No. 12-71

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA, et al.,
Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., and JESUS M. GONZALEZ, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

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STATE PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants-Appellees below, are the State of Arizona; Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constabile, in her official capacity as Yavapai County Election Director; Laura Dean–Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official capacity as Graham County Election Director; Donna Hale, in her official capacity La Paz County as Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Linda Haught Ortega, in her official capacity as Gila County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; Lenora Fulton, in her official capacity as Apache County Recorder; Juanita Simmons, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official

capacity as Mohave County Elections Director; Suzanne "Suzie" Sainz, in her official capacity as Santa Cruz County Recorder, Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County Recorder; Sue Reynolds, in her official capacity as Yuma County Election Director. Other parties who have been replaced by succession in office are: Janice K. Brewer, now Governor of Arizona, who was replaced by Ken Bennett; Thomas Schelling, who was replaced by Juanita Simmons, Joan McCall, who was replaced by Carol Meier, Ana Wayman-Trujillo, who was replaced by Leslie Hoffman, Patti Madril, who was replaced by Sue Reynolds, Susan Hightower Marler, who was replaced by Robyn S. Poucette, Gilberto Hoyos who was replaced by Steve Kizer, Linda Haught Ortega, who was replaced by Sadie Tomerlin, Dixie Mundy who was replaced by Linda Eastlick, and Penny Pew, who was replaced by Angela Romero.

Respondents, who were Plaintiffs-Appellants below, are The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; Hopi Tribe; Bernie Abeytia; Luciano Valencia; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote; Common Cause; and Georgia Morrison-Flores.

Other parties before the court of appeals were Candace Owens, Coconino County Recorder, and Patty Hansen, Coconino County Election Director in their

official capacities, as were Laurette Justman, Navajo County Recorder, and Kelly Dastrup, former Navajo County Election Director, in their official capacities.

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INTRODUCTION

This case has been before this Court before, as *Purcell v. Gonzalez*, 549 U.S. 1 (2006). In reversing the Ninth Circuit's error at that time, this Court unanimously emphasized the State's "indisputable" and "compelling interest in preserving the integrity of its election process." *Id.* at 4. This Court also cautioned that fraud in voting pollutes the democratic process by "driv[ing] honest citizens out . . . and breed[ing] distrust of our government." *Id.*

To preserve the integrity of their elections, Arizona voters enacted Proposition 200, which in relevant part requires that voter registration applicants provide evidence of citizenship. Using a new standard for preemption under the Elections Clause that is contrary to this Court's prior decisions, the Ninth Circuit held that the National Voter Registration Act (NVRA) preempted Proposition 200's evidence-of-citizenship requirement.

Under the new standard, the Ninth Circuit emphasized that "courts deciding issues raised under the Elections Clause need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." (Pet. App. 16c [emphasis added].) Therefore, although the Ninth Circuit did not find that there was an actual conflict between Proposition 200's evidence-of citizenship requirement and the provision in the NVRA that requires the States to "accept and use" the mail-in registration form (the Federal Form) created by the Electoral Assistance Commission (EAC), it found Proposition 200's requirement invalid. That

decision was mistaken on multiple levels. Actual conflict between federal and state law is the cornerstone of preemption under the Elections Clause, just as it is under the Supremacy Clause. In *Ex Parte Siebold*, 100 U.S. 71 (1879), a case decided under the Elections Clause, this Court held that a state election law is preempted when it "conflicts" with federal law, and only "so far as the conflict extends," *id.* at 384, and "no further," *id.* at 386. This Court's later Elections Clause cases followed this precedent. And there is no conflict between the NVRA and Proposition 200, either as to the language or as to the goals and purposes of the NVRA.

The NVRA and the EAC's regulations expressly contemplate that the Federal Form will reflect state-specific registration requirements, and the EAC in practice includes a wide variety of state-specific requirements in the Federal Form. Nothing in the NVRA or the EAC's regulations excludes evidence of citizenship from the requirements a state may impose or that may be incorporated into the Federal Form. Indeed, the NVRA's express purpose includes increasing the number of "eligible" voters and "protecting the integrity of the electoral process." The Ninth Circuit nonetheless found Proposition 200 preempted. The court construed the NVRA's requirement that States "accept and use" the Federal Form application as a requirement to assess the applicant's eligibility based only on the information requested on the Federal Form. This is contrary to the ordinary meaning of that phrase and would lead to the absurd and impossible result that a commissioner who had absolute documented proof that an applicant was

not a citizen would nevertheless have to register that applicant if the proof were external to the application. To "accept and use" a form application in any other context merely means that the application is used to determine whether the applicant is eligible for and entitled to receive what he or she has applied for. (For example, an employer may "accept and use" a form employment application to assess candidates for an open position. But clearly "accepting and using" a form from qualified individuals does not entitle all applicants to a job merely because they filled out the form completely.) As Judge Kozinski observed, "it's entirely possible to accept and use something for a particular purpose, yet not have it be sufficient to satisfy that purpose." (Pet. App. 96a). "A minute's thought comes up with endless [other] examples: passport and visa, car registration and proof of insurance; boarding pass and picture ID. . . ." (Pet. App. 97a).

If the phrase "accept and use" as set forth in the NVRA is construed in accordance with its plain meaning (as it should be), there is no conflict between the NVRA's language and Arizona's requirement that applicants supply some evidence of citizenship with their voter registration forms. A store may "accept and use" credit cards to transact business and nevertheless demand photo identification at the point of sale. In the same way, Arizona "accepts and uses" the Federal Form to process applications from those seeking to register. The requirement that applicants provide additional evidence to support their application does not constitute a "rejection" of the Federal Form any more than an identification check at an airport gate

entrance constitutes a "rejection" of a passenger's ticket.

By ignoring the ordinary meaning, the Ninth Circuit in effect applied a presumption in favor of preemption. Because Arizona "accepts and uses" the Federal Form and the NVRA does not preclude Arizona from requiring that registrants include evidence of citizenship as well, there is no direct conflict. Therefore, the NVRA does not preempt Proposition 200's evidence-of-citizenship requirement.

OPINIONS BELOW

The en banc decision of the Court of Appeals for the Ninth Circuit is reported at 677 F.3d 383 (9th Cir. 2012) (Pet. App. 1c-122c). Other opinions of the Ninth Circuit are included in the Petition Appendix at 1a-106a and 1d-21d. The Ninth Circuit's en banc decision reviewed the decision of the U.S. District Court for the District of Arizona granting summary judgment to the Petitioners (Pet. App. 1e-10e) and the district court's decision denying Respondents' relief on all remaining claims. (Joint Appendix [JA] at 246 to 319.)

JURISDICTION

The court of appeals entered judgment on April 17, 2012. (Pet. App. 4c.) The petition for certiorari was filed within ninety days of April 17, 2012. Accordingly, this Court's jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Article I, Section 2, Clause 1 of the U.S. Constitution provides:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

Article 1, Section 4, Clause 1 of the U.S. Constitution provides:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Seventeenth Amendment to the U.S. Constitution provides:

> The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each state shall have the qualifications requisite

> for electors of the most numerous branch of state legislatures.

Article II, Section 1, Clause 2 of the U.S. Constitution provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in the Congress. . . .

Section 1973gg-4 of the National Voter Registration Act, 42 U.S.C. § 1973gg-4, provides in relevant part:

> Mail registration
>
> (a) Form
> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.

