No. 14-1164

In The Supreme Court of the United States

KRIS W. KOBACH,
Kansas Secretary of State, et al.,

Petitioners,

v.

UNITED STATES ELECTION
ASSISTANCE COMMISSION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar;
DC Bar pending; under direct
supervision of DC Bar member)

Attorney for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS*[1]

Amicus, Immigration Reform Law Institute ("IRLI"), is a national, nonprofit, public-interest legal education and advocacy law firm working to defend the rights and interests of the American people and labor from the negative and predatory effects of unlawful immigration and ungoverned legal immigration. In furtherance of that mission, IRLI has acquired considerable expertise in noncitizen voter fraud issues that it desires to share with the Court.

While *Amicus* agrees with all points raised in the Petition for Writ of Certiorari, this brief is focused on the burdens, inadequacies, and otherwise complete inapplicability of the "alternative means" to proof of citizenship available to Petitioner States upon which the U.S. Election Assistance Commission ("EAC") and the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") relied in ruling against Petitioners.

[1] All parties received timely notice of the intent to file and have consented to the filing of an *amicus curiae* brief by *Amicus* Immigration Reform Law Institute. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. IRLI does not have a parent corporation, and no publicly held company owns 10% or more of IRLI's stock.

REASONS FOR GRANTING THE WRIT

I. Introduction

The core of our republic is threatened to the extent noncitizens vote. Each noncitizen vote cancels out a citizen vote and undermines public confidence in our electoral system. This threat has never been more serious. The size of the noncitizen population in both Petitioner States and the nation is unprecedented and reported instances of noncitizen voter fraud abound. Following the Executive's recent actions on immigration, noncitizens have a newfound ability and more incentive than ever to register and vote.

The size of the noncitizen and illegal alien population along with their ability and incentives to register and vote is most troubling in instances where elections are close. In upholding the EAC's decision to reject Petitioners' requests that the EAC include their state-specific proof-of-citizenship instructions on the National Mail Voter Registration Form ("Federal Form"), the Tenth Circuit found that the states "failed to meet their evidentiary burden of proving that they cannot enforce their voter qualifications because a *substantial* number of noncitizens have successfully registered" (emphasis added). Pet'rs' App. at 27. When elections are decided on the margins, however, any amount of voter fraud is "substantial."

Ohio Secretary of State, Jon Husted, recognized this recently when, following the President's executive actions on immigration, he sent a letter to the

White House noting that in just the past two years over 70 elections in his state had been tied or decided by a *single* vote.[2] It is reasonable to assume that this incidence of extremely close elections is a national phenomenon, and experienced by Kansas and Arizona, to varying degrees. In a decision involving voter ID in Indiana, this Court held that even though state election officials there failed to show concrete evidence of voter fraud, the state still had a compelling interest to create voter ID-safeguards, finding that voter fraud had occurred "in other parts of the country" and "the risk of voter fraud [is] real [and] it could affect the outcome of a close election." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

The consequences of voter fraud are serious. In the 2000 general election in Florida, with more than 1.5 million noncitizens of voting age at the time, only 540 of them would have had to vote (or 540 more ineligible voters than may actually have voted) for Al Gore to reverse the Presidential winner. In fact, election observers reported that a "sizable number" of votes may have been cast by ineligible felons, illegal aliens, and noncitizens.[3] This and the 2004 federal

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[2] Letter from Jon Husted, Ohio Secretary of State, to The Honorable Barack Obama President of the United States (Jan. 27, 2015), *available at* http://www.sos.state.oh.us/sos/upload/news/20150204.pdf.

