



TOM HORNE
ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
STATE OF ARIZONA

July 26, 2013

Ms. Alice P. Miller
Acting Executive Director and Chief Operating Officer
United States Election Assistance Commission
1201 New York Avenue, NW
Suite 300
Washington, DC 20005

RE: Arizona v Inter Tribal Council of Arizona, Inc.

Dear Ms. Miller:

This letter is a follow up to the Arizona Secretary of State's letter dated June 19, 2013, requesting a state specific instruction for evidence of citizenship. This letter is also partially in response to the letter sent to you by Robert A. Kendall, one of the attorneys for the Inter Tribal Council.

Given your recent approval of Louisiana's state-specific instructions, we trust you will approve Arizona's comparable state-specific instructions. Toward that end and consistent with that outcome, I want to emphasize a controlling legal principle embodied in the *Inter Tribal Council* Majority Opinion. The principle derives from Article 1 § 2 of the United States Constitution, which provides that qualifications for voters in federal elections are to be the same as qualifications to vote for the most numerous house of the state legislature, and therefore are a matter of state, and not federal law. The principle, as articulated in the Majority Opinion, is this:

Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.

Slip op. at 15 (footnote omitted).

The Court goes on to state:

We think that-by analogy to the rule of statutory interpretation that avoids questionable constitutionality-validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt. That is to say, it is surely permissible if not requisite for the Government to say that necessary information which may be required will be required.

Slip op. at 16; emphasis in original and emphasis added.

As these statements indicate, evidence of citizenship is necessary for Arizona to fulfill its function under Article 1 § 2 of the United States Constitution, to set the qualifications of voters and in this case, to assure that voters are in fact citizens. It is “requisite” for the EAC to permit that necessary step, in the form of a state specific request, so that Arizona can fulfill its obligations under Article 1 § 2 of the United States Constitution. In the words of the Court, “*it would raise serious constitutional doubts*” for a federal statute to preclude Arizona from fulfilling its constitutional requirements.

Justice Scalia, the author of the opinion, made it quite clear at oral argument that “evidence” of citizenship requires proof beyond a “statement under oath” declaring citizenship:

Justice Scalia: “But the form has to enable the State to do that. And it seems to me you were quite able to argue that in – in refusing to allow you to include in the – in the Federal form in Arizona some indication of proof of citizenship requiring nothing else except oh, I’m a – check off, I’m a citizen, right? So it’s under oath. Big deal. If – if – if you’re willing to violate the voting laws, I suppose you’re willing to violate the perjury laws...”

Justice Scalia: “Not anything else that they want. No anything else that they want. But what is, in the words of the statute, necessary to enable the appropriate State election official to assess the eligibility of the applicant? It’s clear that the statute intends the States to be able to do that. And you say, well, the –you know, the commission has—has required its—its own proof and the State wants a different kind of proof. The proof the Commission requires is simply the statement, I’m a citizen. This is proof? Ms. Millett: “This is – statements”. Justice Scalia: “This is not proof at all. Ms. Millett: “Statements under oath, statements under oath in a criminal case.” Justice Scalia: “Under oath is not proof at all. It’s just a statement.” (Transcript of oral argument, pp. 17, 44, emphasis added)

Arizona’s requirements are precisely the kind of evidence envisioned by the Supreme Court’s opinion and Justice Scalia’s comments at oral argument.

The Court concluded the opinion as follows:

Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form. See 5 U.S.C. §706(1). Arizona might also assert (as it has argued here) that it would be arbitrary for the EAC to refuse to include Arizona's instruction when it has accepted a similar instruction requested by Louisiana.¹¹

Slip op. at 17; emphasis added.

Footnote 11 provided:

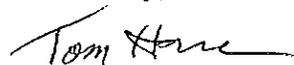
The EAC recently approved a state-specific instruction for Louisiana requiring applicants who lack a Louisiana driver's license, ID card, or Social Security number to attach additional documentation to the completed Federal Form." See National Mail Voter Registration Form, p. 9; Tr. of Oral Arg. 57 (United States).

In addition to the constitutional and legal points here, we appeal to your sense of fairness. To grant Louisiana what is denied to Arizona, would evidence inexplicable hostility to the citizens of Arizona, who passed Proposition 200 overwhelmingly. We know of no reason why Louisiana should be favored, or Arizona should be disfavored, in that manner.

Finally, we need to interpret what the Court meant by "should the EAC's inaction persist..." The letter to you requesting a state-specific instruction is dated June 19. We understand that you have advised the Arizona Secretary of State's Office that you will reach a decision within the next couple of weeks. Time is of the essence. We believe that 60 days is a reasonable period of time for you to act. If we do not receive a favorable ruling from you by 60 days from the date of the letter, a deadline of Monday August 19, we will treat that as inaction tantamount to a rejection, and we will pursue the legal remedies set forth in the above quoted United States Supreme Court decision.

Thank you very much.

Sincerely,



Tom Horne

Cc: Robert A. Kengle
Nina Perales, Esq.

TCH/dcs