Section 1973gg-7 of the National Voter Registration Act, 42 U.S.C. § 1973gg-7, provides in relevant part:

Federal coordination and regulations

(a) In general The Election Assistance Commission --

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form.

The mail voter registration form developed under subsection (a)(2) of this section –

(1) May require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that --

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

(5) the information required in section 1973gg-6(a)(5)(A) and (B) of this title;

(i) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

> (ii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration will remain confidential and will be used only for voter registration purposes.

The entire text of the National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-7, is reproduced in the Petition Appendix at 1h-28h.

Arizona Revised Statutes (A.R.S.) Section 16-166:

> F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
>
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship

> to the satisfaction of the county recorder.
>
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
>
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
>
> 5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
>
> 6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

(The complete text of A.R.S. § 16-166 is reproduced in

the Petition Appendix at 46h-50h.)

STATEMENT OF THE CASE

I. The National Voter Registration Act of 1993.

Congress enacted the NVRA in 1993 with the primary objectives of

> [1] "increas[ing] the number of *eligible* citizens who register to vote for Federal office;" [2]"mak[ing] it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;" [3] "protect[ing] the *integrity* of the electoral process; and [4] "ensur[ing] that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b)(1)-(4) (emphasis added) (The complete text of the NVRA is reprinted in Pet. App. 1h-42h.)

In furtherance of the NVRA's goals, Congress requires States to accept three different kinds of voter registration applications from those wishing to register to vote in federal elections. First, the NVRA requires States to treat any application for a driver's license submitted to the state motor vehicle department "as an application for voter registration with respect to elections for federal office (the Motor Voter Form"). 42 U.S.C. § 1973gg-3(a)(1). Second, the NVRA permits

voters to submit their application via mail through the use of "the mail voter registration application form." 42 U.S.C. § 1973gg-4(a)(1). Lastly, individuals may apply "in person at the appropriate registration site designated . . . in accordance with State law." 42 U.S.C. § 1973gg-2(a)(3).

With respect to registrations submitted by mail, the NVRA directs the States to "accept and use the mail voter registration application form prescribed by [the U.S. Elections Assistance Commission] for the registration of voters in elections for Federal Office" ("the Federal Form"). 42 U.S.C. § 1973gg-4(a)(1). The contents of the Federal Form are governed by Section 1973gg-7(b). "In addition," individual States may also "develop and use a mail voter registration form that meets all of the criteria" required for the Federal Form in subsection 1973gg-7(b). 42 U.S.C. § 1973gg-4(a)(2). This form "may require only such identifying information . . . and other information as is necessary to enable the appropriate state elections official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

A. Congress Delegated a Limited Role to the U.S. Election Assistance Commission—That Is, to Develop the Federal Form.

Congress prescribed the specific information that *may* be required, the information that *must* be required, and the information that must *not* be required on the Federal Form and any individual state counterpart that might otherwise be used. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA explicitly provides

that the Federal Form "*may require* only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg-7(b)(1) (emphasis added). The NVRA also provides that the Federal Form "*shall include*" statements that specify each eligibility requirement (including citizenship), contain an attestation of eligibility, and require the applicant's signature under penalty of perjury. *Id.* § 1973gg-7(b)(2) (emphasis added). Lastly, the NVRA provides that the forms developed for voter registration "*may not include* any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3) (emphasis added).

While the U.S. Election Assistance Commission (EAC) is responsible for creating the Form, Congress explicitly denied the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits the EAC to develop the Federal Form, and "provid[e] information to the States with respect to the responsibilities of the States under [the NVRA]."

B. The EAC Developed a Federal Form that Includes State-Specific Instructions and Revises It As State Election Laws Evolve.

There are three "components" to the Federal Form:

the general application instructions, the form itself, and the state-specific instructions. (Pet. App. 60c-84c [Appendix to Opinion].) The state-specific instructions account for seventeen pages of the twenty-five page Federal Form. Nearly all of the state-specific instructions require that the registrant provide specific identifying information on the Federal Form. For example, to register in California, "you must provide your California driver's license or California identification card number." (*Id.* at 68c.) In Hawaii, "[y]our full social security number is required." (*Id.*at 71c.) And "Michigan law requires that the same address be used for voter registration and driver license purposes." (*Id.* at 75c.) The state-specific instructions also include additional eligibility requirements that vary from state to state. As its instructions clearly indicate, a person cannot complete the Federal Form without referencing and meeting the widely varied, state-specific requirements, as well as attesting to eligibility. (*Id.* 63c).

The EAC's regulations include "state-specific instructions" as a mandatory "component" of the Federal Form. *See* 11 C.F.R. § 9428.3(b). The regulation further requires that "[t]he state-specific instructions shall contain . . . information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. § 9428.3(b). The EAC requires that state election officials report and update it on the State's unique "voter registration eligibility requirements" for the purpose of including and updating any requirements set forth in the "state specific" component of the Federal Form. 11 C.F.R. § 9428.6. Updating the Federal Form with new or

additional state-specific registration requirements is primarily a ministerial task, which the EAC has largely delegated to its staff: "EAC staff routinely fields requests from states to update or change their state-specific instructions, which are part of the National Form." (*See* EAC Operation Policy; Statement of Paul DeGregorio at 1 [JA at 223].)

II. The Passage and Implementation of Proposition 200.

A. Arizona Voters Pass Proposition 200 Due in Part to Concerns About Ineligible Voters Registering and Voting in Elections.

Due at least in part to concerns about the "increase in non-citizens registering to vote and actually voting in elections,"[1] Arizona voters passed a ballot initiative called Proposition 200), which asks prospective voters to provide evidence of U.S. citizenship in order to register to vote. (The portion of Proposition 200 that addresses registration is codified at A.R.S. § 16-166(F), which is set forth in Pet. App. 42h-50h.) Proposition 200 also requires registered voters to present identification in order to cast their ballots at the polls. A.R.S. § 16-579.

Arizona, like other States, has experienced fraud in voting with regard to both registration and casting ballots. (JA 99, 117, 267-68, 336-39). For example, in

[1] This Court recognized the States' legitimate concern with voter fraud in *Purcell*, 549 U.S. at 4.

2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner they were not U.S. citizens. (*Id.* at 267.) Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now ("ACORN") submitted "garbage" voter-registration forms and had misled noncitizens into registering to vote. The Maricopa County Recorder testified:

> It was enormous amounts of voter registrations that were – and there is no other term for it other than garbage, these were scrawled, they were -- they were not whole addresses, these were not real people, Nacho Cheese, that type [of] thing. . . . And they were getting paid for it.
>
> So we had them in on many occasions. On one particular occasion, we had gotten a group in . . . and there were 24 that said, "I am not a citizen." We drug them back in and asked them to bring their lawyers to say, "Do you understand that if I put these on file, these people have committed a felony?" I believed then and I believe now that it is not the person who is doing this, but the person who is getting them to do this in order to make their money.

(*Id.* at 340-41.)

B. The U.S. Department of Justice Precleared Proposition 200 as Compliant with the Voting Rights Act.

Following Arizona voters' enactment of Proposition 200, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. (*Id.* at 193, 248). Arizona specifically stated that the measure would require applicants registering to vote to provide evidence of United States citizenship with the application. (Pet.App. 6e-7e.) Arizona had the burden of showing that Proposition 200's "new voting policy did 'not have the purpose [or] effect of denying or abridging the right to vote on account of race or color.'" *Purcell*, 549 U.S. at 3 (quoting 42 U.S.C. § 1973(c). The Department of Justice precleared the measure on January 24, 2005. (JA 193.)[2]

C. Arizona Requested an Amendment to the Federal Form to Avoid Voter Confusion, Which the EAC Rejected.

After receiving preclearance from the Department of Justice, Arizona submitted a request to the EAC to include Arizona's evidence-of-citizenship requirement on the state-specific instructions for the Federal Form. (*Id.* at 181.) The then-EAC Executive Director declined to approve this state-specific requirement.

