*); *Kirksey v. Bd. of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). As such, LDF has a significant interest in ensuring the full, proper, and continued enforcement of the National Voter Registration Act of 1993.

The Leadership Conference on Civil and Human Rights is the nation's oldest and largest civil and human rights coalition, consisting of more than 210 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

The Anti-Defamation League (ADL) was founded in 1913—at a time when anti-Semitism was rampant in the United States—to advance good will and mutual understanding among all Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons, whether they are members of the minority or the majority, and in ensuring that each individual re-

ceives equal treatment under the law regardless of race, ethnicity, or religion. Consistent with its mission, ADL opposes ballot access requirements that disproportionately affect the voting rights of racial or ethnic groups.

SUMMARY OF THE ARGUMENT

Recognized by this Court as the right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the right to vote is the cornerstone of our democracy. But America's relationship with the right to vote is a contested one, characterized by periods of expansion of the electorate often followed by efforts to contract voter access.

Against this historical backdrop, Congress enacted the National Voter Registration Act of 1993 (NVRA) to expand America's promise of democracy by the People by making voter registration opportunities more widely available and, ultimately, politically engaging, among others, the most marginalized in our democracy: people of color and the poor. 42 U.S.C. §§ 1973gg(a)(3), (b)(1). As intended by Congress, voter registration increased dramatically, with 20 million new voters, nearly half of whom were Black, registering between 1995 and June 1996. Widely recognized for its pivotal role in ushering in a new, but not complete, period of democratic expansion in this Nation, the NVRA also led to significant improvements in disparities in registration rates between people of color and Whites.

As explained more fully below, however, following record participation by voters of color in several recent election cycles, and the substantial growth of communities of color in the last decade, several

states, including Arizona, have adopted voting measures to diminish access to the vote by people of color.

Between 2000 and 2010, the number of Latinos in Arizona increased substantially, by 600,000, and Latinos now comprise 30 percent of the state's population. Citing a need to combat undocumented immigration, Arizona responded by adopting Proposition 200. This discriminatory measure requires county registrars to reject any application for registration that is not accompanied by certain types of documentary evidence of United States citizenship. While citizenship is a legal requirement to register and vote, laws like Proposition 200 erect onerous documentary proof requirements that inhibit the registration of eligible voters.

Although Arizona failed to identify a single instance in which an undocumented immigrant registered to vote or voted in the state, the impact of the law was clear: following the enactment of Proposition 200, Arizona rejected the registration applications of more than 30,000 individuals. Of these, nearly 17 percent were Latinos. The Court of Appeals, sitting *en banc*, struck down Proposition 200 as applied to the Federal Form, a nationally uniform voter application that applicants can use to register by mail, recognizing that Proposition 200 was both inconsistent with and preempted by the NVRA.

Amici write separately to make three key points. *First*, this amicus brief provides the historical backdrop against which the NVRA was enacted and details various discriminatory measures that were employed by a number of states to prevent voters of color and the poor from exercising their voting

rights. *Second*, this amicus brief describes the manner in which Congress, responding to this anti-democratic period of exclusion in American history, enacted the NVRA to usher in a period of electoral expansion. *Finally*, this brief argues that, absent full enforcement of the NVRA, measures such as Arizona's Proposition 200 will undermine the hard-fought progress that has been made in combating discrimination in our political process.

Accordingly, amici respectfully urge this Court to uphold the ruling of the Court of Appeals.

ARGUMENT

I. States have a long and well-documented history of discriminating against voters of color.

Nearly fifty years ago, in his speech proposing the bill that would become known as "the most successful piece of civil rights legislation ever adopted," Voting, U.S. Dep't of Justice, http://www.justice.gov/crt/about/vot/ (last visited January 13, 2013), President Lyndon Johnson framed the challenge posed by our Nation's lamentable tradition of racial discrimination in voting:

> Many of the issues of civil rights are very complex and most difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to ensure that right.

President Lyndon B. Johnson, Special Message to the Congress: The American Promise, 1 Pub. Papers 281, 282 (Mar. 15, 1965), *available at* http://lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.

