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.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE, and 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,

Respondents.

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

BRIEF FOR GONZALEZ RESPONDENTS

THOMAS A. SAENZ
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

DANIEL R. ORTEGA, JR.
ORTEGA LAW FIRM
361 E. Coronado Rd.
Phoenix, AZ 85004

KARL J. SANDSTROM
PERKINS COIE
607 14th St. NW
Washington, DC 20005

Counsel for Gonzalez Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the National Voter Registration Act's mail voter registration provisions preempt an Arizona law requiring rejection of federal mail voter registration forms that are unaccompanied by additional state-mandated documentation.

PARTIES TO THE PROCEEDING

Gonzalez Respondents, who were Plaintiffs-Appellants in the lead case below, are: Jesus M. Gonzalez; Bernie Abeytia; Debbie Lopez; Georgia Morrison Flores; Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Arizona Hispanic Community Forum; Common Cause; and Project Vote.

ITCA Respondents, who were Plaintiffs-Appellants in a later-filed, consolidated case below, are: The Inter-Tribal Council of Arizona; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and Hopi Tribe.

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 as La Paz County 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; Sadie Jo Tomerlin, in her

PARTIES TO THE PROCEEDING – Continued

official capacity as Gila County Recorder; Linda Eastlick, 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 Murray, 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; and Sue Reynolds, in her official capacity as Yuma County Election Director.

Other parties before the Ninth Circuit in their official capacities were Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Laurette Justman, Navajo County Recorder; and Kelly Dastrup, former Navajo County Election Director.

CORPORATE DISCLOSURE STATEMENT

Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; and Project Vote are incorporated as nonpartisan, nonprofit 501c(3) corporations. Common Cause is incorporated as a nonpartisan, nonprofit 501c(4) corporation. Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Common Cause; and Project Vote have no parent corporation or publicly held company owning 10% or more of the corporation's stock.

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RELEVANT STATUTES

The National Voter Registration Act, 42 U.S.C. §1973gg, provides in relevant part:

Findings and purposes

(a) Findings

The Congress finds that –

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this subchapter are –

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this sub chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

Section 1973gg-2 of the National Voter Registration Act, 42 U.S.C. §1973gg-2, provides in relevant part:

National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office –

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person –

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

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.

(2) In addition to accepting and using the form described in paragraph (1), a State may 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 elections for Federal office.

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

§1973gg-7. 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 –

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

(ii) 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

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

STATEMENT OF THE CASE

In 1993, Congress enacted the National Voter Registration Act (NVRA) to establish several uniform procedures to register to vote in federal elections "in addition to any other method of voter registration

provided for under State law[.]" 42 U.S.C. §1973gg-2(a) (1993) (amended 1996). One provision of the NVRA requires states to "accept and use" a mail voter registration form promulgated by the U.S. Election Assistance Commission ("Federal Form"). *See* App. to Br. for Gonzalez Resp'ts ("App.") 4-5. Over the last 20 years, millions of Americans across the country have registered to vote using this simple postcard form.

This case involves the voter registration provision of the Arizona Taxpayer and Citizen Protection Act ("Proposition 200"), which requires state election officials to reject voter registration applications unless they are accompanied by certain documentation identified in the statute as proof of United States citizenship. *See* Joint App. ("JA") 167-80 (ARIZ. REV. STAT. ANN. ("A.R.S.") §16-166 (2004) (amended 2010)). Voter registrants who submit the Federal Form but who do not provide the additional documentation required by Proposition 200 are rejected for voter registration.

The Ninth Circuit, sitting en banc, applied this Court's well-established test under the Elections Clause to conclude that Arizona's refusal to accept Federal Forms (unless accompanied by the documentation set out in Proposition 200) departs from the mandate that all states "accept and use" the Federal Form and is superseded by the National Voter Registration Act. Pet'r's Petition Appendix ("Pet. App.") 10c-43c.

Congressional authority to make or change federal election rules is plenary, including the authority to establish a mechanism for registration in federal

elections such as the uniform federal postcard. Because Arizona rejects properly-completed Federal Forms when they do not also satisfy additional requirements under Proposition 200, Arizona's practice conflicts with the NVRA and must yield.

I. Statutory Background

A. The National Voter Registration Act

The National Voter Registration Act of 1993 ("NVRA") establishes several national procedures for registration to vote in federal elections. The statute includes findings that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and declares a purpose of the NVRA to "establish procedures that will increase the number of eligible citizens who register to vote." 42 U.S.C. §1973gg(a), (b) (1993). Congress chose to fulfill its purposes by mandating use of a uniform mail registration application and by requiring states to establish procedures by which individuals could register to vote in federal elections when applying for a driver's license (the so-called "motor-voter" rules) or when visiting certain public agencies. §1973gg-2(a).

Under the NVRA, individuals may register to vote in federal elections by mailing a simple, universal postcard to the local election official. *See* App. 4-5. The content of the national voter registration form ("Federal Form") is set forth by Congress and the

NVRA requires all states to "accept and use" the Federal Form.[1]

The NVRA requires the U.S. Election Assistance Commission ("EAC")[2] to promulgate the Federal Form and to follow specific requirements when the agency designs the Federal Form. *See* 42 U.S.C. §1973gg-7(a) (1993) (amended 2002). The Federal Form may require only the information necessary for election officials to assess the eligibility of the applicant, "shall include a statement that specifies each eligibility requirement (including citizenship)," must contain an attestation that the applicant meets each eligibility requirement and must require the signature of the applicant under penalty of perjury. §1973gg-7(b). The Federal Form must have printed on it the voter eligibility requirements and state the "penalties provided by law for submission of a false voter

[1] The mail registration provisions of the NVRA were modeled on postcard registration programs then existing in approximately half of the states, covering well more than half of the nation's population. The NVRA provided that the Federal Form would be made widely available and could be used to register a voter anywhere. The NVRA placed particular emphasis on making the card available to organized voter registration programs. 42 U.S.C. §1973gg-4(b) (1993).

[2] The NVRA initially vested the Federal Election Commission with the authority to design the Federal Form. *See* 42 U.S.C. §1973gg-7. In 2002, Congress shifted the NVRA's federal coordination responsibilities from the Federal Election Commission to the U.S. Election Assistance Commission. *See* 42 U.S.C. §15532 (2002).

registration application." §1973gg-6 (1993) (amended 2002).

The NVRA prohibits the EAC from including on the Federal Form "any requirement for notarization or other formal authentication." §1973gg-7(b)(3).

Neither the language instructing the EAC on the contents of the Federal Form nor the provision requiring its acceptance by states permit states to require additional information with the Federal Form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the Federal Form. *See* 42 U.S.C. §1973gg-4(2). The NVRA specifically provides, "*in addition to* any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office . . . by mail application pursuant to section 1973gg-4 of this title" and "[*i*]*n addition to* accepting and using the [federal] form . . . a state may develop and use a mail voter registration form. . . ." §1973gg-2(a) (emphasis added); §1973gg-4(a)(2) (emphasis added).

1. The Federal Form

Pursuant to its authority under the NVRA, the EAC adopted regulations designing the Federal Form in a postcard format. *See* 11 C.F.R. §9428.5(b) (2009) ("The application shall consist of a 5" by 8"

application card of sufficient stock and weight to satisfy postal regulations.").

The Federal Form contains several elements: the registration form, general instructions on how to fill out the form, and state-specific instructions. App. 4-5. The state-specific instructions inform registrants which boxes on the form are required to be completed in order to be registered in that state. For example, Mississippi registrants are instructed that they need not write in the box requesting their race because election officials do not collect this information in Mississippi. App. 14. By contrast, North Carolina registrants are asked to provide their race in the box requesting their race. App. 18. As directed by Congress, the Federal Form is a complete application on the mail form; neither the Federal Form nor the state-specific instructions require registrants to provide additional documents or information that is not already requested on the application form.

The Federal Form requires each applicant to check a box at the top of the application indicating U.S. citizenship and states that if the applicant checked "No" to the citizenship question, "do not complete the form." App. 4. The Federal Form further requires the applicant to sign the bottom of the form and swear or affirm under penalty of perjury that he or she is a U.S. citizen and further that, "[i]f I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States." *Id.*

The cover of the Federal Form pamphlet states "For U.S. Citizens" and the General Instructions begin with: "If you are a U.S. citizen. . . ." App. 1, 2. The General Instructions further explain: "All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election." App. 2.