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[2] The Department precleared a subsequent similar law after the State of Georgia filed suit in the district court of the District of Columbia. (JA 342-72.)

(*Id.* at 181-82.) The EAC Commissioners themselves apparently had no involvement in the decision. Rather, the Director made the decision unilaterally. (*See, e.g., id.* at 223). The Director claimed that the voter approved measure was "preempted by Federal law." (*Id.* at 186.) According to the Director, "[a]ny Federal Registration Form that has been properly and completely filled-out by a *qualified* applicant and timely received by an election official must be accepted in *full satisfaction* of registration requirements." *Id.* (emphasis added). It would follow from this reasoning that even if state officials had documentary proof that the applicant was not a citizen and therefore was not a qualified applicant, the application would have to be accepted.

One day after the district court issued its opinion denying the Plaintiffs' application for a temporary restraining order and concluding that NVRA did not preempt Proposition 200, Arizona requested that the EAC reconsider. (*Id.* at 216-22.) A vote on that request resulted in a deadlock, as two Commissioners voted in favor of amending the instructions and two voted against it. (*Id.* at 225.) Director Wilkey's original decision was permitted to stand and the Federal Form has not been amended. "Any action" taken by the EAC, however, "may be carried out only with the approval of at least three of its members." 42 U.S.C. § 15328. Here, the EAC Director was not performing the ministerial task of adding state-specific requirements, but making a legal determination about the validity of the state-specific instructions. Yet three Commissioners never approved the Director's legal determination about the validity of Arizona's evidence-

of-citizenship requirement. Currently, the EAC has *no* active commissioners and has not maintained even three members since 2010. The two remaining Commissioners both resigned in late 2011 along with Director Wilkey.[3] In May 2012, the EAC's general counsel and default interim executive director also resigned.[4]

D. Arizona Election Officials Implemented Proposition 200's Evidence-of-Citizenship Requirement in 2006.

Proposition 200 permits a variety of options to satisfy its evidence-of- citizenship requirement. A.R.S. § 16-166(F). In most instances, providing evidence of citizenship is accomplished by writing an identifying number on a postcard registration form, including an Arizona driver's license or non-operating identification number issued after October 1, 1996. A.R.S. § 16-166(F)(1). Approximately ninety percent of voting-age Arizonans possess driver's licenses (JA 257).

Applicants may also write the "A-number" located on their certificate of naturalization on their postcard registration form. A.R.S. § 16-166(F)(4). Applicants

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[3] *See* Commissioner Gineen Bresso's 12/8/2011 Resignation Letter, *available at* http://www.eac.gov/assets/1/Documents/Bresso%20Resignation1.pdf; Commissioner Donetta L. Davidson's 11/30/2011 Resignation Letter, *available at* http://www.eac.gov/assets/1/Documents/Davidson%20resignation%20letter%20to%20President%20Obama1.pdf.

[4] See EAC Employee Directory, available at http://www.eac.gov/about_the_eac/staff.aspx.

may also provide their tribal identification number. A.R.S. § 16-166 (F)(6). For the very few applicants who do not have any of these numbers, they can provide copies of other documents such as birth certificates, passports, naturalization documents, or "other documents that are meant as proof that [may be] established pursuant to" federal immigration law. (Pet. App. 9d (quoting A.R.S. § 16-166(F)(5)). Originals are not required. *See* A.R.S. § 16-166(F).

E. Arizona Continues to Accept and Use the Federal Form.

Following the implementation of Proposition 200, Arizona has continued to accept the Federal Form and for voter registration purposes. (JA 190.) The Arizona Secretary of State continually makes the Federal Form available to anyone who requests it. (*Id.* at 191.) In addition, that form is publicly available for downloading and printing on the EAC's website. (*Id.* at 191.) Before the district court's injunction following remand from the Ninth Circuit (*Id.* at 381-84), when an Arizona applicant provided the Federal Form, county recorders evaluated the application, determined if it provided satisfactory evidence of citizenship, and sent correspondence to any applicant who did not provide adequate information indicating what information was necessary to complete the application process. (*See* JA 251; *see also* Arizona Secretary of State's Procedures Manual, at 9-14, *available at* http://www.azsos.gov/election/electronic_voting_system/manual.pdf.) In other words, submission of the Federal Form without the requisite evidence of citizenship does not result in denial; instead, officials respond with a request that

the applicant supply evidence of citizenship.

III. Procedural History

After the voters passed Proposition 200, several Plaintiffs brought overlapping Complaints in the United States District Court for the District of Arizona to prevent its implementation. (Pet. App. 7c.) The district court, following briefing and an evidentiary hearing, denied preliminary relief. (Pet. App. 1f-3f.) A two-judge motions panel of Ninth Circuit reversed the district court and granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006). This Court reversed. *Purcell*, 549 U.S. at 8.

On remand, a panel of the court of appeals affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the State from requiring evidence of citizenship. (Pet. App. 16d-17d) (*Gonzalez v. Arizona I*). Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the district court granted the State's motion for summary judgment on the NVRA claim. (Pet. App. 3e). Following a trial on the remaining claims, the district court granted judgment in favor of the State. (Pet. App. 8c.) The district court found that the burdens on potential registrants were not excessive. (JA 288-94.) The district court also found that voter fraud, the basis for Proposition 200, was a significant problem. (*Id.* at 294-95.)

Plaintiffs appealed. (Pet. App. 9c). A divided second panel of the Ninth Circuit Court of Appeals disagreed with *Gonzalez I* and reversed the district court's summary judgment ruling on the NVRA claim, affirming the district court's decision on the remaining claims. (Pet. App. 1a-96a) (*Gonzalez v. Arizona II*). The State petitioned for and received rehearing en banc. (Pet. App. 1b-6b).

In another divided opinion, the en banc court concluded that the NVRA preempts Proposition 200 as applied to the Federal Form. (Pet. App. 1c-122c) (*Gonzalez v. Arizona III*). The court reasoned that the Election Clause "empowers both the federal and state governments to enact laws governing the mechanics of federal elections." (*Id.* at 13c.) The court determined that because the Election Clause permits Congress to "'conscript state agencies to carry out' federal mandates," it "operates quite differently from the Supremacy Clause." (*Id.* at 14c-15c(quoting *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)). The court concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." (*Id.* at 16c (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991))). Instead, the court determined that the Election Clause "establishes its own balance" and that the "presumption against preemption" and "plain statement rule'" that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (*Id.*)

The Ninth Circuit's new test for analyzing elections preemption does not require an actual conflict between

state and federal law. Under its newly created preemption analysis, the court determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." (*Id.* at 20c). It then concluded that because of the evidence-of-citizenship requirement, Arizona did not "'accept[] and us[e]' the Federal Form," and therefore Arizona's requirement was preempted "when applied to the Federal Form." (*Id.* at 31c, 43c.)

Chief Judge Kozinski concurred, but observed the following:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

(Pet. App. 89c.)