[3] H.R. REP. NO. 110-101 (2007-2008), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110U0Sbt&refer=&r_n=hr101.110&item=&sel=TOC_28761&.

election voting controversies led to the formation of the bipartisan Commission on Federal Election Reform, led by former President Jimmy Carter and former Secretary of State James A. Baker III, which produced a report calling for states to implement voter identification requirements among other prophylactic measures. On the issue of voter fraud the Commission concluded:

> While the Commission is divided on the magnitude of voter fraud – with some believing the problem is widespread and others believing that it is minor – there is no doubt that it occurs. *The problem, however, is not the magnitude of the fraud*. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system.[4]

In 1996, former California Representative Bob Dornan contested his 1996 congressional election-loss by claiming noncitizen-votes had been cast for his challenger. Although the House Oversight Committee, which pursued the investigation, failed to find quite enough votes from noncitizens to make up the margin of loss, they did point out that the number of

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[4] Jimmy Carter and James A. Baker, III (Co-Chairs), Report of The Commission on Federal Election Reform, *Building Confidence in U.S. Elections*, AMERICAN UNIVERSITY'S CENTER FOR DEMOCRACY AND ELECTION MANAGEMENT (Sept. 2005), at 18, *available at* http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF.

undetected illegal alien voters may have swung the election:

> That a significant number of aliens appear in the INS databases] leads logically to a serious question and a troubling hypothesis: if there is a significant number of "documented aliens," aliens in INS records, on the Orange County voter registration rolls, how many illegal or undocumented aliens may be registered to vote in Orange County? . . . The Task Force does not have available to it clear and convincing evidence on the number of undocumented aliens who may be registered voters in Orange County.[5]

Examples of voter fraud around the country are indeed numerous. Professors from George Mason University and Old Dominion University have estimated that nearly 100,000 noncitizens voted in the 2008 and 2010 federal elections which they determined was "enough[ ] that their participation can change the outcome of close races."[6] Voting law expert Hans von Spakovsky has cited examples of hundreds of thousands of noncitizen-voting cases, the majority of which were uncovered in Florida, California, and Illinois,

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[5] H.R. REP. NO. 105-416 (2001), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-105hrpt416/html/CRPT-105hrpt416.htm.

[6] Jesse Richman & David Earnest, *Could non-citizens decide the November election?*, WASH. POST, Oct. 24, 2014, *available at* http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/10/24/could-non-citizens-decide-the-november-election/.

states with some of the highest illegal alien and foreign-born populations.[7]

The size of noncitizen and illegal alien populations, along with their ability and incentives to vote, is creating a perception among the general public that elections are unfair and lacking in integrity. Not only is proof of citizenship necessary in order to protect the integrity of close elections from the threat of noncitizen-voting, but it would also greatly foster public confidence and deter legitimate voters from staying home on election day. Opinion polls show public confidence at a critical juncture. An August 2013 opinion poll found that only 39% of Americans believe that our elections are fair.[8] Another poll from 2014 found that 78% of Americans believe proof of citizenship should be a requirement for voter registration;[9] a 7-point increase from 2013 polling responses.[10] As this court has recognized, "Confidence in

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[7] Hans von Spakovsky & John Fund, *Who's Counting?: How Fraudsters and Bureaucrats Put Your Vote at Risk* 91 (Encounter Books 2012).

[8] RASMUSSEN REPORTS, *New Low: 39% Think U.S. Elections Are Fair* (Aug. 16, 2013), *available at* http://www.rasmussenreports.com/public_content/politics/general_politics/august_2013/new_low_39_think_u_s_elections_are_fair.

[9] RASMUSSEN REPORTS, *78% Favor Proof of Citizenship before Being Allowed to Vote* (Mar. 25, 2014), *available at* http://www.rasmussenreports.com/public_content/politics/general_politics/march_2014/78_favor_proof_of_citizenship_before_being_allowed_to_vote.

[10] RASMUSSEN REPORTS, *78% Favor Proof of Citizenship before Allowing Voter Registration* (Mar. 20, 2013), *available at* http://

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the integrity of our electoral processes is essential to the functioning of our participatory democracy . . . Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The burden placed on state election officials, who are mandated by the National Voter Registration Act of 1993 ("NVRA")[11] to protect voter integrity, has never been greater.

