

In The  
**Supreme Court of the United States**

—◆—  
MARGARITA DEL PILAR FITZPATRICK,

*Petitioner,*

v.

JEFFERSON BEAUREGARD SESSIONS III,  
United States Attorney General,

*Respondent.*

—◆—  
**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Seventh Circuit**

—◆—  
**BRIEF FOR AMICUS CURIAE  
IMMIGRATION REFORM LAW INSTITUTE  
IN SUPPORT OF RESPONDENT**

—◆—  
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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The Immigration Reform Law Institute (IRLI) is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to urge this Court to deny review both because of the constitutional importance of election integrity, protected by federal laws against non-citizen voting, and because the U.S. Court of Appeals for the Seventh Circuit correctly found that

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<sup>1</sup> Timely notice was given to all parties. Both Petitioner and Respondent have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Petitioner brought her removal on herself by choosing to vote illegally.



### **SUMMARY OF THE ARGUMENT**

Congress has made it not only illegal, but a removable offense for a non-citizen to vote in a federal election. There is no constitutional infirmity in this exercise of Congress's plenary power over immigration. On the contrary, every time a non-citizen votes in a federal election, the constitutional rights of all citizens who vote in that election are infringed. This Court should weigh these grave constitutional harms in the balance.

In this case, contrary to Petitioner's argument, it was her responsibility to determine for herself whether she was eligible to register to vote. When a person registers to vote, federal law clearly outlines the responsibilities of the state, the voter registration location, and the applicant. The state and voter registration location inform an applicant about what requirements must be fulfilled in order to register to vote. Ultimately, the applicant must independently decide whether to register. Petitioner improperly chose to register to vote even though the form used to register a voter states specifically several times that one must be a United States citizen to do so.

Petitioner claims that a clerk's telling her that whether she registered was "up to [her]" not only justified her in illegally registering to vote, but in actually

voting in two separate elections. The Seventh Circuit, however, correctly analyzed Petitioner’s defense by beginning with a threshold inquiry: whether she had the requisite permission to vote. Obviously, whether she had such permission must be determined before analyzing whether her reliance on any permission was reasonable. Here, the ambiguous statement by a lower level government worker that Petitioner adduces did not constitute permission in the first place.



## ARGUMENT

### **I. The Court Must Weigh The Harm To Citizens Caused By Non-Citizens’ Voting.**

The foundation of citizens’ participation in self-government is their ability to influence laws and policy through voting for political candidates for office. That foundation is directly threatened when non-citizens vote in elections. Indeed, the dilution of the votes of U.S. citizens by non-citizens who cast ballots contravenes the Constitution. “Every voter in a federal . . . election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes.” *Anderson v. United States*, 417 U.S. 211, 227 (1974) (upholding a federal conviction for ballot box stuffing).

The infringement on the fundamental right of citizens to participate in the election of government officials, including the infringement on that right caused by non-citizen voter fraud, has very negative consequences. For example, it contributes to low confidence in elections. Jimmy Carter and James A. Baker III, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform*, American University's Center for Democracy and Election Management 18 (2005), [http://www.umic.pt/images/stories/publicacoes1/full\\_report.pdf](http://www.umic.pt/images/stories/publicacoes1/full_report.pdf). "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). As this Court has held, voter confidence in elections is essential to the democratic process. *Id.*

Even worse, votes by non-citizens can throw elections. Ohio Secretary of State Jon Husted has noted that in just two years, over 70 elections in his state had been tied or decided by a single vote. *Elections chief says 70 local races, issues decided by 1 vote*, AKRON BEACON JOURNAL (2015), <http://www.ohio.com/news/break-news/elections-chief-says-70-local-races-issues-decided-by-1-vote-1.561913> (last visited on Aug. 8, 2017). He also found that over 400 non-citizens were registered to vote in Ohio, and that 44 had cast ballots in an election. Press Release, John Husted, Ohio Secretary of State, Secretary Husted Identifies an Additional 155 Non-Citizens Registered to Vote, Refers 27 for Illegal Casting Ballots (Mar. 12, 2015), [https://www.sos.state.oh.us/media-center/press-releases/2015/2015-03-12-b/?\\_t\\_id=1B2M2Y8AsgTpgAmY7PhCfg%3d%3d&\\_t\\_q=Jan.+27%2c+2015](https://www.sos.state.oh.us/media-center/press-releases/2015/2015-03-12-b/?_t_id=1B2M2Y8AsgTpgAmY7PhCfg%3d%3d&_t_q=Jan.+27%2c+2015)



+letter+to+obama&\_t\_tags=language%3aen&\_t\_ip=207.188.230.50&\_t\_hit.id=SOS\_Web\_Models\_Pages\_MediaArticle/\_8a255644-fcc2-45ac-aa82-300757be51b2\_en&\_t\_hit.pos=10 (last visited on Aug. 8, 2017). Considering these numbers in just one state, it is frighteningly clear that non-citizen voting can alter the course of political power.