The Federal Form's application instructions open with: "Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen [and age 18]. If you answer no to either of these questions, you may not use this form to register to vote." App. 3. The Federal Form's state-specific instructions also inform Arizona registrants: "To register in Arizona you must: be a citizen of the United States. . . ." App. 7.

The NVRA's Federal Form provisions allowed registrants to overcome procedural barriers that still existed in the states when the NVRA was enacted. For example, Federal Form registrants were no longer subject to arbitrary rejection based on their answers to questions such as one posed to North Carolina college students regarding whether they had "abandoned" their parents' homes or satisfaction of a requirement in Arkansas that registrants sign the state form in four different places with the exact same signature. *Voter Registration: Hearing on H.R. 3023, H.R. 3950, and H.R. 5121 Before the Subcomm. on Elections of the Comm. on H. Admin.*, 100th Cong.

at 244 (1988) (prepared statement of William T. Robinson, Chairman of the Board, Churches' Committee for Voter Registration/Education); *id.* at 727 (testimony of Johnnie Pugh).

Federal Form registrants were also able to overcome racially discriminatory practices that lingered following enactment of the Voting Rights Act of 1965, including the refusal of local jurisdictions to put satellite registration facilities in minority neighborhoods, imposition of excessive identification requirements for minority voter registrants and additional scrutiny of U.S. citizenship of Latino and Asian American registrants. *Id.* at 35 (testimony of Dr. Arthur S. Flemming, Chairman, Citizens Commission on Civil Rights).

In the 2008 presidential election alone, 28 million citizens used the Federal Form to register to vote by mail, in person, or as part of a voter registration drive.[3]

2. The NVRA's Safeguards Against Fraud

The mail registration provisions of the NVRA have a number of safeguards to prevent voter fraud,

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[3] *See* U.S. ELECTION ASSISTANCE COMMISSION, 2008 ELECTION ADMINISTRATION AND VOTING SURVEY ("EAC Report 2008"), *available at* www.eac.gov/research/election_administration_and_voting_survey.aspx.

including an attestation clause on the Federal Form that sets out the requirements for voter eligibility, requiring registrants to sign the Federal Form under penalty of perjury and imposing criminal penalties on persons who knowingly and willfully engage in fraudulent registration practices. In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. Finally, the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable. *See* Pet. App. 41c-42c n.28.

Congress considered, and rejected, allowing states to require additional documentation of U.S. citizenship with the Federal Form. Members in both Houses proposed amendments that would expressly allow states to require that an individual provide additional documentation of his or her citizenship before being allowed to register. But those efforts were defeated in the House and in the Senate precisely *because* they made registration too cumbersome and thus undermined the central purpose of the NVRA. *See* H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49 (rejecting an amendment to the NVRA which would have provided that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration" because it was not "consistent with the purposes

of [the NVRA]" and "could effectively eliminate or seriously interfere with the mail registration program of the Act.") (Conf. Rep.).

B. Arizona's Proposition 200

Arizona's Proposition 200 is a voter initiative measure adopted in 2004 in order to "discourage illegal immigration." JA 168 (A.R.S. §16-166). Proposition 200 states that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship."[4] JA 167. The official voter information pamphlet accompanying Proposition 200 included statements in support of the initiative explaining: "The Initiative will prevent non-citizens from being able to register to vote in Arizona", "ensuring that illegal aliens who are not entitled to vote or obtain certain benefits

[4] In addition to the voter registration provision, Proposition 200 requires state and local agencies to verify the immigration status of applicants for public benefits and requires voters to show identification at the polls on Election Day. JA 176, 178-80. The public benefits provisions of Proposition 200 barred undocumented immigrants from programs for which they were already ineligible under federal law. *See* Letter from Terry Goddard, Arizona Attorney General, to Anthony D. Rodgers, Director, Arizona Health Care Cost Containment System (Nov. 12, 2004), *available at* www.azag.gov/sites/default/files/sites/all/docs/Opinions/2004/I04-010.pdf.

cannot subvert the law to access them", "For too long, our porous borders have allowed millions of immigrants to illegally enter the United States, circumventing our generous immigration laws and undermining our sovereignty. . . ." Tr. Ex. 1 at 6, 7, Record 627, 627.[5]

Proposition 200's registration provision provides that "the county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship" and sets out a limited number of documents that registrants must produce in order to prove their citizenship.[6] JA 173-75 (A.R.S. §16-166(F) (2004), *invalidated by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012)); *see also* Tr. Ex. 4 at 43, Record 650, 650 ("The County Recorder must reject any registration that is not accompanied by satisfactory evidence of United States citizenship."). Voters already on the rolls are "grandfathered in" and do not have to provide Proposition 200 documentation unless they move to a different county in Arizona and

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[5] In *Calik v. Kongable*, the Arizona Supreme Court held that the language in a contested proposition's publicity pamphlet is helpful in determining the voters' intent in enacting the proposition and that "the electorate was entitled to rely on this description of the intent or effect of the initiative proposal." 990 P.2d 1055, 1059 (Ariz. 1999).

[6] Several documents listed in Proposition 200 as "satisfactory evidence of citizenship" either do not exist or do not prove U.S. citizenship, thus further narrowing the ability of registrants to comply with the registration provision. A.R.S. §16-166(F). These include Bureau of Indian Affairs cards, tribal treaty cards, the number of the certificate of naturalization, and an out of state driver's license. *See, e.g.*, JA 249-50, 260.

re-register to vote. JA 175 (A.R.S. §16-166(G) (2004 (amended 2010)).

Under Proposition 200, Arizona counties reject all voter registration forms that are not also accompanied by the state-required documentation, including Federal Forms under the NVRA and federal voter registration forms promulgated by the U.S. Department of Defense under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[7] *See* JA 250 ("Without this proof [of citizenship], a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship." (citation omitted)).[8]

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[7] The NVRA's provisions related to the Federal Form are similar to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. §§1973ff – 1973ff-7 (1986), which permits men and women serving in the military and U.S. citizens living overseas to register to vote with a postcard application. *See* 42 U.S.C. §1973ff-1(a)(4) ("Each State shall . . . use the official post card form (prescribed under section 1973ff of this title) for simultaneous voter registration application and absentee ballot application"). Since implementing Proposition 200, Arizona has rejected UOCAVA forms from military and overseas applicants when they are not accompanied by the documentation required by Proposition 200. The rejected UOCAVA federal registration applications in the court record are primarily from military servicemen and women, some serving stateside and others serving abroad at the time their forms were rejected for voter registration. *See* Tr. Ex. 896, Record 336, 340.

[8] Although required to do so, the Arizona Secretary of State does not "make the [Federal Form] available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter

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Registrants rejected under Proposition 200 are required to submit a new voter registration application accompanied by documentation that satisfies the Proposition 200 requirements. *See* Tr. Ex. 4 at 47, Record 650, 650 (if a registrant does not provide proof of citizenship, "the County Recorder shall send the registrant correspondence stating that the registration form has been rejected and the reason why along with a new voter registration form."); *id.* at 285 (providing uniform correspondence to rejected registrants: "Let this letter serve as notification that we have not yet received documentation of citizenship for purposes of voter registration. Be advised that you ***are not*** a registered voter in <County Name> County until we receive a new registration form containing one of the following. . . ."). If the registrant complies with Proposition 200 he is added to the rolls as of the date he submitted a new application, not the original date. *Id.* at 54.

