March 15, 2022

President Karen Fann
Arizona State Senate
1700 W Washington
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Arizona Senate Leadership,

The undersigned organizations respectfully request your support and prioritization of HB2492, which will safeguard Arizona's voter registration process ensuring only qualified applicants are properly registered and voting in our elections.

In 2004, the Arizona voters overwhelmingly approved Proposition 200 which, in part, required that "The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," now codified as A.R.S § 16-166(F). Unfortunately, over the last two decades, this voter approved requirement has been whittled away.

In 2014, the US Supreme Court, in *Inter Tribal Council,* decided that the National Voter Registration Act (NVRA) preempts us from requiring information beyond that which is requested on the Federal Form created by the Election Assistance Commission (EAC). As a result, Arizona bifurcated our voter registration system to register all who applied on the Federal Form without documentary proof of citizenship (DPOC) as "Federal Only Voters."

Then, in 2018, Secretary of State Michelle Reagan and Maricopa County Recorder Adrian Fontes entered a consent decree with the League of United Latin American Citizens (LULAC) agreeing that Arizona could accept state voter registration forms without DPOC, essentially nullifying the proof of citizenship requirement in its entirety.

The result has been the proliferation of the Federal Only Voter list. In 2018, 1,700 individuals voted in elections for federal office in Arizona who had not provided DPOC. By 2020, the first election the LULAC consent decree was in effect, that number grew to more than 11,600. There are currently tens of thousands of individuals registered as Federal Only Voters who have never proven their citizenship status.

This is a critical insecurity in Arizona's elections with the potential to impact outcomes and seriously undermine the electorate's confidence. Additionally, as Congress contemplates legislation that would constitute a federal takeover of elections, it is more important than ever for states to assert their constitutional authority over election laws.

First, HB2492 would take us back to the practice prior to the LULAC consent decree, enforcing the proof of citizenship requirement on our own state form and rejecting state applications submitted

without DPOC. *Inter Tribal Council* affirmed this authority, with Justice Scalia writing that "states retain the flexibility to design and use their own registration forms." Additionally, the LULAC consent decree will not preempt this provision because it expired on December 31, 2020.

Second, HB2492 would require counties to check multiple databases to obtain evidence of an applicant's citizenship status who submitted a Federal Form without DPOC. This process, and the databases outlined in the bill, is exactly the same process recommended by the EAC for federal forms in 2014. Following these mandatory database checks, there are three possible outcomes.

1. If the county recorder is able to obtain evidence that the applicant is a US citizen and the applicant has provided all of the information required by statute, the applicant would be registered to vote.
2. If the county recorder obtains evidence that the applicant is not a US citizen, the application would be rejected, and the county recorder would notify the Attorney General and county attorney for possible investigation. Our authority to reject these applications is affirmed in *Inter Tribal Council* with Justice Scalia writing that the NVRA "does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility." Importantly, with this provision, we would not be denying registration because an applicant failed to provide DPOC, rather the application would be rejected because the county has "information in their possession establishing the applicant's ineligibility."
3. If the county recorder is unable to find the applicant in any of the databases, the applicant would be registered as a Federal Only Voter, as required by the NVRA's mandate to "accept and use" the Federal Form and the decision in *Inter Tribal Council*.

Third, HB2492 would make DPOC a qualification to vote in Presidential elections. Importantly, while *Inter Tribal Council* relied heavily on the "Times, Places, and Manner" clause of the US Constitution, which does grant Congress power to "at any time alter or make such regulations" relating to the Times, Places, and Manner of conducting elections for Representatives and Senators, the Elector's Clause of the US Constitution does not enumerate such power to Congress. Instead, it grants broad power to state Legislatures, "Each state shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors." This distinction has yet to be presented to the court.

When the courts have interpreted this clause, they have understood it to give broad power to the state Legislatures. "Art. II, § 1, vests in the States the broad discretion to select their presidential electors as they see fit." Williams v. Rhodes, 393 U.S. 23 (1968). Further, "it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors." McPherson v. Blacker, 146 U.S. 1 (1892)

Lastly, HB2492 would make DPOC a qualification to vote early by mail in any election. Importantly, the courts have repeatedly affirmed that there is no constitutional right to vote by mail. As recently as last year, a 7th Circuit decision affirmed this, "as long as the state allows voting in person, there is no constitutional right to vote by mail." *Tully v. Okeson*, No. 20-2605 (7th Cir. Oct. 6, 2020)

HB2492 is critical. Our proof of citizenship requirement has been left with no enforcement, and the result has been the exponential growth of individuals who have never provided DPOC participating in and influencing our elections. This upward trend will only continue. Additionally, now is the time to assert our constitutional authority over election law, specifically as it pertains to the appointment of Electors and voter qualifications. States around the country have their eyes on this bill, and Arizona is prime to take the lead on the issue.

Respectfully,

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