In passing prophylactic voter protection measures that require proof of citizenship, the people's representatives in Arizona and Kansas have taken the problem in hand and fashioned an appropriate solution. Reasonably, Petitioners requested the EAC to include their state-specific proof-of-citizenship instruction on the Federal Form. The EAC rejected Petitioners' request finding, among other things, that there exist "a myriad" of other means available to enforce Petitioners' citizenship requirements. Pet'rs' App. at 118. The alternatives means cited by the EAC include (1) deterrence through criminal prosecution of unlawful voters, (2) coordination with driver's license issuers, (3) comparing juror responses, (4) utilizing the Systematic Alien Verification for Entitlements ("SAVE") program, and (5) verifying birth records through the Electronic Verification of Vital Events

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www.rasmussenreports.com/public_content/politics/general_politics/march_2013/71_favor_proof_of_citizenship_before_allowing_voter_registration.

[11] 42 U.S.C. §1973gg *et seq.*

("EVVE") database. *Id.* at 118-123. Each alternative, the EAC claimed, "reflects the States' ability to identify potential non-citizens and thereby enforce their voter qualifications relating to citizenship, even in the absence of the additional instructions they requested on the Federal Form." *Id.* at 113. The Tenth Circuit upheld the EAC's findings. *Id.* at 27.

As will be shown below, both the EAC and the Tenth Circuit erred as each of the suggested alternatives exhibit vulnerabilities, including the inability to safeguard against vote-cancellation, the possibility of inadvertent disenfranchisement of eligible voters, the inability to stem illegal alien voting, and the unreasonable degree of reliance on historically uncooperative federal agencies. If the EAC truly considered documented examples of voter fraud, Supreme Court precedent, declining public confidence in our electoral system, and the glaring inadequacies and relative burdens of their suggested alternatives, it would have been compelled to arrive at a different conclusion, one which acknowledges Petitioners' responsibility for adopting effective, efficient, and realistic safeguards, notably requiring citizenship verification in elections.

II. The EAC Overstated the Benefits and Efficacy of Criminal Prosecution and Deportation-Risk as Meaningful Factors in Deterring Fraudulent Voter-Registration and Fraudulent Voting.

The EAC incorrectly assumed that criminal prosecutions for discovered voter fraud in both intentional and non-intentional cases are common. They are not. "There is no reliable method of determining the number of noncitizens registered, or actually voting, because most laws meant to ensure that only citizens vote are ignored, are inadequate, or are systematically undermined by government officials."[12]

Furthermore, even if the enforcement priorities of the current administration ever posed a serious deportation or prosecution-risk, it is clear that such priorities have changed for the worse. Since the EAC's decision, DHS has issued a guideline memorandum outlining a new set of priorities for removals, in effect redefining who is out of bounds for immigration agents.[13] Only those aliens who pose "threats to national security," new illegal entrants, and illegal aliens

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[12] Hans von Spakovsky & John Fund, *Who's Counting?: How Fraudsters and Bureaucrats Put Your Vote at Risk* 87 (Encounter Books 2012).

[13] Memorandum from Homeland Security Sec. Jeh Charles Johnson, to Acting Director, U.S. Immigration and Customs Enforcement, Thomas S. Winkowski et al., *Policies for the Apprehension, Detentions and Removal of Undocumented Immigrants* (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

convicted of street gang crime, felonies and aggravated felonies fall into so-called "Priority 1"-category. If prosecutors decline to charge illegal aliens caught voting fraudulently with a felony, they may fall into the "Priority 2"-category, but only if the charge is a "significant misdemeanor" carrying a sentence of 90 days or more. Those not described in Priorities 1 and 2 fall into "Priority 3"-category, the "lowest priority" category. A "non-serious" misdemeanor charge or the discovery of a person's illegal status as a result of fraudulent voting will not trigger deportation under the new "enforcement priorities." Although the DHS memo is new and lacks detail, it would appear that illegal aliens caught committing voter fraud may not face *any* risk of deportation or prosecution on that ground alone.

What is more, even if federal prosecutors did decide to ramp up criminal prosecutions, the lack of adequate enforcement resources in the field of immigration, perhaps the most prominent policy argument made by the current administration, would doom any enforcement measures and deterrent effect.