The Arizona voter registration form does not contain all of the safeguards present in the Federal Form to ensure that non-citizens don't register to vote. In contrast to the Federal Form, *see supra* at A.2, Arizona's registration form includes instructions on the Proposition 200 requirements but no changes

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registration programs." 42 U.S.C. §1973gg-4(b). Instead, the Arizona Secretary of State keeps a stack of Federal Forms behind the counter in his office in downtown Phoenix and only provides a Federal Form to individuals who come to the office and request one. Tr. Ex. 916 at 147:13-150:5, Record 627, 628.

to the registration form itself to include additional affirmations of citizenship. App. 24-27. The Arizona form lacks a checkbox at the top of the form for the applicant to indicate U.S. citizenship. App. 24. Instead, Arizona places the citizenship checkbox at the bottom of the form. *Id.* Arizona's form requires the applicant to swear to the veracity of the information on the form but does not again state the requirement of U.S. citizenship near the signature line. *Id.* Finally, the Arizona form does not state the penalties for providing false information in general and the specific consequences for non-citizens who claim U.S. citizenship on the voter registration form. *Id.*

II. Factual Background

Following enactment of Proposition 200, over 31,000 individuals were rejected for voter registration in Arizona. JA 263. Less than one-third of the rejected registrants subsequently successfully registered to vote. JA 264. Reflecting the demographic composition of Arizona voter registrants overall, more than 80% of the rejected voters were not Latino. JA 263.

Voter registration through community-based drives in Maricopa County, Arizona's largest county, plummeted 44%. Tr. Ex. 966, Record 741, 741. The proportion of all voter registrations in Maricopa County attributable to community-based drives decreased from 24% in 2004 to 7% in 2005, 5% in 2006 and 6% in 2007. *Id.* at 8-11. Throughout Arizona,

voter registrations attributable to community drives has remained low – 5% in 2009-2010 and 11% in 2007-2008.[9]

Individuals whose voter registration forms are rejected for failure to provide Proposition 200 documentation include Arizona residents who have a driver's license issued before October 1, 1996 (such as those over age 33), who do not have a current Arizona driver's license (including students, new state residents and people with disabilities that do not permit them to drive), or who are naturalized citizens coded "Foreigner" in the state's motor vehicles database.[10]

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[9] *See* U.S. ELECTION ASSISTANCE COMMISSION, "THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009-2010: A REPORT TO THE 112TH CONGRESS JUNE 30, 2011," *available at* www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf; U.S. ELECTION ASSISTANCE COMMISSION, "THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2007-2008: A REPORT TO THE 111TH CONGRESS JUNE 30, 2009," *available at* www.eac.gov/assets/1/AssetManager/The%20Impact%20of%20The%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202007-2008.pdf.

[10] Arizona contends that compliance with Proposition 200's documentation requirement is easily accomplished by writing the number of the registrant's driver's license on the form. State Pet'rs' Br. on the Merits at 19 ("[a]pproximately ninety percent of *voting-age* Arizonans possess driver's licenses") (emphasis added to highlight failure to consider citizenship). However, Arizona makes no effort to show how many Arizona voting-age citizens can use their driver's licenses to register to vote because their driver's licenses were issued after October 1996 and are not coded "Foreigner" in the state's database. Similarly, Arizona makes no effort to show how many Arizonans retain access to

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The Pima County Recorder testified that her mother, who was born in New Mexico, could not satisfy the documentation requirements to register to vote under Proposition 200. Tr. Ex. 930 at 90:15-91:3, Record 627, 628.

Proposition 200 requires rejected voter registrants to register again in person or make photocopies of citizenship documents such as U.S. birth certificates and passports, enclose the documents in an envelope with a new registration application, attach proper postage and mail the envelope to the county recorder.

A. Treatment of Naturalized Citizens

Proposition 200 singles out naturalized citizens for different treatment, often immediately rejecting them for voter registration and forcing them to apply a second time. Proposition 200 creates an automatic "rejection loop" for naturalized citizens by providing that applicants can register to vote by writing the "number of the certificate of naturalization" on the registration form which must then be verified by the County Recorder with the federal government. JA 174-75 (A.R.S. §16-166(F)). Because the number of the

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their Alien Registration Numbers or how many Arizonans possess tribal ID cards so that these numbers that can be written on the registration form in satisfaction of Proposition 200. The fact that tens of thousands of Arizona registrants were rejected after the law went into effect demonstrates that many registrants' driver's licenses (or other identifying numbers) alone do not satisfy Proposition 200 requirements.

certificate of naturalization cannot be verified with the federal government, every naturalized citizen who writes his naturalization certificate number on the registration form is rejected and forced to reapply.[11] Similarly, most naturalized citizens are immediately rejected for voter registration when they provide their driver's license numbers on their voter registration applications because, unbeknownst to them, the Arizona motor vehicles database applies "Type F-Foreigner" flags to the driver's license records of individuals who initially obtained their licenses when they were legal permanent resident immigrants (or other non-citizens lawfully residing in the U.S.). The "Foreigner" flag is not visible on the driver's license itself and thus there is no way for the license holder to know that he is coded as a "Foreigner" in the database, or to know that he may update his motor vehicle record after naturalization. Although Arizona election officials are aware that naturalized citizens who register to vote are likely to have vestigial "Foreigner" flags in their driver's license records, election officials still automatically reject and request a new voter registration application from all registrants

[11] Under Proposition 200, Arizona requested on its voter registration form that applicants provide their "number of the certificate of naturalization." JA 174-75 (A.R.S. §16-166(F)). During this litigation, Arizona conceded that the number of the certificate of naturalization could not be verified with the federal government and amended its voter registration form to request that applicants provide their former Alien Registration Numbers.

whose driver's license shows a "Foreigner" flag in the database. *See* JA 262.[12]

Because naturalization certificates state on their face that it is a federal offense to photocopy the certificate, naturalized citizens who wish to avoid committing a crime by photocopying the certificate are forced to register in person at the county recorder's office with their naturalization certificates. Tr. Ex. 961, Record 625, 625; *see* JA 174 (A.R.S. §16-166(F)) (providing that a registrant can mail the county recorder a "*photocopy*" of a U.S. birth certificate or passport but requiring a "*presentation* to the county recorder of the applicant's United States naturalization documents." (emphasis added)).

B. The Federal Form Has Not Led to Non-Citizen Voter Registration in Arizona

There is no evidence that a non-citizen has registered to vote using the Federal Form in Arizona. With respect to non-citizen registration in general, contrary to the assertion by Petitioners ("Arizona"), the district court did not find that voter fraud was a

[12] Respondent Jesus Gonzalez was twice rejected for voter registration under Proposition 200. On the first occasion, Mr. Gonzalez applied to register to vote on the day he became a U.S. citizen and provided, as instructed by the Arizona registration form, the number of his certificate of naturalization. Following the rejection of his registration application, Mr. Gonzalez attempted to register to vote using his driver's license number and was informed that his driver's license number could not be accepted under Proposition 200. Record 224-25 (Tr. Transcript).

significant problem. State Pet'rs' Br. on the Merits at 21. On the contrary, following trial the district court found that Arizona had produced only some "instances" in which non-citizens had registered to vote and even fewer in which non-citizens had cast a ballot. JA 294. Most important, the district court cited evidence that the small number of non-citizens who had registered to vote had done so mistakenly and without understanding that they were not eligible. JA 267-68.

In all, the district court found that Arizona had provided evidence that ten non-citizens were proven to have registered to vote (four of whom had voted) in 2005 and nine non-citizens were proven to have registered to vote (five of whom had voted) in 2007. *Id.* The evidence amounts to nine voters having cast ballots out of 2,734,108 registered voters in Arizona during this same period.[13]

The Ninth Circuit concluded, when denying the stay of its mandate, that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud." *Gonzalez v. Arizona*, No. 08-17094, Dkt. No. 232 at 8 (9th Cir. June 7, 2012) (order denying stay) (citing various provisions of 42 U.S.C. §1973gg (1993)).

The EAC is statutorily required to report on the impact of the NVRA every two years and, in the two

[13] ARIZONA SECRETARY OF STATE, "STATE OF ARIZONA REGISTRATION REPORT" (June 1, 2008), *available at* www.azsos.gov/election/voterreg/2008-06-01.pdf.

decades since enactment of the NVRA, it has not identified any election-related fraud associated with the Federal Form. *See, e.g.,* U.S. ELECTION ASSISTANCE COMMISSION, THE IMPACT OF THE NATIONAL VOTER REGISTRATION ACT OF 1993 ON THE ADMINISTRATION OF ELECTIONS FOR FEDERAL OFFICE 2009-2010, A REPORT TO THE 112TH CONGRESS, JUNE 30, 2011 ("EAC Report 2009-2010"), *available at* www.eac.gov/registration-data/.[14]

Although Proposition 200 states that its purpose is to combat undocumented immigration (JA 167-68), Arizona can identify no instances in which undocumented immigrants registered or voted in Arizona. Much to the contrary, and as the Arizona Secretary of State's office wrote, the "strong desire to remain in the United States and fear of deportation outweigh [non-citizen's] desire to deliberately register to vote before obtaining citizenship. Those who are in the county illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation." JA 166.