Election observers have reported to Congress a “sizeable number” of illegal votes cast in their elections. H.R. Rep. No. 110-101, at 11 (2007). Stunningly, in Virginia, it was reported that almost 7,500 illegal ballots were cast by non-citizens subsequently removed from the voter rolls. *One Third of Noncitizens Found Voted Illegally*, PUBLIC INTEREST LEGAL FOUNDATION (2017), <https://publicinterestlegal.org/blog/report-5500-non-citizens-discovered-voter-rolls-virginia/> (last visited on Aug. 8, 2017). Florida, Maryland, Utah, and Hawaii also have documented counts of votes cast by non-citizens in their elections. H.R. Rep. No. 110-101, at 11. “While there may be disputes about the nature and extent of voter fraud, there can be no dispute that it occurs.” *Id.*

Congress has addressed these concerns by making non-citizen voting in federal elections not only illegal, 52 U.S.C. § 611, but also a removable offense, 8 U.S.C. § 1227(a)(6)(A). Indeed, overturning Petitioner’s removal would only give a green light to more illegal voting by non-citizens, and more infringement on the constitutional rights of Americans. This Court has a duty to consider these grave constitutional harms.

## **II. Under Applicable Law, Petitioner Had The Responsibility To Determine Her Own Eligibility To Vote.**

The thrust of Petitioner's argument is that responsibility for her illegal voting rests not on her, but on government officials. The applicable law says otherwise. The National Voter Registration Act of 1993 (NVRA), 103 Pub. L. No. 31, 107 Stat. 77 (1993), clearly outlines the responsibilities of the state, the Department of Motor Vehicles (DMV) as a voter registration agency, and the applicant in registering an individual to vote.

First, a state's driver's license application serves as a voter registration unless the applicant fails to sign the voter registration application within it. 52 U.S.C. § 20504(a)(1). To serve as an application to vote in a federal election, the form must include the eligibility requirements, including citizenship; contain a section attesting that each eligibility requirement is met and stating the penalties for falsely submitting a voter registration form claiming U.S. citizenship; and be signed by the applicant. *Id.* at 20504(c)(2)(C); *see also* 52 U.S.C. § 20507(a)(5).

The DMV's role, as the voter registration agency, is limited. The NVRA requires that DMV workers distribute mail voter registration application forms to those completing a driver's license application or certain other forms. 52 U.S.C. § 20504(a)(f)(A). Workers are also to be available to assist in completing the

form, and accept the completed voter registration applications. *Id.* In completing these duties, a DMV worker cannot make any statement to an applicant that would discourage the applicant from registering to vote. *Id.* at § 20506(a)(5)(C).

Thus, the law places the responsibility on the applicant to determine eligibility, not on the voter registration agency. The state has made the requirements for voting clear through a registration form which requires the applicant to determine if he or she is a U.S. citizen. While the DMV can assist, the DMV worker does not have the power to approve voter registration. The DMV provides notice of the eligibility requirements and attestation statement. It is the applicant who evaluates whether he or she fulfills the eligibility requirements, attests to that fulfillment, and signs the registration application. The DMV locations are merely a convenient collection point for voter registration.

Here, Petitioner was aware of the penalties for falsely submitting a voter registration form claiming U.S. citizenship because they were included in the attestation portion of the voter registration application. *Illinois Voter Registration Application*, STATE OF ILLINOIS (2006), [https://web.archive.org/web/20060422193417/https://www.elections.il.gov/Downloads/Voting Information/PDF/R-19.pdf](https://web.archive.org/web/20060422193417/https://www.elections.il.gov/Downloads/Voting%20Information/PDF/R-19.pdf) (last visited Aug. 10, 2017) [hereinafter *Ill. Voter Registration Application 2006*]. She attested that her statement that she was a citizen was true and signed the application of her own free will. *Id.* As the Seventh Circuit observed, “statements

such as ‘I didn’t read the form carefully’ or ‘I didn’t think this through before acting’ or ‘I didn’t understand the legal significance of what I was doing’ may be explanations, but they are not excuses.” App. 3 (citing *Kimani v. Holder*, 695 F.3d 666 (7th Cir. 2012)).

