



Arizona State Senate Issue Brief

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Note to Reader:

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ARIZONA ELECTIONS

INTRODUCTION

Elections are governed by federal and state law. The Voting Rights Act (VRA) and the Help America Vote Act (HAVA) are two federal laws with significant impact on Arizona elections. Additionally, the Arizona Constitution, Arizona statutes, the Secretary of State's Elections Procedures Manual (EPM) and court opinions have helped to shape election law in Arizona. This issue brief addresses the VRA, HAVA, state legislation involving equipment testing and manual audits of election results, the Active Early Voting List, and the Arizona Taxpayer and Citizen Protection Act (Proposition 200). Arizona's Citizen Clean Elections Act and Reapportionment and Redistricting are discussed in separate issue briefs.

FEDERAL LAW: THE VOTING RIGHTS ACT¹

The VRA, adopted initially in 1965 and extended in 1970, 1975, 1982 and 2006, codifies and effectuates the Fifteenth Amendment's guarantee that, throughout the nation, no person shall be denied the right to vote on account of race or color. On July 27, 2006, President George W. Bush signed the Fannie Lou Hamer, Rosa Parks and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (H.R. 9) that, among other things, extends sections 4 and 5 of the VRA for 25 years.

The VRA's Impact in Arizona

Section 2 of the VRA closely follows the language of the Fifteenth Amendment and applies a nationwide prohibition against the denial or abridgement of the right to vote. Section 4 of the VRA contains special enforcement provisions for jurisdictions identified as having greater potential for discrimination according to outlined criteria.

In 1965, the VRA determined a jurisdiction to be *covered* if: 1) the jurisdiction maintained a voting "test or device" as a prerequisite for voting or registration as of November 1, 1964; or 2) less than 50 percent of the voting aged residents in the jurisdiction were registered to vote or actually voted in the presidential election of 1964. The State of Arizona,

¹ [National Archives: Voting Rights Act](#)

prior to 1972, employed a “test or device” that required a person to show, in order to register to vote, that the person was able to read the U.S. Constitution in English in a manner that showed the person was neither prompted nor reciting from memory, unless the person was prevented due to a physical infirmity. Following the passage of the VRA, certain political subdivisions in Arizona became “covered” jurisdictions.

In 1975, the VRA was extended and the entirety of Arizona became a covered jurisdiction because test or device was expanded to include the practice of providing any election information only in English where members of a single language minority constituted more than five percent of the citizens of voting age. The coverage formula was also expanded to apply as of November 1972. Both in 1982 and 2006, Congress again extended the VRA for 25 years but did not change the coverage formula.²

Under Section 5 of the VRA, jurisdictions that are covered by Section 4 cannot implement any change affecting voting until the Attorney General of the U.S. Department of Justice (DOJ) or the U.S. District Court for the District of Columbia determines that the change does not have a discriminatory effect, a process commonly called “preclearance.”

Prior to 2013, a covered jurisdiction was required to receive preclearance of any voting law changes or practices, including redistricting changes, ballot formats, legislation amending election law statutes and other voting procedures before the changes or practices could legally take effect. The covered jurisdiction was required to show that the voting law change did not have a racially discriminatory purpose and that the change was not retrogressive, meaning it would not make the minority voters worse off than they were prior to the change.³

In June 2013, the U.S. Supreme Court held that it is unconstitutional to use the coverage formula provided in Section 4(b) of the VRA to determine

which jurisdictions are subject to the preclearance requirement of Section 5 of the VRA. However, the Supreme Court did not rule on the constitutionality of Section 5 itself. The effect of the decision releases jurisdictions previously identified by the coverage formula in Section 4(b) from the preclearance requirement, unless they are covered by a separate court order entered under Section 3(c) of the VRA.⁴

Minority Language Election Requirements

The VRA requires election information to be provided in more than one language, if criteria in a two-part test are met. The first condition is satisfied if, in a state or jurisdiction, one of the following is true: 1) more than five percent of the voting-age citizens are members of a single language minority and are limited-English proficient; 2) more than 10,000 of the voting-age citizens are members of a single language minority and are limited-English proficient; or 3) in the case of a political subdivision that contains all or any part of an Indian reservation, more than five percent of the American Indian or Alaska Native voting-age citizens within the Indian reservation are members of a single language minority and are limited-English proficient. If the second condition, the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate, is also true, then the jurisdiction must provide voting materials in other languages, in addition to the English language until August 6, 2032. Under these provisions of the VRA, the State of Arizona must provide all voting materials in the Spanish language and some counties must provide all voting materials in one or more Native American languages.⁵