The scattered instances of non-citizen voter registration fail to establish any pattern of actual voter fraud in Arizona, much less that the use of the

[14] Of the prospective jurors who claimed not to be citizens (thereby avoiding jury duty) and had their registrations canceled, Arizona does not know whether any of them were actually non-citizens or if they voted. JA 267. Election officials in Arizona's largest county testified that they believed some U.S. citizens claimed not to be citizens in order to avoid jury duty. Tr. Ex. 936 at 91:4-9, Record 627, 628; Tr. Ex. 935 at 7:20-25, 8:1-14, Record 627, 628.

Federal Form has any relationship to voter fraud in the state.[15]

By contrast, the number of registrants whose Federal Forms were rejected under Proposition 200 is very real. The record in the case demonstrates that the rejected Federal Form registrants were Democrats and Republicans in equal numbers, almost one-half were under the age of 30, and a majority of those who indicated a race said they were white. Tr. Ex. 896, Record 336, 340.

C. The EAC Declines to Change the Federal Form Instructions to Reflect Proposition 200's Documentation Requirements

As part of its obligation to confer with the states on the design of the Federal Form, in March 2006, the EAC considered a request by Arizona that the Federal Form state-specific instructions be amended to inform Arizona registrants that acceptance of their Federal Forms would be conditioned on satisfaction of the requirements of Proposition 200.

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[15] Arizona tries to buttress its claims of non-citizen voter fraud by describing unrelated instances in which voter registrations were rejected for incompleteness, illegibility and mistakes in the address. However, Arizona's county recorders testified that when registration forms are missing names, addresses, and signatures they cannot be processed and also that such forms are immediately (and properly) rejected. *Compare* State Pet'rs' Br. on the Merits at 16 *with* Tr. Ex. 937 at 11:9-17, Record 627, 628.

The EAC declined Arizona's request, explaining "the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4)." JA 181-82.

The decision of the EAC was consistent with the precedent it established one year earlier when it denied, with the unanimous support of its commissioners, a request by Florida to amend the Federal Form state-specific instructions to inform registrants that their Federal Forms would be conditioned on their furnishing additional information regarding mental capacity.[16] The EAC stated: "Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements." Letter from Gavin Gilmour, EAC Associate General Counsel, to Dawn Roberts, Director of the Division of Elections (Florida) (July 26, 2005).

[16] *See* U.S. Election Assistance Commission, Position Statement: Commissioner Ray Martinez III, On The Matter Regarding EAC Tally Vote Dated July 6, 2006: "Arizona's Request For Accommodation" (July 10, 2006), *available at* www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf.

The EAC explained:

> Under Florida's policy, State officials would take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their Federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither "accepted" nor "used" by the State. The language of the NVRA mandates that the Federal form, without supplementation, be accepted and used by States to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal form is subject only to HAVA's verification mandate. 42 U.S.C. §15483.

Id.

III. Procedural History

Gonzalez Respondents filed this action in May 2006 challenging the voter registration and other provisions of Proposition 200.[17] The district court

[17] While *Gonzalez* was pending in the district court, a second group of parties filed a similar complaint against the State of Arizona and successfully sought consolidation into *Gonzalez* (ITCA parties).

denied Gonzalez Respondents a preliminary injunction on their NVRA claim. Pet. App. 1f-3f. On appeal, the Ninth Circuit limited its analysis to one provision of the NVRA (allowing states to promulgate registration forms for federal elections in addition to accepting the Federal Form), leading it to conclude that the language of the NVRA allowed Arizona to impose its state requirements on top of the Federal Form. Pet. App. 17d (*Gonzalez I*). The case returned to the district court on the merits, and the district court granted summary judgment to Arizona on the NVRA issue based on the Ninth Circuit's analysis. Pet. App. 1e-10e.

After trial on the remaining issues, a new panel of the Ninth Circuit took up the entire case and found the earlier panel decision regarding the NVRA to be "clear error." Pet. App. 53a-54a (*Gonzalez II*). The *Gonzalez II* panel held that Proposition 200's additional documentation requirements are preempted by the NVRA when registrants use the Federal Form. Pet. App. 61a.

The Ninth Circuit, sitting en banc, concluded that Proposition 200's additional documentation requirements are superseded by the NVRA. Pet. App. 42c-43c (*Gonzalez III*). The en banc decision was not closely divided; eight of the ten judges on the panel found that the NVRA provision requiring states to "accept and use" the Federal Form superseded Proposition 200's rejection of Federal Forms when the forms did not meet additional state requirements.

The Ninth Circuit examined the NVRA and Proposition 200 and concluded that the two statutes addressed the same subject – voter registration by mail for federal elections – and that they were in conflict. Pet. App. 19c-20c. The Ninth Circuit approached the preemption question by considering "the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures." Pet. App. 29c. However, because under Proposition 200 county recorders reject every Federal Form that does not also satisfy the additional documentation requirements, the Ninth Circuit concluded that "under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." Pet. App. 31c. The Ninth Circuit concluded that Proposition 200 further conflicted with the NVRA by creating a conflict between state and federal registration procedures and by undermining the NVRA's goal of streamlining the registration process. Pet. App. 36c.

The Ninth Circuit concluded that "the NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" Pet. App. 59c (emphasis added).

Chief Judge Kozinski concurred and joined the majority in concluding the "best construction of the statute" was the preemptive reading of the NVRA.

Pet. App. 95c. Chief Judge Kozinski did not adopt the novel preemption test urged by Arizona but applied the traditional Elections Clause analysis. *Id.* He further explored whether the NVRA's requirement that Arizona "accept and use" the Federal Form should be construed to mean that states cannot impose additional requirements on registrants who submit the Federal Form. He reviewed the text of the NVRA, which he found "readily susceptible to the interpretation of the majority" and noted that requiring registrants to meet two sets of proof requirements would be "redundant" and "secondary" and would "sacrific[e] national uniformity." Pet. App. 89c.

Following the en banc decision, Arizona asked the Ninth Circuit to stay its mandate. The Ninth Circuit declined, concluding that Arizona failed to demonstrate the necessary irreparable harm. *Gonzalez v. Arizona*, No. 08-17094, Dkt. No. 232 at 7, 8 (9th Cir. June 7, 2012) (order denying stay). On June 28, 2012, this Court denied Arizona's application for a stay of the Ninth Circuit's mandate. *Arizona v. Abeytia*, No. 11-1189 (U.S. June 28, 2012) (order denying stay). This Court granted Arizona's petition for certiorari on October 15, 2012.

Following issuance of the Ninth Circuit's mandate, the district court ordered that Arizona "shall not reject Federal Forms from those who seek to register

to vote for the reason that they have not provided proof of citizenship under [Proposition 200]." JA 382.[18]

SUMMARY OF ARGUMENT

This is a case in which the plain language of the federal statute preempts a state statute that provides otherwise. Although Arizona portrays this dispute as a David and Goliath battle between a state and an overbearing federal government, in fact the issue here is between US. citizens, qualified and interested in voting who seek to follow a duly established federal procedure for registration to vote in federal elections and a state that refuses to permit those citizens to register and vote until they satisfy additional procedural requirements that exist entirely outside and at odds with the federal scheme.

[18] The assertion in the Brief of the County Petitioners that, following the district court's order, Arizona election officials adopted "a dual voter registration process" is false. Br. of the Twenty-Six Cnty. Recorders and Cnty. Election Dirs. Pet'rs at 36. Under the district court's order, Arizona maintains a unified voter registration process by accepting and using both state and Federal Forms for voter registration. All of Arizona's registered voters are entitled to vote in state and federal elections. In the brief, County Petitioners describe a bifurcated voter identification process in which election officials require voters who registered using the Federal Form to show additional voter identification at the polls on Election Day. *Id.* at 36-37. The district court has not yet had the opportunity to review whether this practice is consistent with its order of August 2012.