Judges Rawlinson and Smith dissented. The

dissent disagreed with the majority's interpretation of the Elections Clause, finding that it was not supported by this Court's decisions. (Pet. App. 116c-121c.) They noted that this Court's Elections Clause decisions "emphasize the respect that should be accorded the procedures implemented by states," clarify that "preemption extend[s] only as far as a conflict exists," and hold that "a conflict exists only if the [state and federal] regulations cannot co-exist." (*Id.* at 116c, 121c.) The dissent therefore concluded that "[b]ecause the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause." (*Id.* at 121c.)

The dissent articulated several reasons, supported by the NVRA itself, that there was no conflict. For example, drawing on an analogy first articulated by Chief Judge Kozinski in an earlier opinion in this case (Pet. App. at 96a-97a), the dissent observed:

> [A]ccepting and using something does not mean that it is necessarily sufficient. For example, merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card.

(Pet. App. at 105c.)

The dissent further found that § 1973gg-7(b)

expressly "permits states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" (*Id.* at 107c (quoting 42 U.S.C. § 1973gg-7(b)(1); alterations in dissenting opinion). The dissent stated that Congress could not have intended that the States are prohibited from asking for additional information to verify that applicants are citizens because the NVRA expressly allows the States to develop their own forms as long as they comply with 42 U.S.C. § 1973gg-7(b). (*Id.* at 109c-110c.) Consequently, the dissent concluded that Arizona did not defy "the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form." (*Id.* at 106c.)

On remand and after a full trial, the district court found that the burdens on potential registrants were not excessive. (JA 288-94.) Plaintiffs were able to produce only "one person . . . who [was] unable to register to vote due to Proposition 200's evidence of citizenship requirement" and did not "demonstrate [] that . . . persons rejected are in fact eligible to register to vote." (*Id.* at 292.) The district court found that Proposition 200 had a valid basis that is, that voter fraud had indeed infected the voter registration process in Arizona. (*Id.* at 292.) The district court also found that Proposition 200 has not burdened those eligible citizens wishing to register from exercising their fundamental right. (*Id.* at 294.)

SUMMARY OF ARGUMENT

1. The Ninth Circuit applied a new, unprecedented preemption test to find that the NVRA preempts Arizona from requiring that evidence of citizenship accompany an applicant's federal voter registration form. In effect, the Ninth Circuit replaced ordinary preemption principles with a unique presumption in favor of preemption for cases decided under the Elections Clause. This new test is contrary to this Court's precedent under the Elections Clause and the Supremacy Clause.

The Elections Clause grants States explicit authority to manage procedures for federal elections and this Court has long held that if Congress seeks to alter the States' procedures, such federal regulations supplant state regulations only to the extent of a conflict. This Court's Elections Clause preemption analysis is entirely consistent with this Court's preemption analysis under the Supremacy Clause. In contrast, the Ninth Circuit's preemption test implies that Congress's laws should preempt a state law that addresses the same subject matter even if there is no actual conflict between the state and federal law and regardless of any of the factors that govern conflict preemption.

2. The Ninth Circuit's preemption conclusion focused on the NVRA requirement that States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). Under ordinary conflict preemption principles and by following traditional canons of statutory construction, the NVRA's requirement that States "accept and use" the Federal Form and Arizona's evidence-of-citizenship requirement can easily coexist.

It is undisputed that the NVRA contemplates that States can require voter registration applicants using the Federal Form to provide state-specific "information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). The mere requirement that an applicant provide state-specific information is entirely consistent with the NVRA. And there can be no serious dispute that the NVRA by its terms allows States to include in their state-specific requirements that applicants submit evidence of citizenship to allow the State "to assess the eligibility of the applicant." By reading Section 1973gg-4(a)(1)'s "accept and use" language in isolation instead of in conjunction with Section 1973gg-7(b)(1), the Ninth Circuit violated the basic canon of statutory construction that related statutory provisions are to be read together.

In addition, the ordinary meaning of the phrase "accept and use," especially as used in connection with a form application, is consistent with Arizona's requirement that applicants also provide evidence of eligibility to vote. Just as prospective employers may "accept and use" a form application to consider qualified candidates and also require a writing sample, Arizona may "accept and use" the Federal Form and also require evidence of citizenship.

Moreover, the NVRA forbids States from requiring "notarization or other formal authentication" in connection with the Federal Form. 42 U.S.C. § 1973gg-7(b)(3). Under the *expressio unius* canon of construction, Congress's specific exclusion of one

requirement creates the inference that other such requirements, such as evidence of citizenship, are not excluded.

Finally, the Ninth Circuit incorrectly gave deference to EAC's failure to include Proposition 200's evidence-of-citizenship requirement in Arizona's state-specific instructions. The EAC's decision declining to include Arizona's requirement was not a result of a majority vote of the EAC Commissioners and certainly the decision was not subject to formal rulemaking following notice and comment. Instead, the decision was nothing more than the whim of an EAC administrator.

3. Any doubts concerning whether the NVRA preempts Proposition 200 should be resolved in favor of finding no preemption under the canon of constitutional avoidance. The States have the exclusive authority to determine and enforce voter qualifications in federal elections under the Voter Qualifications Clauses of the Constitution. If this Court interprets the NVRA as preempting Proposition 200's evidence-of-citizenship requirement, it will raise a serious question concerning the constitutionality of the NVRA under the Voter Qualifications Clauses. To avoid that collision, this Court should interpret the NVRA as not preempting Proposition 200.

ARGUMENT

I. The Ninth Circuit Erred in Applying Preemption Principles Under the Elections

Clause that Are Different from Supremacy Clause Preemption Principles.

The Ninth Circuit concluded that the "Elections Clause operates quite differently from the Supremacy Clause." (Pet. App. 15c.) The court emphasized that "courts deciding issues raised under the Elections Clause need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." (Pet. App. 16c [emphasis added].) It abandoned the principles traditionally governing preemption and fashioned a new approach.

According to this newly invented test, a state law is preempted if it does not "operate harmoniously in a single procedural scheme" with a state law that "address[es] the same subject." (Pet. App. 20c.) The Ninth Circuit erred in applying this newly invented test because it is inconsistent with *Siebold* where this court held that a federal law enacted under the Elections Clause did not preempt a state law addressing the same subject unless there wass an actual conflict between the two laws and even then, preemption extended only "so far as the conflict extends," 100 U.S. at 384, and "no further," *id.* at 386.[5]

Under the *Siebold* test, the issue is whether state

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[5] This argument assumes that the Elections Clause authorized Congress to enact the NVRA as applied here. The Ninth Circuit's decision, however, also raises a serious question concerning whether the NVRA's application here interferes with the States' excusive authority to define the qualifications for voting in federal elections. See § 1(C) *infra*.

officials can comply with both Proposition 200's evidence-of-citizenship requirement and the NVRA's requirement that they "accept and use" the Federal Form. If state officials can comply with both, there is no conflict between the laws. That test is met in this case.

The Elections Clause expressly authorizes the States to establish the times, places, and manner of congressional elections, subject to superseding regulation by Congress:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. I, § 4, cl.1.

In *Siebold*, this Court applied concepts essentially identical to modern preemption doctrine under the Supremacy Clause to describe preemption under the Elections Clause. In *Siebold*, the petitioners challenged their prosecutions for violations of a federal statute that criminalized certain conduct that interfered with federal elections. *Id.* at 378-82. This Court rejected petitioners' argument that if Congress enacted regulations under the Elections Clause, those regulations "must take the place of all State regulations of the subject regulated." *Id.* at 383.