As leading historians have explained, the extension of the right to vote in America has been contested, characterized by expansions often followed by swift contractions; gains in political participation by communities of color are too often met with corresponding efforts to constrict the franchise. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* xxiii (2009). The fight for the vote for Black Americans provides a prime example of this phenomenon. No other democracy in the world has enfranchised a large group, then disfranchised it—and then re-enfranchised it. *See* Richard M. Valley, *The Two Reconstructions: The Struggle for Black Enfranchisement* 1-2 (2004).

A. Early federal efforts to enfranchise Blacks during Reconstruction were later undermined by state election laws.

Following the Civil War, Congress moved swiftly to establish widespread Black suffrage. Between 1866 and 1867, the percentage of Black males eligible to vote "shot up from .5 percent to 80.5 percent, with all of the increase in the former Confederacy." Valley, *supra*, at 3.

By 1870, the U.S. Constitution featured two new amendments, the Fourteenth and Fifteenth, enshrining the right to vote. *See* U.S. Const. amend. XIV, amend. XV. With those constitutional amendments,

the first Reconstruction, a period of democratic expansion, was well underway. "Black office-holding emerged very rapidly" during Reconstruction. Valley, *supra*, at 3. "About half of the lower house of South Carolina's legislature . . . was [B]lack; 42 percent of Louisiana's lower [state] house was Black; and 29 percent of Mississippi's state house was Black." *Id.*

But the abrupt end of Reconstruction in 1877 offers a bitter lesson about the consequences of failed political will to sustain comprehensive voting rights for voters of color. Following the demise of Reconstruction, states and localities in the Old Confederacy engaged in decades of "unremitting and ingenious defiance of the Constitution," by promulgating numerous measures designed either to prevent Blacks from voting, or to cancel out the effect of the Black vote. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

By the 1890s, only "a generation after the great expansion in Black voting and office-holding," Southern legislatures "extinguish[ed] voting rights for the great majority" of Blacks, as Congress dismantled Reconstruction-era statutes. Valley, *supra*, at 3. Indeed, "[a] House report from the Fifty-third Congress (1893-1895) demanded that 'every trace of reconstruction measures be wiped from the books.'" *Id.* at 1 (quoting H.R. Rep. No. 53-18, at 7 (1893)). Without the democratic protections of the Reconstruction-era statutes, discriminatory voting laws proliferated, as states implemented grandfather clauses, voter roll purges, poll taxes, strict voter identification requirements, and literacy and "understanding" tests—each of which was discriminato-

rily enforced against Black voters at the polls. *See generally* Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 413, 416-19 (2008) (tracing the history of voting rights discrimination in Louisiana to the present day). Specifically, "'the key disfranchising features of the southern registration laws were the amount of discretion granted to the registrars, the specificity of the information required of the registrant, the times and places set for registration, and the requirement that a voter bring his registration certificate to the polling place.'" Mark Thomas Quinlivan, Comment, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. Pa. L. Rev. 2361, 2368 (1989) (quoting J. M. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 48 (1974)). To disfranchise voters of color further, states also tailored laws that disqualified people convicted of criminal offenses to apply to crimes thought to be committed by newly freed Blacks but not by Whites. *See Hunter v. Underwood*, 471 U.S. 222, 224-27 (1985) (striking down Alabama's 1901 felon disfranchisement law because it was enacted with a discriminatory purpose); Lawyers' Comm. for Civil Rights Under Law & The Sentencing Project, *The Discriminatory Effects of Felony Disenfranchisement Laws, Policies and Practices on Minority Civic Participation in the United States* 3-4 (2009), *available at* http://www.sentencingprject.org/doc/publications/publications/fd_UNMinorityForum.pdf.

In addition, states passed "second generation" barriers—a seamless continuation of the previous

discrimination, akin to "pour[ing] old poison into new bottles," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part and dissenting in part)—to prevent Black participation in voting. These efforts enabled county councils and school boards, for example, to use at-large elections to submerge newly registered minority voters within White majorities, draw racial gerrymanders, close or secretly move polling stations in minority neighborhoods, and employ countless other strategies to minimize the voting strength of voters of color. *See* Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, *in Quiet Revolution in the South* 21, 22-27 (Chandler Davidson & Bernard Grofman eds., 1993).