When Arizona election officials reject every Federal Form that is not accompanied by the documentation required by Proposition 200, they do not "accept and use [the Federal Form] for the registration of voters in elections for Federal office" as required by the NVRA. 42 U.S.C. §1973gg-4(a). The meaning of Proposition 200 is equally plain: "the county recorder shall reject any application for registration" that does not meet Proposition 200's requirements. JA 173 (A.R.S. §16-166(F)). None of Arizona's contorted interpretations of "accept and use," or mischaracterizations of its own registration procedures change the fact that Arizona election officials must under state directive reject as invalid any and all Federal Forms that do not satisfy Proposition 200's documentation requirements and that rejected registrants must complete a new registration application in order to be registered to vote. In enacting the NVRA, Congress did not mean the term "accept and use" to mean reject and refuse every form that does not satisfy separate and independent state requirements. Had Congress so intended, the "accept and use" would be meaningless and superfluous. No previous court in this case has accepted Arizona's eviscerating definition of "accept and use." On the contrary, Arizona's definition was rejected by the district court as well as the Ninth Circuit panel and en banc court.

Because congressional authority to regulate voter registration procedures in federal elections is well-established, "there is no colorable argument that [the

NVRA] goes beyond the ample limits of the Elections Clause's grant of authority to Congress." *Foster v. Love*, 522 U.S. 67, 71 (1997). Applying its broad powers under the Elections Clause, prior to and following its enactment of the NVRA, Congress has adopted laws regulating voter registration procedures for federal elections, preempting – without significant controversy – state laws in the process.

The power to regulate its own federal elections has always resided with the federal government; the Constitution conditionally grants states the authority to enact laws regulating federal elections unless and until Congress chooses to change or override those state laws by enacting new federal laws. When Congress enacts rules regarding federal elections that are different from the states, "the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879).

Here Arizona seeks to enforce a law that addresses the same subject as the NVRA – the procedure for registering to vote by mail in federal elections using the Federal Form. The two laws are straightforward: the NVRA requires state election officials to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (42 U.S.C. §1973gg-4(a)), and Proposition 200 requires election officials to "reject" those same Federal Forms when they fail to satisfy additional state requirements, JA 173 (A.R.S. §16-166(F)). The inevitable conclusion of this conflict is clear-cut and

well-established: Proposition 200 is void to the extent that it requires election officials to reject valid Federal Forms that the NVRA requires to be accepted.

To conclude otherwise requires construing the NVRA's plain language out of existence or departing dramatically from the established interpretation of the Elections Clause by narrowing Congressional authority to the simple design of a suggested Federal Form and nothing more.

No other provisions of the NVRA support Arizona's claim that states may layer their own requirements on top of the Federal Form and no subsequent federal law permits Arizona to use its state form to the exclusion of the Federal Form. *See, e.g.*, Help America Vote Act, 42 U.S.C. §15545(a) (2002) (providing that HAVA does not "supersede, restrict or limit the application of [the NVRA].").

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is also misplaced. Contradictory procedures, even in pursuit of the same ultimate goal, still present an irreconcilable conflict under the Elections Clause. First, Proposition 200 thwarts Congress's purpose in enacting the Federal Form provision by requiring county recorders to "reject" valid Federal Forms for failure to meet state requirements. Second, when Congress has acted to create a simple, uniform procedure for registration to vote in federal elections that can be used in any state, procedures that defeat this uniformity operate to thwart the statute. Under

the Elections Clause, Arizona may not substitute its own judgment for that of Congress with respect to balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters.

Finally, appropriate interpretation of the NVRA raises no significant constitutional difficulties. Both Congress and Arizona require U.S. citizenship as a qualification of voting. The NVRA creates additional procedures for registration to vote in federal elections; it does not change the qualifications of voters. The Federal Form's requirement that registrants indicate their U.S. citizenship and then swear or affirm under penalty of perjury that they are U.S. citizens is not a matter of qualification, but of process or "manner" squarely within congressional authority under Article I, Section 4 of the United States Constitution.

ARGUMENT

A common-sense reading of the NVRA, and Arizona's mandate that election officials "shall reject" Federal Forms that do not satisfy Proposition 200, demonstrates that the two statutes are in conflict and Proposition 200 must yield.

Arizona contends that although Congress is empowered to design a Federal Form, Congress cannot establish a procedure for voter registration in federal elections, and states are free to condition acceptance of the Federal Form on the registrant's satisfaction of

additional state requirements. Arizona's constrained reading of the Elections Clause is inconsistent with this Court's decisions and strips Congress of its constitutional authority to regulate federal elections.

Arizona assumes for itself a power that it has not been granted – the power to override a procedure for voter registration in federal elections that was established by Congress. Although states may establish voter registration procedures for federal elections, when Congress chooses to require states to "accept and use" the Federal Form "in addition to" any state registration form, the federal registration rule preempts inconsistent state rules. *See* 42 U.S.C. §1973gg-4(b).

I. The Plain Language of the NVRA Compels the Conclusion that Arizona Does Not "Accept and Use" the Federal Form when It Automatically Rejects Voter Applications for Failure to Satisfy the Requirements of the State Form

Arizona's claim that Proposition 200 complies with the NVRA's "accept and use" provision flouts the plain language of the NVRA. While the NVRA requires states to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (§1973gg-4(a)), Proposition 200 provides that "[t]he County Recorder *shall reject* any application for registration," (JA 173 (A.R.S. §16-166(F))), including a Federal Form, that does not meet Proposition 200 documentation requirements. JA 250-51 ("Without [meeting the additional documentation

requirements], a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship." (citation omitted)).

Arizona contorts the ordinary meaning of "accept and use" when it argues that "accept" means to refuse voter registration applications because they do not contain "verification from outside sources." State Pet'rs' Br. on the Merits at 40. Similarly, Arizona argues that it "use[s]" the Federal Form because, when implementing Proposition 200, it is "[u]sing the Federal Form to deny registrations to those who have not provided evidence of citizenship." *Id.*

Not surprisingly, Arizona does not discuss the meaning of "reject" in Proposition 200's mandate that the county recorder "shall reject any application for registration" that does not satisfy Proposition 200. JA 173 (A.R.S. §16-166(F)). "Reject" is defined as "*to refuse to accept*, consider, submit to, take for some purpose, or use." MERRIAM-WEBSTER DICTIONARY, "REJECT" (online ed. 2013) (emphasis added).

Thus, under Arizona's tortured reading of the NVRA, the statutory requirement that every state "shall accept and use" the Federal Form, §1973gg-4(a)(1), is the equivalent of the nonsensical command that every state "shall accept and reject" the Federal Form. Or, just as absurdly, Arizona claims that a state can satisfy the "accept and use" mandate by

taking delivery of Federal Forms and then using them to line garbage cans.

Arizona argues that an examination of its procedures demonstrates that it does "accept and use" the Federal Form. *See* State Pet'rs' Br. on the Merits at 40 ("Arizona 'accepts' the Federal Form by receiving it willingly and 'uses' the form by employing it as a tool to verify voter eligibility."). On the contrary, Arizona does not process the Federal Forms that are unaccompanied by Proposition 200 documentation, or consider whether they establish eligibility, because Arizona rejects the forms immediately as invalid.

Arizona's contention that it accepts, processes and then denies voter registration applications that fail to comply with Proposition 200 is contradicted by the Secretary of State's Elections Procedures Manual, which has the force of law and directs local election officials in the conduct of elections. The Procedures Manual provides repeatedly that registration forms that do not satisfy Proposition 200 cannot be processed. *See, e.g.*, Tr. Ex. 4 at 43, Record 650, 650 ("The County Recorder must reject any registration that is not accompanied by satisfactory evidence of United States citizenship"); *id.* at 54 ("If a voter registration request is missing citizenship proof, the voter registration form shall be placed in a 'rejected' status"); *id.* at 47 (a registrant who does not provide Proposition 200 documentation shall be sent "correspondence stating that the registration form has been rejected and the reason why along with a new voter registration form"); *id.* at 44 ("If the form is not accompanied

by proper proof of citizenship, the voter registration form is not valid and either will not be entered into the system or if it was entered into the system, the record shall be canceled."); *id.* at 291 (uniform letter to registrants who fail to satisfy Proposition 200 states: "Your name will not be added to the voter registration file until we have received the new enclosed voter registration form with the required information.").