This Court recognized that the Elections Clause provided "concurrent authority of the *two sovereignties, State and National,* over the same subject-matter." *Id.* at 384-85 (emphasis added); c*f. Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause."). The *Siebold* Court analogized Congress's Elections Clause authority with its Commerce Clause authority over interstate commerce, as both provide "concurrent authority of the State and national government, in which that of the latter is paramount." 100 U.S. at 385.

Unlike the Ninth Circuit's new approach to preemption, under *Siebold* a state election law is preempted when it "conflicts" with federal law and, even then, preemption extends only "so far as the conflict extends," *id.* at 384, and "no farther" *id.* at 386. *Siebold* further instructed that, when considering a question of preemption under the Elections Clause, courts "are bound to *presume* that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any *unnecessary* interference with State laws and regulations, [or] with the duties of State officers." *Id.* at 393 (emphasis added).

Put in modern preemption parlance, that means "in *all* preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] start[s]

with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added; internal quotation marks omitted). For purposes of preemption, then, a conflict arises "if both" the state and federal laws at issue "cannot be performed." *Siebold*, 100 U.S. at 386. Under *Siebold,* a federal regulation affecting the administration of elections "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395.

More recently, this Court followed *Siebold* and applied Supremacy Clause preemption principles in *Foster v. Love*, 522 U.S. 67 (1997). In *Foster*, this Court considered whether federal statutes setting a uniform date for federal elections preempted a Louisiana open primary system that allowed for conclusive congressional elections in October, in advance of the national November election date. This Court observed that the "Fifth Circuit's conception of the issue here as a narrow one turning entirely on the meaning of the state and federal statutes is exactly right," *id.* at 71, and that "[w]hen Louisiana's statute is applied to select from among congressional candidates in October, it conflicts with federal law and to that extent is void," *id.* at 74. In affirming the Fifth Circuit's analysis as "exactly right," this Court affirmed the Fifth Circuit's application of preemption principles under the Supremacy Clause. *See Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996) (applying the test for conflict preemption under the Supremacy

Clause and concluding that "the Louisiana election system . . . must yield under the Supremacy Clause").[6]

Nothing in the Court's analysis in *Foster* suggests that the Court did not find an actual conflict between state and federal law or that it used a more vague "same subject matter" approach to preemption under the Elections Clause. Rather, *Foster* reiterated that federal elections laws are paramount where they conflict with state law and only "so far as the conflict extends." *Foster*, 522 U.S. at 69 (*quoting Siebold*, 100 U.S. at 384).

II. UNDER ORDINARY CONFLICT PREEMPTION PRINCIPLES, THE NVRA DOES NOT PREEMPT PROPOSITION 200'S EVIDENCE-OF-CITIZENSHIP REQUIREMENT.

The only form of preemption even potentially applicable here is conflict preemption, which "includes cases where compliance with both the federal and state regulations is a physical impossibility and those

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[6] The Ninth Circuit relied on *Foster* for its conclusion that preemption under the Elections Clause operated differently than preemption under the Supremacy Clause, noting that "instead of adopting the Fifth Circuit's Supremacy Clause analysis, the Court analyzed the claim under the Elections Clause, without ever mentioning a presumption against preemption or a plain statement rule." (Pet. App. 17c.) The Court did not need to apply those rules in *Foster*, however, because it found that no possible interpretation of "federal election day" permitted Louisiana's open primary law that allowed congressional candidates to be elected a month before the federal election day. 552 U.S. at 70-72. Therefore, there was no reason for the Court to invoke the presumption against preemption or the plain statement rule.

instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal citations and quotation marks omitted);[7] *see also Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) (under conflict preemption, the challenger must "present a showing of . . . conflict between a particular local provision and the federal scheme, *that is strong enough* to overcome the presumption that state and local regulation . . . can constitutionally coexist with federal regulation") (emphasis added). Under that test, Arizona's evidence-of-citizenship requirement is not preempted. It is undisputed that the NVRA allows the States to require the inclusion of state-specific information on the Federal Form. And requiring evidence of citizenship as part of such state-specific information submitted in connection with the Federal Form does not conflict with the NVRA.

Finally, the EAC's failure to include Arizona's evidence-of-citizenship requirement in the state-specific instructions on the Federal Form carries no preemptive force, because Congress did not give the EAC the authority to preempt state law. Further, because a majority of the EAC's Commissioner's did not vote to reject the inclusion of Proposition 200's

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[7] Other types of preemption not relevant here are express preemption, in which Congress expressly preempts States' authority to regulate, and field preemption, in which Congress comprehensively occupies the field of a given area to the exclusion of the States. *See id.* at 2501.

requirement, the EAC's rejection is invalid.

A. The NVRA Does Not Preclude States from Requiring that Applicants Supply State-Specific Information with the Federal Form.

It is undisputed that the NVRA contemplates that the States may require that applicants provide state-specific information with the Federal Form. Section 42 U.S.C. § 1973gg-7 provides that the Federal Form "may require only such identifying information (including the signature of the applicant) *and other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added).

Consistent with the statutory requirement that the Federal Form requires that applicants submit such "other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant" under state-specific qualifications, the EAC's regulations expressly contemplate that the States can require state-specific information on the Federal Form. The EAC's own regulations define the term "form" as "the national mail voter registration application form, *which includes* the registration application, accompanying general instructions for completing the application, and *state-specific instructions*." 11 C.F.R. § 9428.2(a) (emphasis added). Accordingly, of the twenty-five pages comprising the Federal Form, seventeen pages are devoted exclusively to a description of the "state-

specific" criteria for voter registration. The Federal Form requires all applicants to "review [their] state's instructions" and to "swear/affirm" that they "meet the eligibility requirements of [their] state." (Pet. App. 63c at Box 9.)

As the sheer length of the state-specific instructions suggests, States have adopted widely varied identification and eligibility requirements beyond what is minimally required of applicants by the Federal Form. (Pet. App. 67c-89c.) The EAC's inclusion of such widely varied, state-specific instructions as a "component" of the Federal Form belies the claim that the NVRA preempts all state requirements that seek additional or supplemental evidence to support a voter registration application. To the contrary, the EAC has generally included all state-specific registration criteria as a matter of course so long as they do not conflict with any of the NVRA's express prohibitions.

The EAC's practice of including state-specific requirements in the Federal Form dates back to the early implementation of the NVRA by its predecessor, the Federal Election Commission (FEC). Immediately following its enactment, the FEC issued detailed implementation guidelines.[8] In so doing, the FEC meticulously reviewed the text of the NVRA as well as its legislative history and highlighted Congress's desire to avoid a construction of the NVRA that would

[8] FEC Guide to Implementing the NVRA, *available at http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%20Jan%201%201994.pdf.*

displace the role of state officials with respect to voter registration. *Id.* (citing House Report, Section 5 at 8, providing that "[t]his bill should not be interpreted in any way to supplant [the] authority" of state officials to "make determinations as to applicants' eligibility"). The FEC was careful to distinguish between the submission of a registration *application* and voter registration itself—"an application received by the local voter registration official is *only* an application and may be subject to whatever verification procedures are currently applied to all applications." *Id.*

In short, it is undisputed here that it is possible for state officials to require applicants to submit state-specific information in connection with the Federal Form and that doing so does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona,* 132 S. Ct. at 2505.