III. The EAC Overstated the Benefits and Efficacy of Electronic Databases at Petitioners' disposal.

The EAC's electronic database alternative to proof of citizenship involves cross-checking certain state and federal databases with state voter rolls. These *post hoc* alternatives, however, are burdensome to election officials to the extent the state's population

is composed of noncitizens. Currently, the United States is the world's largest importer of people by a wide margin.[14] Since the NVRA was passed in 1993, the U.S. foreign-born population (legal permanent residents, noncitizens, and illegal aliens) has risen from 18 to 37 million.[15] The illegal alien population alone has increased from 3 million in 1990 to 11.2 million in 2012.[16] According to Census figures, Kansas has 9 counties where the foreign-born population is between 13 and 30% of the population.[17] Meanwhile, the foreign-born population in Arizona's three most populous counties range from 16 to 34%.[18] Since 1990, the illegal alien population for Kansas and Arizona

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[14] UNITED NATIONS, International Migration 2013, *available at* http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/wallchart2013.pdf.

[15] PEW CHARITABLE TRUSTS, *Changing Patterns in US Immigration and Population* (Dec. 18, 2014), *available at* http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/12/changing-patterns-in-us-immigration-and-population; PEW RES. CENTER, *Statistical Portrait of the Foreign-Born Population in the United States* (2012), *available at* http://www.pewhispanic.org/files/2014/04/FINAL_Statistical-Portrait-of-the-Foreign-Born-2012.pdf.

[16] PEW RES. CENTER, *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions* (Dec. 2014), *available at* http://www.pewhispanic.org/2014/12/11/unauthorized-trends/.

[17] INDEX MUNDI, *Kansas Foreign-Born Population by County* (2010), *available at* http://www.indexmundi.com/facts/united-states/quick-facts/kansas/foreign-born-population-percent#map.

[18] INDEX MUNDI, *Arizona Foreign-Born Population by County* (2010), *available at* http://www.indexmundi.com/facts/united-states/quick-facts/arizona/foreign-born-population-percent#chart.

has risen from 15,000 to 75,000 and 90,000 to 300,000, respectively.[19] The burden of cross-checking between one or several of the databases mentioned by the EAC has increased greatly since the NVRA was enacted and would necessarily persist should the U.S. foreign-born population continue to increase.

Further, the portion of any state's noncitizen population that is composed of *illegal* aliens cannot *at all* avail itself to any cross-checking methods because of their lack of presence in the EAC's suggested databases. The SAVE program, for instance, provides immigration status information to certain agencies that administer benefits programs; however, since illegal aliens by definition have no immigration records, like U.S. citizens, they cannot be identified by means of a query to SAVE.

Commentators also complain of SAVE's inadequacy in verifying eligibility when it comes to *legal* aliens:

> SAVE data only[ ] verif[ies] citizenship status [for persons with Alien Registration Numbers]. When the state does not have these numbers, it can only obtain them by contacting individuals – a highly labor-intensive task . . . SAVE is not designed to

[19] PEW CHARITABLE TRUSTS, *Changing Patterns in US Immigration and Population* (Dec. 18, 2014), *available at* http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/12/changing-patterns-in-us-immigration-and-population.

> verify the citizenship status of the entire population of eligible voters.[20]

Special interest groups have noted problems with SAVE as well as other databases.[21] Intervenor-Appellant, Project Vote, has identified problems with database cross-checking in general:

> In the absence of specific guidelines for conducting HAVA [The Help America Vote Act of 2002, 42 U.S.C. §5301 *et seq.*] matching for purposes of list maintenance individual states have failed to legislate specific matching standards, which has inevitably led to the disenfranchisement of thousands of eligible voters. *Purges based on computerized database matching are inherently fallible*, and clerical error alone can be expected to lead to a ten percent error rate. The likelihood that individuals in a large database

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[20] IMM. POLICY CENTER, *Using the Systematic Alien Verification for Entitlements (SAVE) Program for Voter Eligibility* (Aug. 2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/usingthesaveprogramsforvotereligibilityverification.pdf.

[21] Press Release, ADVANCEMENT PROJECT, After Criticism from Grassroots Organizations, Florida Secretary of State Temporarily Abandons Voter Purge Program (Mar. 27, 2014), *available at* http://www.advancementproject.org/news/entry/after-criticism-from-organizations-florida-secretary-of-state-temporarily-a ("Any use of SAVE or similar voter maintenance list will only result in the error-ridden purges we have seen in the past.").