FEDERAL LAW: THE HELP AMERICA VOTE ACT⁶

The U.S. Congress passed HAVA in 2002, to: 1) establish a program to provide funds to states to replace punch card voting systems; 2) establish the

²DOJ: [Section 4 "covered" areas](#)

³DOJ: [Section 5 of VRA](#)

⁴*Shelby County v. Holder*, 570 US 529 (2013)

⁵DOJ: [Language Minority Citizens](#)

⁶EAC: HAVA

Election Assistance Commission (EAC) to assist in the administration of federal elections; and 3) to otherwise provide assistance with the administration of certain federal election laws and programs. Additionally, HAVA established minimum election administration standards for states and units of local government with responsibility for the administration of federal elections.

To receive HAVA monies, each state is required to develop and submit a state plan to the Federal Election Commission and the EAC to implement the federal requirements. The Secretary of State (SOS) organized a 25-member committee to create Arizona's plan. The final Arizona plan was submitted on May 15, 2003, and is the official working document for implementation of the federal HAVA requirements.⁷

In addition to the creation of a state plan, each state is required to create an election fund consisting of federal appropriations to be used exclusively to carry out federal HAVA requirements.

HAVA requires each state to meet minimum election technology and administration requirements, including:

- ensuring that voting systems used in federal elections meet certain voting system standards;
- employing provisional voting for certain voters whose eligibility to vote is in question in federal elections;
- posting certain voting information at the polls on the day of each election for federal office;
- developing and maintaining a uniform computerized statewide voter registration database; and
- implementing requirements for voters who register by mail.

ARIZONA LAW

Voting Equipment Testing

Both the EPM and statute contain instructions for certifying and testing voting equipment. All voting machines and devices used

⁷[A.R.S. § 16-442](#)

in federal, state or county elections are certified if they are tested and approved by a laboratory accredited by the federal Election Assistance Commission (EAC).⁸ Additionally, the SOS certifies all election equipment, software and firmware to be used in the election.⁹ The EPM specifies that any card, tape or disc used in the programming or operation of vote tabulating equipment upon which votes are counted and used in compiling vote totals must to be kept secure. The election management software is stored for three years following the official election canvass for each election.¹⁰ Any failure of the equipment is corrected before using the equipment for election processing.

The public is given at least 48 hours' notice of statutorily-required elections equipment testing. The test is observed by at least two election inspectors who are not of the same political party and is open to representatives of the political parties, the candidates, the press and the public. The test is conducted by processing a preaudited group of ballots marked to record a predetermined number of valid votes. If any error is detected, the cause must be ascertained and corrected and an errorless count must be made before the equipment is approved. The same testing procedures are repeated immediately before the start of the official count of the ballots. Additionally, electronic ballot tabulating systems are tested for logic and accuracy within 10 days before their use in an election or 7 days before their use for early voting.¹¹

Manual Audits of the Election

As soon as the polls are closed and the last ballot has been deposited in the ballot box, the election board or the tally board must immediately count the votes cast. All proceedings at the counting center are under the direction of the county board of supervisors or other officer in charge of elections and may be observed by representatives of each political party and the

⁸[A.R.S. § 16-442](#)

⁹[A.R.S. § 16-441](#)

¹⁰[A.R.S. § 16-445](#)

¹¹[A.R.S. § 16-449](#)

public. In 2008, the Legislature created a selection procedure to allow for three additional observers who represent a candidate for nonpartisan office or a political committee in support of or in opposition to a ballot measure, proposition or question. If for any reason it becomes impracticable to count all or a part of the ballots with tabulating equipment, the officer in charge of elections may direct that they be counted manually. The public can view live video of the ballots at the counting center through a link on the SOS's website. Disruptions in the live video feed will not affect or prevent the tabulation of ballots but the county recorder or officer in charge of elections must attempt to reinstate video coverage as soon as practicable. The recordings must be retained as a public record through the challenge period for the general election.

The counterfeiting of election returns is classified as a class 3 felony. For each countywide primary, general and presidential preference election, the county officer in charge of the election conducts a limited hand count audit of at least two percent of the precincts in that county, or two precincts, whichever is greater, selected at random from a pool consisting of every precinct in that county. Up to five contested races must be hand counted, including one federal race, one statewide office race, one statewide ballot measure, one state legislative office race and additional contested federal statewide or legislative races, or ballot measures. If a presidential race is on the ballot, it also must be hand counted. All selections of races are chosen by lot without the use of a computer, after the ballots are separated by political party.¹²

If the randomly selected races result in a difference in any race that is less than the assigned designated margin when compared to the electronic tabulation of those same ballots, the results of the electronic tabulation constitute the official count for that race. If the randomly selected races result in a difference in any race that is equal to or greater than the designated margin when compared to the electronic

tabulation of those same ballots, further hand counts must be performed.