B. The NVRA Does Not Preclude States from Including Evidence of Citizenship as Part of the State-Specific Information that Applicants Are Required to Submit with the Federal Form.

Putting aside for the moment the EAC's attempt to control the content of the state-specific instructions included on the Federal Form, there can be no serious dispute that that the NVRA *on its own terms* allows the States to include evidence of citizenship in the state-specific information applicants are required to submit with the Federal Form.

First, the NVRA explicitly provides that the

Federal Form may require such "other information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). As this Court has observed, this statutory language leaves the "policy choice" to the States by not listing "all the other information the State may——or may not—provide or request" in determining voter eligibility. *Young v. Fordice*, 520 U.S. 273, 286 (1997). It is precisely because the NVRA left this "discretionary" policy choice open to the States that the choices made by covered jurisdictions are subject to preclearance under the Voting Rights Act. *Id.* Indeed, Arizona as a covered jurisdiction, submitted its evidence-of-citizenship requirement for preclearance under the Voting Rights Act, and the Justice Department precleared it. In order to obtain preclearance, Arizona had the burden of showing that Proposition 200's "new voting policy did 'not have the purpose [or] the effect of denying or abridging the right to vote on account of race or color.'" *Purcell*, 549 U.S. at 3 (quoting 42 U.S.C. § 1973(c)).

Second, the NVRA specifically forbids States from including "any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). Generally, under the doctrine of *expressio unius est exclusio alterius*, a statute that explicitly prohibits one thing does not implicitly prohibit another. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (such a legislative decision represents "'deliberate choice, not inadvertence'") (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)); *see also Gonzalez II*, Pet. App. 98a ((Kozinski, J., concurring in part and dissenting in part) ("The inclusion of a specific

prohibition is a strong indication that other prohibitions weren't intended."). In expressly forbidding only a requirement of notarization or authentication, Congress left open other "policy choice[s]" for States to make in requiring applicants to demonstrate their qualification to vote. *Young*, 520 U.S. at 286.

Finally, Section 1973gg-4(a)(2) allows the States, "in addition to accepting and using the [Federal Form]," to develop and use a mail voter registration form *that meets all of the criteria* stated in section 1973gg-7(b) of this title for the registration of voters in federal elections." 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Arizona's state form developed pursuant to this authority requires evidence of citizenship. If Congress did not prohibit States from requiring applicants to submit evidence of citizenship when using the state form to apply for registration, then Congress could not have intended to prohibit applicants to submit the same information when using the Federal Form to apply for registration, because the statute employs the same substantive standards for *both* forms. *See* 42 U.S.C. § 1973gg-4(a)(2); *id.* -7(b).

C. Arizona "Accepts and Uses" the Federal Form for Purposes of § 1973-gg-4(a)(1) by Requiring that Evidence of Citizenship Be Submitted with the Federal Form As Permitted by § 1973-gg-7(b)(1).

Given their ordinary meaning, the words "accept and use" in § 1973gg-4(a)(1) do not require Arizona to treat the Federal Form conclusive of voter eligibility

upon submission without allowing verification from outside sources. The word "accept" ordinarily means "to receive willingly" or "to be able or designed to take or hold."[9] In turn, "to use" means "to employ" or "to derive service from." *Smith v. United States*, 508 U.S. 223, 228-29 (1993). Because the words "accept and use" are not defined in the NVRA, the Court construes them in accordance with their ordinary meaning and in light of the terms that surround them. *Id.* at 228.

An airline may advertise that it "accepts and uses" e-tickets and that paper tickets are not needed, yet may still require photo identification before one could board the airplane. Prospective employers may "accept and use" a form application to consider qualified candidates, but still decline to give some of those applicants a job. Similarly, Arizona "accepts" the Federal Form by receiving it willingly and "uses" the form by employing it as a tool to verify voter eligibility. Moreover, Arizona officials notify applicants who have not provided satisfactory evidence of citizenship and give them the opportunity to supply that information.

Using the Federal Form to deny registration to those who have not provided evidence of citizenship is also fully consistent with Section § 1973-gg-7(b)(1), which expressly authorizes Arizona to "require . . . information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973-gg-7(b)(1). In interpreting a statute, a court "will not look merely to a

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[9] http://www.merriam-webster.com/dictionary/accept

particular clause in which general words may be used, but will take in connection with it the whole statute." *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 573 (1989) (internal citation and quotation marks omitted). The Ninth Circuit erred by construing § 1973-gg-4(a)(1) in isolation, rather than as part of a larger statutory scheme that permits States to require evidence of citizenship.

Indeed, the NVRA by its terms contemplates that some applicants who use the Federal Form will be rejected as it requires that applicants be notified of the "disposition of [his or her] application." 42 U.S.C. § 1973gg-6(a)(2). Hence, Arizona "accepts and uses" the Federal Form, even if it denies an application because it does not contain the requisite evidence of citizenship.

D. Proposition 200 Is Consistent with Congress's Purpose of Protecting Election Integrity.

In addition, Proposition 200's evidence-of-citizenship requirement is consistent with Congress's express purposes for enacting the NVRA. 42 U.S.C. § 1973gg(b). While the NVRA's goals indicate Congress's intent to increase voter registration, they also emphasize Congress's concern with the integrity of the election process, including ensuring that only eligible voters are registered. *Id.* (the four express purposes include Congress's intent that the NVRA enhance participation of *eligible* voters and protect the *integrity of the electoral process*). Because only U.S. citizens are eligible to vote, Proposition 200's evidence-of-citizenship requirement is consistent with the NVRA's

express goals.

Congress's concern that only *eligible* voters register is evidenced throughout the NVRA. For example, the NVRA requires administrators of federal elections to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added). It also requires election administrators to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. *Id.* § 1973gg-6(a)(4); *see also Common Cause of Colo. v. Buescher,* 750 F. Supp. 2d 1259, 1275-76 ("eligibility is the definitive criterion for registration and list maintenance obligations" and as a result, "States must strive to add eligible voters and to remove ineligible ones"). Because Proposition 200's evidence-of-citizenship requirement is consistent with the congressional goal of registering *eligible* voters, it does not stand as an obstacle to the accomplishment and execution of Congress's purposes in enacting the NVRA.

Indeed, the district court's factual findings on remand regarding Proposition 200's evidence-of-citizenship requirement further demonstrate that the requirement is not an obstacle to the accomplishment of Congress's purposes in enacting the NVRA. Justice Stevens noted two factual resolutions as key in resolving this case: (1) The scope of the disenfranchisement that the evidence requirements will produce, and (2) the prevalence and the character of the fraudulent practices that allegedly justify those requirements. *Purcell*, 549 U.S. at 6 (Stevens, J.

concurring).

Following a trial on the remaining claims, including Equal Protection, the district court granted judgment in favor of the State. (Pet. App. 8c-9c.) The district court found that the burdens on potential registrants were not excessive. (JA 291.) Plaintiffs were able to produce only "one person … who [was] unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate[] that … persons rejected are in fact eligible to register to vote." (*Id.* at 292) The district court also found that voter fraud was a significant problem. (*Id.* at 294.) The district court's factual findings demonstrate that Proposition 200 is not inconsistent with Congress's purposes in enacting the NVRA.