Together, these schemes reduced minority participation to insignificance. By the early 1900s, the racially discriminatory application of these laws resulted in the disfranchisement of 90 percent of Blacks in the Deep South. *See* James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, *in Quiet Revolution in the South* 351, 354-56 (Chandler Davidson & Bernard Grofman eds., 1993). "In Virginia, the black electorate was reduced from 147,000 to 21,000. In Mississippi, after adoption of the post-Reconstruction constitution, 6% of eligible Blacks were registered to vote. One percent of eligible African-Americans were registered to vote in Alabama by 1902, compared with 75% of Whites." Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 Yale L. & Pol'y Rev. 370, 380 (1991).

Over the course of the 20th century, this Court slowly invalidated many of these state-sponsored discriminatory voting practices. Nevertheless, states continued to systematically exclude Blacks from the political process. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972) (striking down durational residency requirements for voter registration in Tennessee); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (declaring poll taxes an unconstitutional violation of the Equal Protection Clause); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (striking down Louisiana's provision of an "interpretation test" to prospective voters as an unconstitutional device designed to disenfranchise Blacks); *Smith v. Allwright*, 321 U.S. 649, 656-57, 664-65 (1944) (condemning the Democratic Party's practice of all-White primaries, which completely excluded Blacks from the political process).

B. The Voting Rights Act of 1965 abolished many of the barriers to full political participation for voters of color.

March 7, 1965 was a turning point, and a defining moment for civil rights in this Nation. That day, millions of Americans had their television programs interrupted with images of law enforcement officers brutally assaulting Black men, women, and children on the Edmund Pettus Bridge in Selma, Alabama. The demonstrators were peacefully protesting a state trooper's killing of a young Black man during a voter registration event. *See* David J. Garrow, *Protests at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965* 61-62 (1978). A week later, President Johnson delivered a speech before a special joint session of Congress. He began:

> I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that. At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.

President Lyndon B. Johnson, Address to Congress on the Voting Rights Act: We Shall Overcome (Mar. 15, 1965), *available at* www.historyplace.com/speeches/johnson.htm.

President Johnson described the now-infamous tactics employed to prevent Blacks from voting in the South, and he shared his first-hand experience witnessing discrimination against Mexican Americans in Texas. *Id*. He urged the passage of a new voting rights act, but recognized: "even if we pass this bill the battle will not be over." *Id*.

Congress responded by enacting the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 937, a milestone in "the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009). Widely regarded as the crowning achievement of the Civil Rights Movement, the VRA has proven to be one of the most successful federal civil rights statutes, if not statutes of any kind, in American history.

As a result of the VRA, Black registration rates rose dramatically and, consequently, the number of Black elected officials in this country increased nearly fivefold within five years after its passage. *See* H.R. Rep. No. 109-478, at 18, 130 (2006), , *reprinted in* 2006 U.S.C.C.A.N. 618. Today, there are over 9,000 Black elected officials. *Id.* at 18. Most of these officials are elected from districts that were created or protected under the VRA to remedy the dilution of the votes of communities of color. *See* Chandler Davidson & Bernard Grofman, *The Voting Rights Act and the Second Reconstruction*, *in Quiet Revolution in the South* 378, 381-86 (Chandler Davidson & Bernard Grofman eds., 1993). Significantly, the VRA helped lead to the election and then the re-election of the first Black President of the United States. *See* Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. Times, July 21, 2009, at A14, *available at* http://www.nytimes.com/2009/07/21/us/politics/21vote.html; *see also* Harry J. Enten, *White Voter Decline in 2012: The Conundrum Behind the Cliché*, The Guardian (Nov. 9, 2012), *available at* http://www.guardian.co.uk/commentisfree/2012/nov/09/white-voter-decline-2012-conundrum.

And yet, while the VRA has proven to be a powerful remedy, voting discrimination has persisted.

C. Black registration rates remained significantly lower than those of Whites even after the enactment of the VRA.

The VRA helped to raise Black registration rates in the South to 60 percent by the late 1980s. *See* Alt,

supra, at 354 & 374. But even with this powerful tool, Black registration and turnout rates continued to lag far behind those of Whites.