> may share the same name and date of birth is high (*emphasis added*).[22]

Each of these databases also provides information that can lag the current status of the registrant. For instance, in discussing North Carolina's discovery of noncitizens on its voter rolls after cross-checking its DMV database, Intervenor-Appellant noted on their website:

> The DMV database contained names of license holders who were not U.S. citizens *when they got a license*. They may have been green-card holders, foreign workers or DACA recipients, for example. While the 1,425 did not show up as citizens in the Homeland Security database, the other 8,926 did . . . *Those license holders apparently became U.S. citizens since getting a license* (*emphasis added*).[23]

With regards to noncitizens, the EAC incorrectly assumes that federal and state database administrators have the will and resources to cooperate with election officials. The U.S. Department of Homeland Security (DHS) has in the past reportedly declined to allow the use of the SAVE program for checking voter

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[22] PROJECT VOTE, *Maintaining Voter Rolls* (Jul. 21, 2008), http://projectvote.org/voter-rolls.html (last visited, April 21, 2015).

[23] Bernard Gutierrez, *1,425 voters in question: State winnows down list of possible noncitizens*, WINSTON-SALEM J. (Oct. 24, 2014), *available at* http://projectvote.org/in-the-news/1105-state-1425-voters-in-question-state-winnows-down-list-of-possible-noncitizens.html.

eligibility.[24] Indeed, under the current administration, the *only* lawsuit the U.S. Department of Justice (DOJ) has launched under Section 8 of the NVRA (the voter roll maintenance provision) was against the state of Florida when they sought to *enforce* voter roll maintenance by cross-checking department of motor vehicle records. DOJ alleged Florida's "Non-U.S. Citizens Project" was "discriminatory," in violation of the Voting Rights Act, and that it was based on "outdated and inaccurate data,"[25] a claim that has also been lodged by third-party organizations against cross-checking efforts using DMV data.[26]

Recent congressional testimony from voting law expert Hans von Spakovsky, confirmed the difficulty state governments have had in requesting federal

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[24] Alicia M. Cohn, *Florida Gov. Scott: DOJ 'stonewalling' attempt to protect voter rights,* THE HILL (June 12, 2012), *available at* http://thehill.com/video/policy-areas/232185-florida-gov-scott-doj-stonewalling-attempt-to-protect-voting-rights.

[25] Complaint at ¶ 19, *United States v. Detzner*, 870 F. Supp. 2d 1346 (N.D. Fla. 2012) (No. 4:12CV284-RH/CAS), *available at* http://www.justice.gov/iso/opa/resources/538201261216385524948 6.pdf.

[26] Associated Press, *ACLU sues to stop Iowa voter registration law*, USA TODAY (Mar. 30, 2013), *available at* http://www.usatoday.com/story/news/politics/2013/03/30/aclu-iowa-voter-registration/2038379/ ("The ACLU also contends that the databases [Iowa Secretary of State Matt] Schultz plans to use contain numerous errors, were never designed to cross-check voters, contain insufficient data to do so comprehensively and put the burden on voters to prove their citizenship if they are identified, rightly or wrongly.").

agencies to cooperate,[27] despite federal laws which require them to do so. *See*, *e.g.*, 8 U.S.C. §1373(C). Von Spakovsky cited numerous examples to Congress where "federal agencies . . . have either refused to cooperate with those few state election officials who seek to verify the citizenship status of registered voters or put up burdensome red tape to make such verification difficult."[28]

IV. The EAC Overstated the Benefits and Efficacy of Juror Response-Comparisons and the Oath System in General as Meaningful Factors in Deterring Fraudulent Voter-Registration and Fraudulent Voting.

The EAC contradicts itself in regards to juror response-comparisons as an alternative to requiring proof of citizenship, and the oath system in general. When Petitioners presented evidence that a large number of respondents pulled from voter rolls had

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[27] *The President's Executive Actions on Immigration and their Impact on Federal and State Elections: Hearing before the House, Committee on Oversight and Government Reform*, 114th Cong. (February 12, 2015) (Statement of Hans von Spakovsky), *available at* http://oversight.house.gov/wp-content/uploads/2015/02/Testimony-of-Hans-von-Spakovsky-2-12-15.pdf ("During the Clinton Administration, the INS refused to investigate noncitizen voting in Dallas because according to officials, 'there could be tens of thousands [of illegal voters] in places like New York, Chicago or Miami' and such an investigation could 'open a Pandora's Box.' ").