Instead of paying attention to the district court's findings that voter fraud is a significant problem in Arizona and that Proposition 200 did not significantly burden potential registrants, the court of appeals erroneously concluded that Proposition 200 is "seriously out of tune" with the NVRA. (Pet. App. 30c.) Arizona should be permitted to require evidence of citizenship because it is consistent with the NVRA's purpose of protecting the integrity of the electoral process. Otherwise, the only protection is the applicant's sworn statement that he or she is a citizen. But someone who is willing to commit voter fraud is likely to be willing to attest to false information. This honor system deprives the State of the ability to protect the integrity of its electoral process. *Cf. Purcell*, 549 U.S. at 4 (fraud in voting pollutes the democratic process by "driv[ing] honest citizens out . . .

and breed[ing] distrust of our government").

E. The EAC's Failure to Include Arizona's Evidence-of-Citizenship Requirement in the Federal Form's State-Specific Instructions Has No Preemptive Force.

The Ninth Circuit also concluded that the EAC possesses the "ultimate authority" to determine the contents of the Federal Form. (Pet. App. 34c.) Accordingly, the Ninth Circuit effectively gave the EAC preemptive power by reasoning that "[o]nce the EAC determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants." (*Id.* at 36c.) In so doing, the Ninth Circuit drastically expanded the scope of the EAC's authority under the NVRA beyond what Congress ever prescribed or intended.

The EAC is a federal agency of extremely limited powers. Unlike other federal regulatory agencies,[10] Congress explicitly *denied* the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42

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[10] *See, e.g.,* 47 U.S.C. § 253(d) (authorizing the Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with the development of competitive telecommunications services) and 49 U.S.C. § 5125(d) (authorizing the Secretary of Transportation to determine whether particular state, local, or tribal requirements respecting the transportation of hazardous materials are preempted).

U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits only the development of the Federal Form, and "provid[ing] information to the States with respect to the responsibilities of the States under [the NVRA]." Congress did not give the EAC authority to preempt State law.

The Ninth Circuit relied heavily on the notion that the EAC exercised its "ultimate authority" by "rejecting" Arizona's request to include the evidence-of-citizenship requirement as a part of its other state-specific instructions already contained in the Federal Form. (Pet. App. 34c). But pursuant to the Help American Vote Act (HAVA), "[a]ny action" taken by the EAC in furtherance of its statutory authority "may be carried out only with the approval of at least three of its members." 42 U.S.C. § 15328. Notably, the EAC's purported "rejection" of Arizona's evidence-of-citizenship requirement has never been supported by a majority of its members. Rather, the Commission's only vote resulted in a deadlock, with two Commissioners voting in favor of including the requirement and two voting against it. (JA 225.)

The Ninth Circuit's reference to EAC's "rejection" of Arizona's requirement was really based upon an informal letter from the EAC's executive director relaying his opinion that the NVRA preempted state law because he believed that "[a]ny Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in *full satisfaction* of registration requirements." (JA 186) (emphasis added). As noted, this would require

registration even if there were irrefutable extrinsic evidence that the applicant is not a citizen. That cannot be the law.

In addition, this Court does not typically defer to "agency proclamations of preemption," but "perform[s] its own conflict determination" based upon "the substance of state and federal law." *Wyeth*, 555 U.S. at 576. This is especially true where, as here, there is no "agency proclamation" but merely an informal letter written by an agency staff member. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely conferred to "a single agency official." *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Rather, this Court has "rightly reject[ed]" the argument that a state law may be preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. at 2524 (Alito, J., concurring in part and dissenting in part). Accordingly, Mr. Wilkey's letter lacks "the force of law," *see United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), just as the Ninth Circuit's reliance on it as the "ultimate authority" governing preemption in this case lacks the force of logic.

III. The NVRA Should Be Read As Not Preempting Proposition 200 to Avoid Raising a Serious Doubt as to the NVRA's Constitutionality.

Under the canon of constitutional avoidance, "when deciding which of two plausible statutory

constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *see also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) ("It is a cardinal principle of statutory interpretation . . . that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.") (internal citation and quotation marks omitted).

As explained below, interpreting the NRVA to preempt Proposition 200's requirement of evidence of citizenship would raise a "serious doubt" as to the constitutionality of the NRVA so applied, because the Constitution reserves to the States the exclusive power to determine the qualifications for voters in federal elections. That problem can be avoided, however, by interpreting the NRVA as not preempting Proposition 200's proof-of-citizenship requirement for applicants using the Federal Form. That construction is much more than "fairly possible," because Arizona can "accept and use" the Federal Form as required by § 1973gg-4(a)(1) and still require voter registration applicants to provide evidence of citizenship. As Chief Judge Kozinski recognized below, the statutory language is "readily susceptible" to this broader interpretation. (Pet. App. 89c.). Adopting this construction will avoid a possible collision between the NVRA and the Constitution.

A. If the NVRA Is Construed to Preempt

Proposition 200's Evidence-of-Citizenship Requirement, the Construction Raises Serious Question Concerning the Constitutionality of the NVRA Because Such a Construction Intrudes upon the States' Exclusive Power to Define and Enforce Voter Qualifications in Federal Elections.

1. The Voter Qualifications Clauses assign to the States the exclusive power to define and enforce voter qualifications in federal elections.

The Constitution expressly assigns to the States the exclusive power to define and enforce the qualifications to vote in federal elections. *See* U.S. Const. art. I, § 2., cl. 1 ("the Electors [for U.S. House elections] in each State shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature"); U.S. Const., amendment XVII ("The electors [for U.S. Senate elections] in each state shall have the qualifications requisite for electors of the most numerous branch of the State legislature."); U.S. Const., art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled to in the Congress[.]").[11]

Under the foregoing provisions (collectively, the

[11] A state legislature's power to "appoint" presidential electors must necessarily incorporate the authority to set qualifications of voters if popular election is chosen as the mode of appointment.

Voter Qualifications Clauses"), the qualifications for voting in federal elections are those "which may be established by the State itself" and are not subject to the "occasional regulation of the Congress." *The Federalist No. 52*, at 354 (James Madison) (J. Cooke ed. 1961). "[P]rescribing qualifications" for voters in federal elections "forms no part of the power . . . conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60*, at 408-09 (Alexander Hamilton) (emphasis in the original). Therefore, "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Gray v. Sanders*, 372 U.S. 368, 379 (1963); s*ee also Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45, 51 (1959); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 806 (1995) (noting Madison's contrast in the *Federalist No. 52* of "state control over the qualifications of electors with the lack of state control over the qualifications of the elected").

This Court explained that "Hamilton expressly distinguished the broad power to set qualifications *from the limited authority under the Elections Clause*." *U.S. Term Limits,* 514 U.S. at 833 (emphasis added). The Elections Clause's power to regulate the "manner" of elections has a limited "procedural focus" that "'only'" allows the States—and Congress if it chooses to exercise that authority—"'to determine *how* [voters] shall elect—whether by ballot, or by vote, or any other way.'" *Id.* (quoting 4 Elliot's Debates 71 (Steele statement at North Carolina ratifying convention) (emphasis in original)). The Elections Clause, then, is

a "grant of authority to issue procedural regulations, and not a source of power to . . . *evade important constitutional restraints*." *Id.* at 833-34 (emphasis added).