In the mid-1980s in Mississippi, for example, Black registration rates were 25 percentage points below White registration rates. *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 1254-55 (N.D. Miss. 1987). In the late 1980s, people of color and the poor were overrepresented among the 47 percent of eligible voters who remained unregistered. *See* Cunningham, *supra*, at 385 & n.97. Voter turnout for people of color also remained extremely low, as only 37 percent of eligible Black voters went to the polls in 1994. *See* Nathan V. Gemmiti, Note, *Porsche or Pinto? The Impact of the "Motor Voter Registration Act" on Black Political Participation*, 18 B.C. Third World L.J. 71, 73 (1998).[2]

These low registration and turnout rates were attributable in part to the restrictive registration laws that traced their origins to the discriminatory laws described above. *See, e.g.*, Cunningham, *supra*, at 385-86 ("'[R]egistration requirements are a more effective deterrent to voting than anything that normally operates to deter citizens from voting once they have registered, at least in presidential elections.'") (quoting Stanley Kelley et al., *Registration and Voting: Putting First Things First*, 61 Am. Pol. Sci. Rev. 359, 362 (1967)). In a study published in 1980, 82 percent of nonvoters explained that they did not vote because they were not registered. *Id*. at

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[2] States were not mandated to implement the NVRA until 1996. 42 U.S.C. § 1973gg; *see also* Gemmiti, *supra*, at 96.

386 n.98 (citing William Crotty, *The Franchise: Registration Changes and Voter Representation*, *in Paths to Political Reform* 67, 524 (1980)).

Before the passage of the NVRA, states, particularly in the South, prohibited absentee voter registration, permitted only county registrars or their deputies to register voters, limited registration to the least convenient hours for potential voters, and maintained registrar locations far from where many voters lived. *See, e.g.*, Alt, *supra*, at 356 ("Even in 1970, of the eleven southern states only Tennessee and Texas had any provision for absentee registration, although twenty-seven of the thirty-nine non-southern states had such provisions."); Cunningham, *supra*, at 386 & n.99 (noting that "[i]n some rural areas where only one site is used for voter registration, potential voters . . . must travel distances of over 100 miles to register"); Quinlivan, *supra*, at 2374-75 & n.93 (listing states that give the local registrars discretion to appoint deputies; "this practice results more often in greater power to inhibit registration than in increases in the ease of registration"). To make matters worse, forty states and the District of Columbia permitted purges of voters from registration rolls if those voters did not participate in a certain number of past elections. *Id.* at 2374.

These barriers to registration disproportionately impacted, and often were originally intended to target, voters of color and the poor, many of whom lacked access to transportation to travel long distances at inconvenient times to register to vote. *See* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 Harv. C.R.-C.L. L. Rev. 393, 419-20 (1989). For instance, the 1980 Census found

that 42 percent of Blacks, but only 9 percent of Whites, lacked access to transportation in rural Arkansas. *Id.* at 419 (citing U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstracts of the U.S. Table 96, Arkansas 5-117-119 (1988)).[3] Moreover, people of color and the poor relied more heavily than Whites on voter registration drives—which were disfavored in many jurisdictions. *See, e.g.*, *NAACP, DeKalb Cnty. Chapter v. Georgia*, 494 F. Supp. 668, 670 & n.2, 673 (N.D. Ga. 1980) ("During the month of January, 1980, at all DeKalb County voter registration sites, 2,700 people were registered. On the other hand, during a one-day voter registration drive conducted by plaintiff League [of Women Voters] . . . approximately one and one-half times as many people were registered"); *cf.* Alt, *supra*, at 368 (noting that, by 1968, 60 percent of Blacks in southern majority-minority counties visited by federal ex-

[3] The discriminatory impact of those state registration laws that required voters to travel long distances to register to vote is strikingly similar to that of Texas's voter photo identification law, which was rejected by a federal district court because it, among other things, required some rural voters to travel distances of over 200 miles to obtain acceptable identification. *Texas v. Holder*, No. 12-128, 2012 WL 3743676, at *27-29 (D.D.C. Aug. 30, 2012). A three-judge panel refused to preclear the law under section 5 of the VRA, *id.* at *1, finding that 13.1 percent of Blacks and 7.3 percent of Latinos lived in households without access to a motor vehicle, compared with only 3.8 percent of whites. *Id.* at *29. "If traveling over 200 miles constitutes a substantial burden on people without driver's licenses who can nonetheless find a ride to a [Department of Public Safety] office, . . . imagine the burden for the predominantly minority population whose households lack access to any car at all." *Id.*

aminers were registered to vote, whereas only 28 percent of Blacks were registered in similar, but unvisited counties).