Under Proposition 200, a properly completed Federal Form does not trigger the registration process. Election officials do not evaluate the form and then deny the application. They "reject" the Federal Form itself because Proposition 200 requires them to do so.[19] Thus, instead of "accept[ing] and us[ing]" the Federal Form, when it fails to satisfy Proposition 200 Arizona election officials reject it as invalid. Congress could not have meant in the NVRA that "accept and use" means reject every form that does not satisfy separate state requirements.

Arizona analogizes the Federal Form to an employment application and claims that "[p]rospective employers may 'accept and use' a form application to consider qualified candidates, but still

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[19] *See, e.g.*, Tr. Ex. 936 at 38:1-6, Record 627, 628 (Dep. of the Maricopa County Elections Director) ("Q. Did you understand, as a result of that information from [the Arizona State Election Director], that counties must reject federal voter registration forms that do not include the proof of citizenship required by Prop 200? A. Correct.").

decline to give some of those applicants a job." State Pet'rs' Br. on the Merits at 40. The analogy misapprehends the voter registration process. The purpose of a job application process is to fill a limited number of positions by picking the strongest candidates for the job. The franchise is entirely different. First, there is no predetermined limit on the number of voters. Indeed, every eligible citizen is "qualified" and the state is not permitted to "decline to give some of those applicants a [ballot]" because other aspiring registrants impress them as being better citizens.[20]

A variety of further analogies by Arizona also mistake the issue in the case. Although in some settings multiple documents are required as part of a business transaction or government program (for example, a passport and visa may be required to enter a foreign country), it cannot be said in any of those contexts that one document is "accepted" without the other. And none of the analogies shed light on the question whether the NVRA's mandate that states "accept and use" the Federal Form allows

[20] Arizona's attempt to analogize the registration process to traveling by airplane is equally misplaced. Arizona compares the Federal Form to an airline ticket, which it claims is only accepted when accompanied by photo identification. However, federal rules specifically provide that a traveler without photo ID may board an airplane. *See* Transportation Security Administration, "Acceptable IDs," www.tsa.gov/traveler-information/acceptable-ids ("Not having an ID, does not necessarily mean a passenger won't be allowed to fly. If passengers are willing to provide additional information, we have other means of substantiating someone's identity[.]").

states to condition their acceptance of the Federal Form on the registrant furnishing additional, state-mandated documentation.

No previous court in this case has accepted Arizona's contorted definition of "accept and use." On the contrary, Arizona's contention was rejected by the district court as well as the Ninth Circuit panel and en banc court. *See* JA 250-51 ("Without this proof, a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. . . . If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship." (citation omitted)); Pet. App. 8a (noting that Proposition 200 provides that the County Recorder "shall reject any application for registration" that is not accompanied by the additional documentation under Proposition 200).[21] Sitting en banc, the Ninth Circuit held that "Arizona's rejection of every Federal Form submitted without proof of citizenship

[21] Justice Sandra Day O'Connor (sitting by designation on the *Gonzalez II* panel) commented during oral argument: "[T]he statute says 'each state shall accept and use' the federal form. Period. Then it says 'in addition to' accepting that form the state can go on and do certain other things. Now suppose we think that's pretty clear? Looks pretty clear to me." Oral Argument at 22:47-23:06, *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *available at* www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004290.

does not constitute 'accepting and using' the Federal Form." Pet. App. 31c.[22]

Arizona further contends that because the Federal Form is not a complete registration application, Arizona "accept[s] and use[s]" the Federal Form when it *receives* and *rejects* the Federal Form for failure to meet additional state requirements. Arizona's interpretation misconstrues the NVRA.

First, and most important, the NVRA provides that states must "accept and use" the mail voter registration application form "for the registration of voters in elections for Federal office," without provision for further steps in the state's registration process. 42 U.S.C. §1973gg-4(a)(1).

Second, the NVRA's emphasis on uniformity, through the requirement that states accept a mail registration form designed and promulgated by the federal government, "in addition to" any state forms, demonstrates that Congress did not intend for states to layer their own requirements on top of the Federal Form. 42 U.S.C. §1973gg-4(a)(2).

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[22] Conditioning acceptance of the Federal Form on submission of additional documents is not at all like state laws that require registrants to write a particular identification number in the Federal Form box for "ID Number." The Ninth Circuit found that Proposition 200 requires many registrants to locate personal documents, photocopy them and then pay extra postage to mail the documents to the county recorders and that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." Pet. App. 37c.

Third, the NVRA contemplates that the Federal Form will serve as a complete application when it instructs the EAC that the Federal Form "may require only such [information] as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration process." 42 U.S.C. §1973gg(7)(b). The NVRA further states that the federal registration form must include a statement that "specifies each eligibility requirement (including citizenship); contains an attestation that the applicant meets each such requirement; and requires the signature of the applicant, under penalty of perjury." *Id.*

Fourth, the NVRA specifically sought to avoid requiring mail registrants to complete additional steps in the registration process by providing that the Federal Form "may not include any requirement for notarization or other formal authentication[.]" *Id.*

Fifth, the NVRA's requirements for administration of voter registration also contemplate that properly completed Federal Forms would be sufficient for voter registration:

> In the administration of voter registration for elections for Federal office, each State shall – (1) ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the

> period provided by State law, before the date of the election[.]

42 U.S.C. §1973gg-6(a).

Thus, read as a whole, the NVRA establishes the Federal Form as a complete application that presents the necessary information to establish eligibility, and, when filled out correctly and signed, is sufficient to register to vote in federal elections.

II. Arizona's Refusal to "Accept and Use" the Federal Form Unless It Satisfies Proposition 200's Requirements Is Preempted by the NVRA

Because the power of Congress to regulate federal elections is paramount, Congress acted within its authority when, in the NVRA, it created a procedure for voter registration by mail. Proposition 200 is thus preempted to the extent that is requires rejection of Federal Forms for failure to satisfy additional state requirements.

A. The Power of Congress to Regulate Federal Elections Supersedes that of the States

Congress's authority to regulate the "times, places and manner" of congressional elections is

plenary.[23] The "broad authority" conferred on Congress by the Elections Clause gives Congress "general supervisory power" over federal 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. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of 'times, places and manner of holding elections,' and involves lawmaking in its essential features and most important aspect.

Smiley v. Holm, 285 U.S. 355, 366, 367 (1932).

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[23] Art. I, §4, cl. 1 of the United States Constitution, known as the "Elections Clause," confers on Congress the power to override state laws and regulate directly the manner of holding congressional elections:

> 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 chusing Senators.

U.S. CONST. art. I, §4, cl. 1.

An unbroken line of decisions by this Court affirms the authority of Congress to regulate federal elections. In *Ex Parte Siebold*, 100 U.S. 371 (1879), this Court upheld federal authority to impose penalties for violating laws governing the election of Members of Congress. The Court stated that with respect to federal elections, the "power of Congress over the subject is paramount." *Id.* at 384.

This Court used similar reasoning in *Ex Parte Yarbrough*, 110 U.S. 651 (1884), to reject a constitutional challenge to federal laws protecting voters in federal elections from racially-motivated intimidation and violence. The Court held that under the Elections Clause, Congress has unfettered authority to act when it "finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting[,]" and explained that this authority arises "from the necessity of the government itself that . . . the votes by which its members of congress and its president are elected shall be the *free* votes of the electors[.]" *Id.* at 662.

In *United States v. Classic*, the Court upheld congressional power to regulate party primaries and explained that state election rules must yield to congressional enactments. 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not

restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' " (citations omitted)).