In the face of this, Petitioner argues that the word “citizen” is ambiguous, and that it is reasonable to interpret that term as referring merely to a resident of a community or locality. Petition at 15-18. Even if that were reasonable, by her own admission, Petitioner herself did not understand the word in that sense when she asked the DMV worker whether she should register to vote; at that time, she knew she was not a U.S. citizen. Petition at 5-6, 12. Indeed, it would be surprising if she had lacked such knowledge, in light of her English proficiency and her years of personal experience with this country’s immigration system, which revolves around the concept of citizenship. App. 2, 12. And, contrary to Petitioner’s suggestion, Petition at 15-18, it is not reasonable that one neutral or even unhelpful statement by a DMV worker would completely alter her prior, informed, and quite accurate understanding of the word “citizen.”

### **III. Petitioner Did Not Have The Permission Necessary To Assert An Entrapment By Estoppel Defense.**

Petitioner argues that the Seventh Circuit’s consideration of her defense of entrapment by estoppel

was flawed because it was based on an erroneous interpretation of case law. Petition at 18-25. The crux of Petitioner's argument is that the Seventh Circuit did not consider whether Petitioner reasonably relied upon the statement made by the state worker at the DMV. Petition at 22-25.

But before determining whether Petitioner actually and reasonably relied on the statement, the Seventh Circuit rightly considered whether, by that statement, the worker granted her permission to register to vote. As the Seventh Circuit put it, entrapment by estoppel only occurs when an individual makes "complete and accurate representation to a public official and then receives *permission* from that public official, when acting within the scope of his or her authority." App. 3 (emphasis added). Thus, the Seventh Circuit correctly stopped its analysis after determining that the DMV worker had not given Petitioner permission either to register or to vote. It would have been both unnecessary and nonsensical for the court to have gone on to consider whether Petitioner reasonably relied on non-existent permission.

This Court has previously recognized the basic principles of entrapment by estoppel as a defense in criminal cases. *See Raley v. Ohio*, 360 U.S. 423 (1959); *Cox v. Louisiana*, 379 U.S. 559 (1965); *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973). In these cases, this Court has, in effect, discerned two kinds of entrapment by estoppel: that consisting of permission and reliance, and that where a defendant relied on official statements that were affirmatively

misleading. In *Raley*, the petitioners were informed by state officials prior to testifying that they had the right to rely on the privilege against self-incrimination, yet were subsequently convicted of contempt for failing to answer questions. 360 U.S. at 426-34. This Court called this procedure “the most indefensible sort of entrapment by the state – convicting a citizen for exercising a privilege which the state clearly had told him was available to him.” *Id.* at 438. In *Cox*, this Court made the concept of permission, implicit in *Raley*, explicit, analyzing entrapment by estoppel as consisting of “permission and reliance,” 379 U.S. at 572, and holding that because police officials had given petitioners permission to demonstrate at a certain location, and petitioners reasonably relied on that permission, they could not subsequently be convicted of demonstrating near a courthouse. 376 U.S. at 571-73. In *Pennsylvania Industrial Chemical Corp.*, this Court held that entrapment by estoppel would shield petitioners if they had been “affirmatively misled” about the legality of their conduct by statements by the Army Corps of Engineers, and reasonably relied on those statements. 411 U.S. at 674-75.

In the circumstances of this case, the statement by the DMV worker that whether Petitioner should register to vote was “up to [her]” cannot reasonably be construed as permission either to register to vote or to vote. The statement certainly does not *clearly* grant such permission. And, crucially, it was not the only information Petitioner had to rely upon. Petitioner also had a government issued voter registration application

form. At three different points in the application, it reminds the applicant that he or she must be a U.S. citizen to register to vote. Ill. Voter Registration Application 2006. It also states the immigration consequences if one registers without being a U.S. citizen. *Id.* The form cannot be any clearer that an applicant must be a U.S. citizen and if the applicant is not a U.S. citizen, he or she can be deported for fraudulently registering. *Id.*

Thus, the Seventh Circuit had no occasion to consider whether Petitioner reasonably relied on the statement made by the DMV worker; since it did not constitute permission, analyzing whether that permission had been relied on was unnecessary. Even more clearly, the Seventh Circuit had no reason to consider whether Petitioner reasonably relied on an affirmatively misleading statement by the DMV worker; not even Petitioner contends that the worker's statement was affirmatively misleading.

The Seventh Circuit also correctly distinguished registering to vote from actually voting in a federal election. The court found that even if the DMV worker had given Petitioner permission to register to vote – which he did not – that would not have given Petitioner permission to vote in an actual election. App. 4. For this reason, too, the court had no reason to proceed to the second step and consider reliance.



**CONCLUSION**

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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