Finally, purges of voter registration lists also disproportionately affected voters of color and the poor because they were more likely to be inactive voters, to move inter-county between elections, or to be under-educated and, thus, less likely to respond to letters requesting that they update their registration. *See* S. Rep. No. 103-6, at 17-20 (1993) (recognizing that purges of nonvoters had a disparate impact on minorities); Cunningham, *supra*, at 391-95 (discussing illiteracy and local mobility's relationship to discriminatory purges of voter rolls).

VRA litigation successfully challenged some, but not all, of these registration barriers. *See, e.g.*, *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 401, 412-13 (5th Cir. 1991) (affirming a district court's finding that Mississippi's dual registration system and prohibition on satellite registration violated the VRA and affirming the steps taken by the district court to cure those violations); *see also NAACP, DeKalb Cnty. Chapter*, 494 F. Supp. at 673, 676, 679 (holding that DeKalb County's refusal to allow the plaintiff-nonprofits to operate satellite voter registration sites beyond the county registrar's office was subject to the preclearance requirement of the VRA; and temporarily enjoining the county from blocking further third-party registration drives). During the same period, many in Congress recognized that broader, more meaningful voter registration laws were needed, and over the next 20 years introduced more than 44 reform bills. *See* Cunningham, *supra*, at 387-88 (discussing the various pro-

posed bills); Gemmiti, *supra*, at 89-94 (describing efforts to enact voter registration reform).

II. Congress enacted the NVRA in response to persisting discriminatory voting laws and to equalize access to voter registration.

Finally, after numerous attempts to expand the electorate and address longstanding and widespread discrimination in the voter registration context, Representative Al Swift (D-WA) introduced the NVRA in 1993. *See Voter Registration: Hearing Held Before the H. Subcomm. on Elections, Comm. on H. Admin.*, 103rd Cong. 1-2 (1993) (statement of Rep. Swift). Representative Swift, who authored the NVRA, explained the bill's purpose as:

> the eradication of a rather unfortunate tradition in this country. We have used voter registration mechanisms in the United States throughout many, many decades to prevent various groups who were from time to time and by certain groups considered undesirable, to make it very difficult for them to vote. At various times those have been eastern Europeans and southern Europeans, the Irish, African-Americans, and others.

139 Cong. Rec. H505, H506 (daily ed. Feb. 4, 1993) (statement of Rep. Swift).

A. The NVRA is a civil rights statute designed to increase voter registration among people of color and the poor.

The NVRA sought to eliminate barriers to registration and to affirmatively "increase the number of eligible citizens who register to vote in elections for

Federal office." 42 U.S.C. § 1973gg(b)(1). It was also adopted as a special effort to reach "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with [motor vehicle agencies]." H.R. Rep. No. 103-66, at 19 (1993) (Conf. Rep.), *reprinted in* 1993 U.S.C.C.A.N. 140.

In particular, the NVRA requires states to make registration available: (1) "by application made simultaneously with an application for a motor vehicle driver's license," 42 U.S.C. § 1973gg-2(a)(1); (2) "by mail application" using the Federal Form prescribed by the Election Assistance Commission (EAC), 42 U.S.C. §§ 1973gg-2(a)(2), 1973gg-4; and (3) "by application in person" at sites designated in accordance with state law or state voter registration agencies, *id.* § 1973gg-2(a)(3). The Federal Form—a nationally uniform voter application that applicants can use to register by mail, *id.* §§ 1973gg-4, 1973gg-7(a)(2)—was in part designed to facilitate registration drives.

Section 7 of the NVRA sets forth further obligations of certain state offices as "voter registration agencies." H.R. Rep. No. 103-66, at 18-20; *see also* 42 U.S.C. § 1973gg-5. Section 7(a)(6) of the NVRA requires all state offices that provide Medicaid, food stamps, and other public assistance benefits, to provide their clients "a mail voter registration application form," and assistance completing the voter registration form, "with each application for [public] service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance." 42 U.S.C. § 1973gg-5(a)(6). The NVRA, which passed with broad bipartisan sup-

port and was signed into law by President Bill Clinton on May 20, 1993, Gemmiti, *supra*, at 95-96, also established limitations on voter purges. *See* 42 U.S.C. § 1973gg-6(d).