[28] *See* n.26, *supra.*

self-declared themselves as noncitizens when called for jury duty, the EAC cited four commenters in the record who noted that "statements made to a jury commissioner are not always reliable, since some citizens may falsely claim to be non-citizens in order to avoid jury service." Pet'rs' App. at 113, n.14. But this would appear to contradict the EAC's claim that the oath system in general is a fully-adequate prophylactic measure. *Id.* at 98 ("[T]he EAC, in their implementing regulations, specifically considered and determined, in their discretion, that the oath signed under penalty of perjury . . . were all that was necessary to enable state officials to establish the bona fides of a voter registration applicant's citizenship."). By citing the commenters in their decision, the EAC appears to tacitly admit that the current oath system is truly, as one commentator calls it, a mere "honor system."[29] More directly, it discredits their argument that "juror response-comparisons" are indeed a reliable alternative to a prophylactic proof-of-citizenship requirement.

Furthermore, the EAC's belief that the oath system will act as a deterrent to keep illegal aliens from making false attestations is irrational. Even the

[29] John Fund, Panel Discussion Transcript, *Allowing Non-Citizens to Vote? Why Not?*, CENTER IMM. STUDIES (Sept. 2008), *available at* http://cis.org/NoncitizenVotingTranscript ("Our voting system is on the honor system. If you're a non-citizen of this country and you really, really want to vote, you can. The risk of detection is almost infinitesimal. The risk, even if you are detected, of being prosecuted is very low.").

average illegal alien, who some claim is "otherwise law-abiding" despite violating duly established immigration law, violates numerous other laws, including laws prohibiting identity theft, forgery, and driving without a license or insurance. Given this compelling presumption, the Government has no evidence that rules against making false attestations on government forms would seriously deter illegal aliens from registering and voting, especially in elections that could result in the increase in deferred action benefits or benefits going directly to illegal aliens.

Indeed, the EAC's reliance on the claimed efficacy of the oath system is severely weakened by evidence of the growing incentives for illegal aliens to register and vote, and their ability to actually participate as voters. Several states offer benefits to illegal aliens such as in-state tuition and driver's licenses or are pursuing bills that intend to provide such benefits.[30] Besides driver's license and in-state tuition benefits, the state of California, for instance, provides illegal aliens with professional licenses, Cal Grants to supplement in-state tuition, and prohibits state and local police from honoring certain detainer requests from immigration authorities. Recently, that state's legislature introduced a ten-bill package of new

[30] *See*, *e.g.*, *Kansas bill would allow illegal immigrants to get a driver's permit*, KAKE.COM (Nov. 25, 2014), *available at* http://www.kake.com/home/headlines/Bill-would-allow-illegal-immigrants-to-get-a-drivers-permit-283898641.html.

benefits to be considered this year.[31] As a package or individually, such benefits incentivize both current and potential illegal alien-beneficiaries to register and vote for candidates or ballot measures that promise to deliver such benefits. In Washington State, which also provides many benefits to illegal aliens, "dozens" of illegal aliens were reported to have been openly canvassing neighborhoods on behalf of third-party organizations in the run-up to the 2010 federal elections.[32]

Illegal aliens also have other incentives to register to vote, namely to procure voter registration cards. In his testimony before Congress, von Spakovsky explained that illegal aliens can use such cards as "proof" of their identity on federal I-9 (employment authorization) forms in order to secure employment. In 1984, when a grand jury was investigating the problem of illegal alien-voting in Chicago, a U.S. District Attorney estimated that there were 80,000 illegal aliens registered to vote in that city and stated that the main reason for such massive illegal registration was the need to comply with employer's I-9 form requirements. In perspective, the problems with

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[31] Melanie Mason, *With new immigration proposals, state lawmakers hope to build momentum*, L.A. TIMES (Apr. 7, 2015), *available at* http://www.latimes.com/local/politics/la-me-pol-immigration-legislature-20150407-story.html.