The designated margin of error is determined by the Vote Count Verification Committee (Committee) within the office of the SOS. The designated margin is used in reviewing the hand counting of votes and to set the acceptable variance rate between the machine and hand counts.

Early Voting

A voter may vote early by mail or in person at a designated early voting location.¹³ A voter may make a request for an official early ballot to be received by mail as early as 93 days before any election through 5:00 p.m. on the second Friday before the election. Additionally, a voter may appear personally at an on-site early voting location, which opens the same day the county begins to send out the early ballots and closes at 5:00 p.m. on the Friday preceding the election.

A voter may request an early ballot from the County Recorder or other officer in charge of elections by providing a name, address, date of birth and state or country of birth or other information to confirm the identity of the voter. The early ballot and envelope is mailed postage prepaid to the voter 26 days prior to the election. The early ballot and envelope must be returned by 7:00 p.m. on election day.¹⁴

In 2007 the Legislature created a Permanent Early Voting List (PEVL) for voters in Arizona.¹⁵ In 2021, the Legislature renamed PEVL as the Active Early Voting List (AEVL). In order to be included on the AEVL, a voter must make a written request or complete an application containing the voter's name, residence address, mailing address in the voter's county of residence, date of birth and a signature to compare the signature on the voter's registration form. At least 90 days prior to any polling place election scheduled in March or August, a voter is mailed an election notice that includes the election dates,

¹² [A.R.S. § 16-602](#)

¹³ [A.R.S. § 16-541](#)

¹⁴ [A.R.S. § 16-542](#)

¹⁵ [Laws 2007, Chapter 183](#)

early ballot mailing date, the address where the ballot will be mailed and instructions on changing a voter's information or requesting that an early ballot not be sent. If the voter is not registered as a member of a political party recognized in a partisan open primary election, the election notice must also provide information regarding the procedure for the voter to designate a political party ballot. Early ballots are mailed to voters on the AEVL no later than the first day of early voting.¹⁶

A voter can be removed from the AEVL if the voter: 1) submits a by written request; 2) is placed on the inactive list because the initial election notice is returned undeliverable and the voter is unable to be contacted; or 3) fails to vote an early ballot in all elections for two consecutive election cycles. A voter can be placed back on the AEVL by submitting a new request. An absent uniformed services voter or overseas voter is eligible to be placed on the AEVL.¹⁷

ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT (PROPOSITION 200)

Proposition 200 was a voter initiative approved by the voters in 2004. In addition to other requirements, the proposition requires that evidence of U.S. citizenship be submitted by every person to register to vote and that proof of identification be presented by every voter at the polling place prior to voting.¹⁸

History

Proposition 200 was approved by the voters in the 2004 general election. The election was canvassed on November 22, 2004. On November 30, 2004, the Mexican American Legal Defense and Educational Fund sought a temporary restraining order (TRO) to prevent Proposition 200 from becoming law. The TRO was granted but expired on December 22, 2004. On December 22, 2004, Governor Napolitano officially proclaimed the election results.

¹⁶ [A.R.S. § 16-544](#)

¹⁷ [A.R.S. § 16-544](#)

¹⁸ [SOS: Proposition 200 \(2004\)](#)

The Attorney General (AG) then submitted the portion of Proposition 200 modifying election laws to the DOJ for preclearance. When the DOJ precleared Proposition 200 on January 24, 2005, the portions relating to election law became legally enforceable.

Proof of Citizenship to Register to Vote

For persons registering to vote or re-registering to vote in a different county on or after January 24, 2005, Proposition 200 requires the person to provide proof of citizenship.