Significantly, in passing the NVRA, Congress recognized that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 1973gg(a)(3). In that spirit, Congress took steps to ensure that the NVRA could not be used by states to enact discriminatory laws, like Arizona's Proposition 200. In the Joint House-Senate Conference, members of Congress expressly rejected language from the bill that would have given states the power to require individuals to provide documentary proof of citizenship in order to register to vote. *See* Gemmiti, *supra*, at 95 n.252 (citing Richard Sammon, *Deal May Speed Up "Motor Voter*," Cong. Q. Wkly. Rep., May 1, 1993, at 1080).

B. Voter registration rates among people of color have increased significantly as a result of the NVRA.

As intended by Congress, voter registration increased dramatically following the NVRA's passage, with 20 million new registrants, 9 million of whom were Black, being added to the voter registration rolls between 1995 and June 1996. *See* Robert Brown & Justin Wedeking, *People Who Have Their Tickets But Do Not Use Them: "Motor Voter," Registration, and Turnout Revisited*, 34 Am. Pol. Res. 479, 484-87 (2006); Gemmiti, *supra*, at 97. Widely recognized for its pivotal role in ushering in a new period

of democratic expansion in this country, the NVRA led to significant improvements in disparities in registration rates between people of color and Whites. *See* Gemmiti, *supra*, at 97.

Efforts to enforce the NVRA in states have also led to dramatic increases in voter registration in more recent years. In 2004, for example, Iowa improved its agency-based voter registration and experienced a 700 percent increase in registrations over the previous presidential election cycle as well as a 3,000 percent increase over the previous year. *See* Estelle H. Rogers, *The National Voter Registration Act: Fifteen Years On* 2 (2009), *available at* www.acslaw.org/sites/default/files/Rogers_-_NVRA_at_15.pdf.

Other states, however, have sought to frustrate the dictates of the NVRA, through measures similar to Arizona's Proposition 200, and have been required to comply with the statute by court order. Missouri, for example, was compelled by a district court to comply with the NVRA. *Id.* Following the implementation of the court order, state public assistance agencies collected 26,000 voter registration applications in just six weeks. *Id.*

And just last year, LDF won partial summary judgment in a challenge to Louisiana's failure to comply with the NVRA, with a court holding that the NVRA requires that all public assistance clients be provided with a voter registration application, whether they seek benefits in person or remotely by the internet, telephone, or mail. *Ferrand v. Schedler*, No. 11-926, 2012 WL 1570094, at *12 (E.D. La. May 3, 2012). In Louisiana, registrations from public assistance agencies had plummeted 88 per-

cent since the NVRA was first implemented, from 75,000 in 1995 to 1996 to a mere 9,000 in 2007 to 2008. *See* Pls.' Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Injunctive Remedy at 10, *Scott v. Schedler*, No. 11-926 (E.D. La. Oct. 5, 2012), ECF No. 372. After LDF filed this lawsuit, however, voter registrations through public assistance offices spiked, with the number of new registrations increasing as much as sevenfold from previous years. *See id.* at 8-9.

In recent years, the U.S. Department of Justice has also filed a number of lawsuits under the NVRA. *See, e.g.*, *United States v. Florida*, 870 F. Supp. 2d 1346, 1350-51 (N.D. Fla. 2012) (finding that a voter purge program in Florida "probably ran afoul" of the NVRA insofar as it identified many citizens as potential noncitizens); *United States v. Louisiana*, No. 11-470, 2011 WL 6012992, at *6 (M.D. La. Dec. 1, 2011) (denying in part the state's motion to dismiss claims that it failed to offer registration at public assistance agencies); Consent Decree, *United States v. Rhode Island*, No. 11-113S (D.R.I. Mar. 25, 2011), ECF No. 3 (consent decree requiring state officials to ensure that voter registration opportunities are offered at all state public assistance and disability services offices); Consent Decree, *United States v. Tennessee*, No 02-0938 (M.D. Tenn. Oct 16, 2002) (mandating that state officials develop and implement uniform voter registration application procedures and annual NVRA trainings for employees of state driver's licenses and public services offices). Notably, in 2008, after the U.S. Department of Justice raised concerns about the Arizona Department of Economic Security's compliance with Section 7,

the parties entered into an agreement establishing standards to ensure the proper implementation of the NVRA. *See Agreement Between the United States Department of Justice and the Arizona Department of Economic Security Concerning Standards and Monitoring of Compliance with the National Voter Registration Act of 1993* (May 15, 2008), http://www.justice.gov/crt/about/vot/nvra/az_nvra_moa.php.