Under its broad powers under the Elections Clause, prior to and following its enactment of the NVRA, Congress adopted laws regulating voter registration procedures for federal elections, preempting state laws in the process. For example, in the Voting Accessibility for the Elderly and Handicapped Act of 1984, Congress required states without mail voter registration procedures to "provide a reasonable number of accessible permanent registration facilities." 42 U.S.C. §1973ee-2(a) (1984). In the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, Congress required the states to "accept and process" the uniform federal form promulgated by the Department of Defense for the registration of voters in federal elections. 42 U.S.C. §1973ff-1(a)(2) (1986). In 2002, Congress enacted the Help America Vote Act ("HAVA") which requires states to request from voter registrants a driver's license number, the last 4 digits of a social security number, or to assign the registrant a unique identification number for the purpose of keeping better track of voters on the rolls. 42 U.S.C. §15483(a)(5)(A) (2002). In 2009, Congress enacted the Military and Overseas Voter Empowerment Act (MOVE) to require states to send voter registration forms electronically to military and overseas voter

registrants. Nat'l Defense Authorization Act for Fiscal Year 2010, Subtitle H, Sec. 577, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

Because congressional authority to regulate voter registration procedures in federal elections is well-established, "there is no colorable argument that [the NVRA] goes beyond the ample limits of the Elections Clause's grant of authority to Congress." *Foster v. Love*, 522 U.S. 67, 71 (1997); *see also Smiley v. Holm*, 285 U.S. 355, 366 (1932) (including "registration" among the election regulations contemplated by the Elections Clause).

B. Arizona's Documentation Requirement Conflicts with the NVRA and Must Yield

Arizona concedes, as it must, that under *Siebold*, a state law that conflicts with a federal election regulation is preempted. State Pet'rs' Br. on the Merits at 2. That is exactly the situation with respect to Proposition 200. *See* Pet. App. 59c ("[T]he NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" (emphasis added)).

Because the power to regulate federal elections is delegated conditionally to the states by the federal government through the Constitution, states have the authority to enact laws regulating federal elections as long as Congress has not chosen to change those state laws or create new laws. When Congress enacts rules

regarding federal elections that are different from the states, "the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)); *see Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (under the Elections Clause, states have the power to regulate federal elections "[u]nless Congress acts."). "Thus, it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).

In the context of federal elections, the Tenth Amendment can "only 'reserve' that which existed before [and] 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'" *U.S. Term Limits*, 514 U.S. at 802 (citing 1 Story §627). In *U.S. Term Limits*, this Court concluded that Arkansas lacked the authority to impose term limits on members of Congress, explaining that "[t]his conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution." 514 U.S. at 805.

In *Foster v. Love*, 522 U.S. 67 (1997), this Court struck down a Louisiana "open primary" law under which candidates who received a majority of votes in the October primary election would be declared the winners of their seats. The Court stated that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices." *Foster*, 522 U.S. at 69 (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974) and *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate")).

After concluding that Congress has the authority to set a uniform date for federal elections, this Court looked to whether the state and federal laws addressed the same subject and whether they were in conflict. Because Louisiana's open primary allowed for the final selection of congressional candidates for office on a day different than that specified by Congress in 2 U.S.C. §§1 and 7, the Court concluded that the Louisiana law was preempted. *Foster*, 522 U.S. at 72 ("[I]t is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress, clearly violates § 7.").

Similar to *Foster*, here Arizona seeks to enforce a law that addresses the same subject as the NVRA – the procedure for registering to vote in federal

elections with the Federal Form. Also as in *Foster*, the two laws are straightforward: the NVRA requires state election officials to "accept and use" the Federal Form "for the registration of voters in elections for Federal office," (42 U.S.C. §1973gg-4), and Proposition 200 requires election officials to "reject" those same Federal Forms when they fail to satisfy additional state requirements, JA 173 (A.R.S. §16-166(F)). The conclusion is the same in both cases: Proposition 200 is void to the extent that it requires election officials to reject valid Federal Forms that the NVRA requires to be accepted.[24]

Arizona contends that the Ninth Circuit should have concluded that Proposition 200 and the NVRA

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[24] Arizona cannot claim that in Elections Clause preemption cases, "[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." State Pet'rs' Br. on the Merits at 31-32 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). This Court has never employed a presumption against preemption in its Elections Clause cases because the regulation of federal elections was never an historic power of the states. *See U.S. Term Limits*, 514 U.S. at 802 (explaining that "the power to add qualifications [to serve in Congress] is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States" because the states have no reserved powers related to the national government); *see also United States v. Locke*, 529 U.S. 89, 108 (2000) ("The state laws now in question bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers."). Most important, a presumption against preemption cannot save Proposition 200 because it conflicts with the NVRA.

can be carried out without conflict because their terms are consistent. State Pet'rs' Br. on the Merits at 37-39. Arizona's attempt to read the NVRA's "accept and use" mandate out of existence is foreclosed by *Foster*, which rejected the argument by Louisiana that even though it elected most candidates for congressional offices in an October primary election, the state law did not run afoul of the congressional mandate that federal elections be held in November because the state law regulated the "manner" of the election and federal law regulated the "time" of the election. 522 U.S. at 72-73. This Court refused to accept the state's distorted interpretation of 2 U.S.C. §7, and characterized Louisiana's position as "merely wordplay." *Id.*

The NVRA's "accept and use" requirement is also not changed or weakened by HAVA, 42 U.S.C. §§15301-15545. When it enacted HAVA in 2002, Congress again considered the contents of the Federal Form. The provisions of HAVA added several new check boxes to the Federal Form (one of which affirms U.S. citizenship).

Nothing in HAVA authorizes states to impose their own documentation requirements onto the Federal Form and HAVA's drafters anticipated that the statute might intersect with other related laws. Arizona simply cannot avoid HAVA's express language providing that HAVA does not "supersede, restrict or limit the application of NVRA." Pet. App. 40c (quotations omitted) (citing 42 U.S.C. §15545(a)). Although Arizona argues that HAVA reconsidered or superseded Congress's decision to allow a voter to

register with the Federal Form without additional documentation, the express language of HAVA provides otherwise.

Arizona argues that the NVRA's "accept and use" must be read to allow states to impose additional requirements on the Federal Form in order to be consistent with the statute as a whole. State Pet'rs' Br. on the Merits at 37-39. However, the one portion of the NVRA on which Arizona relies, 42 U.S.C. §1973gg-7(b)(1), simply instructs the EAC on the design and content of the Federal Form. Although states may follow these same guidelines in designing their own state forms, they can only use their state forms "[i]n addition to accepting and using the [Federal] form." 42 U.S.C. §1973gg-4(a)(2). Thus nothing in §1973gg-7(b)(1) permits Arizona to use its form to the exclusion of the Federal Form and nothing in the NVRA as a whole suggests that states may layer their own requirements on top of the federal procedures for registration.

The Ninth Circuit correctly identified three areas of conflict between Proposition 200 and the NVRA. Pet. App. 29c-30c. First, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it is not supplemented with additional documentation. Pet. App. 31c-32c. Second, Arizona's rejection of the Federal Form due to lack of additional documentation creates a conflict between state and federal registration procedures and is incompatible with the NVRA's delegation of authority to the EAC.

Pet. App. 34c. Third, Proposition 200 conflicts with the NVRA by undermining the NVRA's goal of streamlining the registration process. Pet. App. 36c. The Ninth Circuit concluded that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." *Id*.

To have reached the opposite conclusion, the Ninth Circuit would have had to read the NVRA's plain language out of existence or depart dramatically from the established interpretation of the Elections Clause and limit Congressional authority to simply designing the Federal Form and nothing more. Because the Ninth Circuit applied the traditional understanding of the scope of Congressional authority under the Elections Clause, it concluded that Congress may establish voter registration procedures and, because the statutes were in conflict, Proposition 200's requirement of additional documentation from Federal Form applicants is preempted.

None of this Court's cases on which Arizona relies examined whether a congressional enactment regulating federal elections preempted state law. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 101 (2003), *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (declining to analyze whether the Bipartisan Campaign Reform Act exceeds Congress's Elections Clause authority because "Title I only regulates private parties' conduct, imposing no requirements upon States or state officials"); *see also Smiley v. Holm*, 285 U.S. 355, 372-73 (1932)

(concluding that "there is nothing in article 1, s 4" that precludes a state from using its normal legislative process to conduct congressional redistricting). The remainder of the cases is from the lower courts. None of the cases cited by Arizona upheld state voter registration practices in the face of a claim that they were inconsistent with the NVRA and none of the cases cited by Arizona support its contention that courts must defer to state laws that are inconsistent with federal laws on the same subject.

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is also misplaced. First, Proposition 200 thwarts Congress's purpose in enacting the Federal Form provision. *See* Pet. App. 31c-32c ("In contrast, Proposition 200's registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose."). Second, when Congress has acted to create a simple, uniform procedure for registration to vote in federal elections that can be used in any state, procedures that defeat this uniformity operate to thwart the statute. *See Charleston & Western Carolina R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) ("When Congress has taken the particular subject-matter in hand coincidence is as ineffective as

opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.").