Satisfactory evidence of U.S. citizenship includes one of the following:

- an Arizona driver license number or nonoperating identification license number, issued after October 1, 1996;
- a driver license or nonoperating identification license from another state that identifies U.S. citizenship;
- a legible photocopy of a birth certificate with the name of the applicant that verifies U.S. citizenship (supporting documentation, like a marriage license, may be needed if the name on the birth certificate is not the same as the person's current legal name);
- a legible photocopy of the pertinent pages of the U.S. passport;
- U.S. naturalization certificate number or the presentation of the original certificate of naturalization; or
- Bureau of Indian Affairs Card Number, Tribal Treaty Card Number or Tribal Enrollment Number.¹⁹

Identification at the Polls

A voter at the polls who wishes to obtain a ballot must present one of the following forms of identification: 1) a valid form of photo identification that includes the name and address of the voter as it appears on the precinct register; 2) two different items that contain the name and address of the

¹⁹ [A.R.S. § 16-579](#)

voter as it appears on the precinct register; or 3) a valid form of photo identification with an address that does not match the precinct register and one item that contains the name and address of the voter as it appears on the precinct register.²⁰

Litigation

In 2006, a group of citizens and community groups challenged Proposition 200's requirement for proof of citizenship to register to vote and the requirement to provide identification at the polls. The U.S. District Court did not grant the plaintiff's requested temporary restraining order to prevent Arizona officials from enforcing the election provisions of Proposition 200. On October 5, 2006, the Ninth Circuit Court of Appeals enjoined the implementation of Proposition 200's voting identification requirement in connection with the 2006 general election and enjoined Proposition 200's registration proof of citizenship requirements so that voters could register before the October 9, 2006, registration deadline without having to show proof of identification. However, on October 20, 2006, the U.S. Supreme Court vacated the order of the Ninth Circuit; therefore, identification at the polls was necessary during the 2006 general election. On appeal, the Ninth Circuit refused to enjoin the citizenship requirement finding that plaintiffs had demonstrated little likelihood of success of proving that Arizona's registration identification requirement is a poll tax. The court also found that the plaintiffs failed to demonstrate that Proposition 200's identification requirement imposes a severe burden on the right to vote and therefore was justified as an even-handed and politically neutral law aimed at preserving the integrity of the election process. Following a six-day bench trial in July 2008, the U.S. District Court denied the plaintiff's request for a permanent injunction on August 20, 2008. Plaintiffs appealed to the Ninth Circuit Court of Appeals.

²⁰ [A.R.S. § 16-579](#)

In April 2012, the Ninth Circuit Court of Appeals filed an opinion that upheld Proposition 200's requirement that voters show identification at the polling place but concluded that the National Voter Registration Act (NVRA) supersedes Proposition 200's registration provision as that provision is applied to applicants using the National Mail Voter Registration Form to register to vote in federal elections. In June 2013, the U.S. Supreme Court held that the NVRA precluded Arizona from requiring anyone registering to vote using the federal voter registration form to submit any additional information not required by the federal form. However, the Court concluded that Arizona could request that the Elections Assistance Commission (EAC) add Arizona's state-specific proof of citizenship instructions to the federal voter registration form.²¹ Following the Supreme Court's decision, The EAC concluded that the additional language was unnecessary and denied the request.

Federal-Only Voters

U.S. citizenship must be sworn to when a person registers to vote. Pursuant to the NVRA, a person is presumed properly registered to vote on completion of a registration form that, among other requirements, includes a statement or other indicator that the registrant answered "yes" to the question of whether the registrant is a U.S. citizen. As a result of the U.S. Supreme Court's decision in *Arizona v. Inter-Tribal Council of Arizona, Inc.*, Arizona established a process whereby an otherwise eligible registrant who does not submit documentary proof of citizenship and whose U.S. citizenship cannot be verified is registered as a *federal-only voter*. A federal-only voter is eligible to vote only in races for federal office in Arizona. Upon designating a registrant as a federal-only voter, a county recorder must send a letter to the registrant within 10 business days, informing the registrant that they must submit documentary proof of citizenship by 5:00 p.m. on the Thursday before an election in order to vote a "full ballot" in that election.²²

²¹ [Arizona v. Inter Tribal Council of Arizona, Inc.](#), 570 U.S. 1 (2013)

²² [EPM Ch.1\(ID\)\(A\)](#)

ADDITIONAL RESOURCES

- Arizona Secretary of State
www.azsos.gov
- Arizona Attorney General
www.azag.gov
- U.S. Department of Justice, Civil Rights Division, Voting Section
<http://www.usdoj.gov/crt/voting/>
- U.S. Election Assistance Commission
<http://www.eac.gov>
- National Conference of State Legislatures, Elections: [Election Resources](#)
- [Chavez v. Brewer](#), 222 Ariz. 309 (2009)
- [Gonzalez v. Arizona](#), 677 F.3d 383 (2012)
- [Kobach et al v. The United States Election Assistance Commission](#), F.3d 1252 (2014)