[32] Associated Press, *Illegal Aliens Canvass for Votes in Wash. State,* FOX NEWS (Oct. 22, 2010), *available at* http://www.foxnews.com/politics/2010/10/22/illegal-aliens-canvass-votes-wash-state/.

noncitizen voter registration in Chicago were occurring *before* the implementation of the NVRA's "increased ballot access"-provision, which makes registration easier.

As for those illegal aliens who qualify for the President's new categorical deferred action initiatives (estimated to be in excess of five million people), beneficiaries now have a much-enhanced ability to register and vote due to their eligibility for federal identification documents, including driver's licenses and Social Security numbers. According to the Social Security Administration, already, 541,000 DACA (Deferred Action for Childhood Arrivals)-recipients have been allotted Social Security numbers.[33] Deferred action beneficiaries with a driver's license or a Social Security number may register to vote simply by attesting that they are a U.S. citizen. Recently, Ohio Senator Rob Portman sent a letter to the White House criticizing the President's recent executive actions on immigration noting that such actions "afford potentially thousands of non-citizens in Ohio the opportunity to willfully or negligently register to vote and to vote" and that they will make state voter protection "significantly more difficult."[34]

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[33] Letter from Carolyn Colvin, Acting Commissioner, Social Security Administration, to Jeff Sessions, United States Senator (Apr. 10, 2015), *available at* http://freebeacon.com/wp-content/uploads/2015/04/SSA-Letter.pdf.

[34] Letter from Rob Portman, United States Senator, to Barack Obama, United States President (Feb. 9, 2015), *available*

(Continued on following page)

Petitioners alone are estimated to have DAPA (Deferred Action for Parental Accountability)-eligible populations of 30,000 and 118,000, and Enhanced DACA-eligible populations of 10,000 and 46,000, respectively.[35] These beneficiaries now have an increased incentive to vote, particularly in elections where a candidate or ballot measure offers to extend current or create future deferred action benefits or to make their current "temporary" status permanent.

Besides DAPA and Enhanced DACA-beneficiaries, other non-immigrants with access to Social Security numbers have an enhanced ability to circumvent the bar to noncitizen voting. Beneficiaries of the statutory deferred action Temporary Protected Status program (a population of 300,000), for instance, are eligible to receive Social Security numbers.[36]

Among illegal aliens, the use of fake or stolen Social Security numbers is commonplace. The Social Security Administration has estimated that 75% of all illegal aliens use either fake Social Security numbers

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at http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=3ee0a84b-7d3c-4a34-b247-608094afcf90.

[35] CENTER MIG. STUDIES, Estimates of the Unauthorized Population for States, *available at* http://data.cmsny.org/.

[36] Lisa Seghetti et al., CONG. RESEARCH SERV., RS20844, *Temporary Protected Status: Current Immigration Policy and Issues* (Jan. 12, 2015), *available at* http://fas.org/sgp/crs/homesec/RS20844.pdf.

or legitimate numbers stolen from legal residents.[37] A study from 2008 shows that petitioner Arizona has the highest incidence rate of identity theft in the country.[38]

Further, it may be difficult for states to refuse state benefits to DAPA, DACA and/or other deferred action beneficiaries going forward. Arizona was recently successfully sued (with the federal government supporting the plaintiffs as *amicus*) for refusing to issue driver's licenses to DACA-beneficiaries, an unhelpful trend that will likely be repeated with DAPA if that program is implemented.[39]

[37] Mortensen, Ronald, Statements to the House, Subcommittee on Immigration Policy and Enforcement of the Committee on the Judiciary, *Document Fraud in Employment Authorization,* Hearing (April 18, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg73860/html/CHRG-112hhrg73860.htm.

[38] Mortensen, Ronald, CENTER IMM. STUDIES, *Illegal, but not Undocumented* (Jun. 2009), *available at* http://www.cis.org/Identity Theft (Table 1).

[39] *Arizona DREAM Act Coalition v. Brewer,* 757 F.3d 1053 (9th Cir. 2014).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar;
DC Bar pending; under direct
supervision of DC Bar member)