Just as the Elections Clause did not authorize Arkansas in *U.S. Term Limits*, 514 U.S. at 828-36, to evade the restraints of the Constitution by establishing *member* qualifications beyond those established in the Constitution, the same Elections Clause power does not authorize Congress here to evade the restraints of the Voter Qualifications Clauses, which reserve to the States the power to set *voter* qualifications in federal elections. *See ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (upholding Congress's power under the Elections Clause to enact the general voter registration provisions of the NVRA, but suggesting that if the State could show that the NVRA made "it impossible for the state to enforce its voter qualifications . . . we might have a different case") (Posner, J.). Here, if the NVRA precludes Arizona from requiring registrants to show satisfactory evidence of citizenship, the NVRA intrudes on Arizona's determination that only citizens are qualified to vote.

Finally, this Court's highly fractured decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), provides no support for the proposition that the Elections Clause authorizes Congress to prevent Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections. In *Mitchell*, the Court considered various States' challenges to Congress's power to, *inter alia*, set a minimum voting age of eighteen in all federal elections.

In three separate opinions, none of which commanded a majority, five Justices concluded (for different reasons) that Congress had the power to set a minimum voting age in federal elections. Three Justices reasoned that such authority resided in Congress's power to enforce the Fourteenth Amendment and did not discuss the Elections Clause. *See Mitchell*, 400 U.S. at 229-281 (joint opinion of Brennan, White, and Marshall, J.J.). Justice Douglas, writing separately, agreed that such authority resided in the Fourteenth Amendment, *id.* at 135-44 (opinion of Douglas, J.), but expressly rejected the contention that the Elections Clause gave Congress such power. *See id.* at 143 (acknowledging that the Elections Clause gives "Congress only the power to regulate the 'Manner of holding Elections,' not the power to fix qualifications for voting in Elections"). Justice Black, writing separately, concluded that the Elections Clause gave Congress the authority to regulate voting qualifications, *see id.* at 117, 118-124 (opinion of Black, J.), but expressly rejected the Fourteenth Amendment as a source of such authority, *see id.* at 125-31.

Four Justices dissented from the Court's judgment upholding Congress's power to set a minimum voting age in federal elections, reasoning in two separate opinions that neither the Elections Clause nor the Fourteenth Amendment so authorized Congress to establish voter qualifications in federal elections, as the Voter Qualifications Clauses assign this authority to the States exclusively. *See id.* at 118, 152-219 (opinion of Harlan, J.); *id.* at 293-96 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.).

In expressly rejecting the Elections Clause as a source of congressional authority to regulate voter qualifications in federal elections, the four dissenters, as noted above, were joined by Justice Douglas. And in expressly rejecting the Fourteenth Amendment as a source of such authority, the four dissenters, as noted above, were joined by Justice Black.

Hence, the significance of *Mitchell* for Elections Clause purposes is that a *majority* of five Justices expressly concluded that the Elections Clause does not authorize Congress to regulate qualifications for voting in federal elections, and only Justice Black found such authority. Three Justices (Brennan, White, and Marshall) also implicitly rejected the Elections Clause as a source for such authority by declining to join Justice Black's separate opinion.

In sum, as Alexander Hamilton recognized in the *Federalist* and this Court confirmed in *U.S. Term Limits*, the Elections Clause has a limited "procedural focus" that does not extend to setting qualifications of voters or members of Congress. This Court's decision in *Mitchell* is consistent with that conclusion, as five Justices expressly rejected the Elections Clause as a source of authority to regulate voter qualifications in federal elections.[12] As such, there is a persuasive

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[12] In Arizona's application to Justice Kennedy for a stay of mandate, Petitioners stated that "[t]here is, of course, no dispute that the Elections Clause permits Congress to alter state laws respecting federal elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Black, J., announcing the judgment of the Court) (age of voters in federal elections)." As discussed above, *Mitchell*'s judgment only applies to Congress's power to set a voting age and (Continued)

argument that the Elections Clause does not authorize the NVRA to preclude Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections. Therefore, to avoid the constitutional question of whether the Elections Clause authorized Congress to enact the NVRA's provision that precludes Arizona from enforcing its evidence-of-citizenship qualification for voting in federal elections, this Court should adopt Arizona's interpretation of term "accept and use" the Federal Form in the NVRA.[13]

B. The Fourteenth Amendment Does Not Authorize Congress to Prohibit Proposition 200's Non-Discriminatory Requirement of Evidence of Citizenship.

(Continued).

the highly fractured rationale of that decision does not support the Elections Clause as a source of authority to for Congress to preclude Arizona from enforcing its voter qualification of citizenship by requiring applicants to verify claims of citizenship. To the extent that Petitioner's stay application overstated *Mitchell*, Petitioners withdraw it.

[13] Similarly, this Court need not address whether the NVRA's general voter registration provisions exceed Congress's authority under the Elections Clause. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (stating in dicta that the Elections Clause "embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved"). In any event, *Smiley* did not go so far as to include voter *qualifications* among the subjects within the Clause's scope.

In the absence of the Elections Clause as a source of constitutional authority for the NVRA to prevent Arizona from requiring evidence of citizenship as a qualification for voting, the only other possible source of such authority is Congress's power under Section Five of the Fourteenth Amendment to "enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. As discussed above, a majority of the Court in *Mitchell* expressly rejected this authority as a source of power to set a minimum national age in federal elections.

Moreover, the rationale of the four Justices in *Mitchell* who found that the Fourteenth Amendment authorized Congress to set a minimum voting age in federal elections does not support the conclusion that such a power extends to prohibiting Arizona from requiring evidence of citizenship in federal elections. In *Mitchell*, Justices Douglas, Brennan, White, and Marshall all concluded that Congress could reasonably determine that persons in the eighteen-to-twenty-one-age group were mature enough to vote, and that Congress was within its authority to act to protect their fundamental right to vote. *See* 400 U.S. at 142-44 (opinion of Douglas, J.); 400 U.S. at 240 (joint opinion of Brennan, White, and Marshall, J.J.). Arizona has a vital state interest in protecting the integrity of its elections by requiring voter registrants to provide evidence of citizenship, and Congress made no findings that requiring such evidence has any discriminatory effect. Arizona does not violate the Equal Protection Clause by denying non-citizens the right to vote in federal elections. The district court

specifically found that there was no Fourteenth Amendment violation here.

In any event, this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) forecloses the Fourteenth Amendment as a source of authority for the NVRA to preempt Proposition 200's evidence-of-citizenship requirement. In *Flores*, this Court explained that Congress's power under the Fourteenth Amendment "extends only to enforcing the provisions" of that Amendment, a power which is "remedial." *Id.* at 519. This power does not include the power to determine "what constitutes a constitutional violation." *Id.* There must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

Denying non-citizens the right to vote inflicts no cognizable constitutional injury. Citizenship is a legitimate voter qualification, and requiring evidence of citizenship is a reasonable means of enforcing that qualification. If the NVRA preempts Proposition 200's evidence-of-citizenship requirement, "it is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Flores*, 521 U.S. at 532. Instead, so construed, the NRVA attempts "a substantive change in constitutional protections" by denying Arizona the ability to enforce its legitimate voter qualification of citizenship. *Id.* As such, the NVRA exceeds Congress's enforcement power under the Fourteenth Amendment to the extent that it is read to preempt Proposition 200.

In sum, this Court should find that the NVRA does

not preempt Proposition 200's evidence-of-citizenship requirement to avoid the serious constitutional question of whether, as so applied, it intrudes upon the States' power to under the Voter Qualifications Clauses to define and enforce voter qualifications in federal elections.

CONCLUSION

For the forgoing reasons, the State requests that the Court reverse the Ninth Circuit's decision and remand for proceedings consistent with its Opinion.

Respectfully submitted,

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