The prominent role that the NVRA has played in increasing registration and turnout rates among low-income voters, who are disproportionately persons of color, is significant. Between 2007 and 2010, an astonishing one million low-income people in five different states registered to vote as a result of NVRA enforcement. *See* Youjin B. Kim & Lisa Danetz, Demos, *1 Million New Voters Among the 99%: How Agency-Based Voter Registration Gives Low-Income Americans a Voice in Democracy* (2011), *available at* http://www.demos.org/sites/default/files/publications/Million_Mark_Demos.pdf.

III. Arizona's Proposition 200 is inconsistent with and preempted by the National Voter Registration Act.

Notwithstanding the long, exclusive, and sad history of voting discrimination in response to which Congress enacted the NVRA, and the important strides toward equality in the voter registration process that the NVRA has occasioned, Arizona has sought to return to the pre-NVRA era—and even the pre-VRA era—by mounting an assault on the voting rights of people of color, and Latinos in particular, through Proposition 200.

As noted earlier, between 2000 and 2010, the number of Latinos in Arizona grew significantly, by almost 600,000, from less than 1.3 million to approximately 1.9 million. *The State of the Right to Vote After the 2012 Election: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Nina Perales, Vice President of Litigation, Mexican American Legal Defense and Educational Fund) [hereinafter *Senate Hearing*] at 1, *available at* http://www.judiciary.senate.gov/pdf/12-12-19PeralesTestimony.pdf. Latinos now comprise 30 percent of the state's population. *Id.* In response to this demographic trend, Arizona voters, citing a need to combat undocumented immigration, adopted Proposition 200, a discriminatory measure that requires county registrars to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F).

For its part, Arizona failed to identify a single instance in which an undocumented immigrant registered or voted in the state. *Senate Hearing*, *supra*, at 3 (statement of Perales). The impact of the law was significant, however. Following the enactment of Proposition 200, Arizona rejected the registration applications of more than 30,000 individuals. *See Gonzalez v. Arizona*, No. 06-1268, slip op. at 13 (D. Ariz. Aug. 20, 2008). Nearly 17 percent of those rejected were Latinos, a figure measurably higher than the almost 14 percent of Latinos in the original registration applicant pool. *See id.*

Proposition 200 is foreclosed by the NVRA. *See Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc). As discussed above, Congress en-

sured that the NVRA could not be used by states to enact discriminatory laws, like Arizona's Proposition 200. Congress specifically rejected language in the bill that would have given states the power to selectively require individuals to provide documentary proof of citizenship in order to register to vote. *See* Gemmiti, *supra*, at 95 n.252 (citing Sammon, *supra*, at 1080). In so doing, Congress also sought to prevent states from discriminating against voters with "foreign sounding" names. *Id*.

The NVRA's preemption of discriminatory measures like Proposition 200 is especially important for Latinos in Arizona, who comprise the state's fastest-growing citizen voting-age population and who are engulfed in an often heated debate about immigrants from Mexico living in the state. *Senate Hearing*, *supra*, at 3 (statement of Perales). As Latinos in Arizona, and people of color more broadly, strive to overcome the effects of past exclusion from the political process, measures like Proposition 200 undermine that effort. Fortunately, the Court of Appeals, sitting *en banc*, struck down Proposition 200, correctly recognizing that it was both inconsistent with and preempted by the NVRA. *Gonzalez*, 677 F.3d at 388.

Democracy in America is contested and has been characterized by periods of progress and retrenchment. For nearly a century before the enactment of the VRA and NVRA, many jurisdictions held tightly to discriminatory practices that excluded people of color from equal political participation. The NVRA ushered in a period of democratic expansion and has been extraordinarily effective at leading our nation toward becoming a more inclusive democracy. Ari-

zona's Proposition 200, and other similar efforts that recall the discriminatory laws of the last century, threaten to undermine the hard-fought progress of the last fifty years.

CONCLUSION

For all of the reasons above, and those advocated by Respondents, we respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully Submitted,

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