The Court recently affirmed that even in the Supremacy Clause context, imposing state rules on top of federal rules can "conflict with the careful framework Congress adopted." *Arizona v. U.S.*, 132 S. Ct. 2492, 2502-03 (2012) (citations omitted). The Court further noted that "a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Id*. at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

Arizona cannot substitute its own judgment for that of Congress with respect to balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters. Congress chose to balance ensuring election integrity with facilitating voter registration by warning non-citizens not to complete the form, by stating the penalties for giving false information on the form (and specifically the penalties for false claim of citizenship), and by requiring registrants to check a box asserting their U.S. citizenship on the Federal Form and swear to their U.S. citizenship under penalty of perjury. The Ninth Circuit correctly observed that "the Elections Clause gives Congress the last word on how this concern [regarding the possibility of registration fraud] will be addressed in the context of federal elections." Pet.

App. 41c. Arizona must follow the NVRA whether or not it would have balanced the goals differently.[25]

Preserving the integrity of the electoral process is one of the stated purposes of the NVRA, and by all indications it has succeeded in fulfilling that purpose. Pet. App. 41c-42c (citing 42 U.S.C. §1973gg(b)(3)). The Federal Form has been used to register millions of voters nationwide over two decades without the alleged voter fraud problem its detractors feared ever coming to pass. Arizona has presented no evidence of voter fraud through use of the Federal Form, and twenty years of experience demonstrates that no such threat exists.

III. The Elections Clause Analysis Used Consistently in the Circuit Courts Is Persuasive

The courts of appeals have soundly rejected attempts by states to impose policies inconsistent with the NVRA. For example, in *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008) the Sixth Circuit held that Michigan was unlikely to succeed in defending its practice of removing

[25] Similarly, whether or not Arizona considers the additional requirements of Proposition 200 to be a "burden" or "obstacle" to voting is beside the point. State Pet'rs' Br. on the Merits at 43 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008)). The Ninth Circuit invalidated Proposition 200's registration requirement as applied to the Federal Form because it conflicted with the NVRA, not because it placed an unconstitutional burden on the right to vote.

registered voters from the rolls when the voters' registration cards were returned in the mail against a claim that the NVRA required an additional step in the removal process. The Sixth Circuit compared the NVRA's provisions to the challenged Michigan statute and concluded "that Michigan's undeliverable-voter-ID-card practice likely violates the clear language of the NVRA." 546 F.3d at 381.

Michigan argued that it could remove these voters because it did not consider them "registrants" as that term is used in the NVRA. *Id.* at 382. The Sixth Circuit rejected the state's attempt to re-define "registrant" in a way that allowed it to remove voters who are protected by the NVRA, reasoning:

> A federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses. If we were to adopt defendants' view, states could completely ignore the requirements of the NVRA, 42 U.S.C. §1973gg-6(d). We refuse to import such a reading to this statute.

Id. at 382-83.[26]

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[26] The Sixth Circuit's earlier decision in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), did not employ a different preemption analysis. Under the NVRA, the Federal Form includes a box in which the registrant writes an "ID Number." *See* App. 4. In *McKay*, the Sixth Circuit concluded that Tennessee was authorized by the federal Privacy Act to require its

(Continued on following page)

In *Charles H. Wesley Educ. Found., Inc. v. Cox*, the Eleventh Circuit held that the NVRA preempted Georgia's policy of rejecting voter registration forms mailed in bulk, reasoning:

> In essence, [Georgia's] claim is that the NVRA only requires that mailed registration forms be accepted when delivered both in a timely fashion *and* pursuant to additional state requirements. *See* 42 U.S.C. §1973gg-6(a)(1)(B),(D) . . . This argument is unpersuasive. By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.

408 F.3d 1349, 1354 (11th Cir. 2005).

In *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012), the Fourth Circuit also recently held that the NVRA overrides inconsistent state practices. The court concluded that Virginia's refusal to permit inspection of voter registration applications (with social security numbers redacted) was preempted by the plain language of the NVRA's disclosure requirements. *Id.* at 339. In response to Virginia's assertion that it had a policy interest in protecting individual privacy, the court explained: "It is not the province of this court, however, to strike the

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registrants to place their social security numbers in the box on the Federal Form and "Congress intended [the Privacy Act] to survive the more general provisions of the NVRA." *Id.* at 756.

proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting [the NVRA].”). *Id.*

The circuit courts of appeals have developed a consistent, persuasive approach to resolving questions of Elections Clause preemption. Under that analysis, not only must states comply with the NVRA’s registration procedures, but where state practices conflict or are inconsistent with the NVRA state laws must yield.

IV. Appropriate Interpretation of the NVRA Raises No Significant Constitutional Difficulties

In an attempt to convert this case, at this quite late stage, into a constitutional challenge that it never filed, either as an independent lawsuit or as a cross-claim in this action, Arizona for the first time asserts that the doctrine of “constitutional avoidance” supports its eviscerated interpretation of the terms “accept and use” in the NVRA. State Pet’rs’ Br. on the Merits at 46-47. Arizona argues that any construction giving practical meaning to the NVRA terms would render the law an unconstitutional federal establishment of “qualifications” on electors. *Id.* at 48-53. Raising the argument at this late stage has deprived both the district court and the court of appeals of the opportunity to address the issue; this “court avoidance,”

if you will, might be explained by the fact that Arizona's assertion reduces to the untenable argument that what the state itself characterizes as "evidence-of-citizenship," State Pet'rs' Br. on the Merits at 53, or "proof-of-citizenship," *id.* at 47, is the same as a "citizenship" qualification. Yet Arizona's recasting of Proposition 200 cannot transform procedural matters of evidence and documentation into substantive qualification.

A. Voter Registration Procedures Differ From Substantive Qualification of Citizenship, Which the Federal Government Embraces

In its brief, Arizona grapples with *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which this Court upheld the constitutionality of a congressional imposition of substantive voter qualifications of age and residency in direct contradiction of the decisions of states on qualifications. Arizona could have avoided its tortuous argument; the NVRA's procedural registration requirements are far from a congressional mandate of substantive voter qualifications. The NVRA does not remotely attempt to contradict a citizenship qualification or impose some sort of alternative, substitute "non-citizenship" requirement (such as geographic residency alone, for example). The federal law simply addresses what – strategic hyphens omitted – Arizona would concede is a manner of additional authentication of the agreed citizenship qualification. More specifically, the NVRA

establishes what may be required as authentication of citizenship for purposes of registration prior to being registered to vote.[27] This is not a matter of qualification, but of process or "manner" squarely within congressional authority under Article I, Section 4 of the U.S. Constitution.

It is now long-established that Congress may act, precisely as it has in the NVRA, to displace state regulation with respect to registration, voter protection, and fraud prevention – all matters encompassed within the NVRA registration procedure at issue here. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932). Arizona cannot simply tack "proof" or "evidence" onto "citizenship" and by so doing convert process and "manner" regulations into substantive qualifications.

Because congressional authority to regulate federal elections is established, there are no knotty constitutional questions implicated by appropriately interpreting the plain language of the NVRA to supersede Proposition 200's rejection of Federal Forms that do not satisfy additional state documentation requirements. Arizona's attempt to supplant congressional regulations in an area where the Congress is constitutionally permitted to override state regulation, and impose its own, is unsupported by

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[27] For example, the NVRA does nothing to dictate what might be relevant and probative evidence of citizenship in a government challenge to the qualifications of someone who has voted.

Mitchell or any other case. Indeed, Arizona's argument for "constitutional avoidance" reduces to an exercise in its own constitutional "projection" – epitomizing Arizona's own desire to avoid constitutional authority that is plainly lodged with Congress.

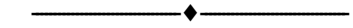
B. Arizona's Attempt to Distinguish Court Precedent Approving Congressional Establishment of Elector Qualifications Demonstrates The Distinction Between Qualification and Registration Procedures

As suggested above, even if Arizona could somehow demonstrate that the NVRA establishes substantive elector qualifications, Arizona would have to distinguish *Mitchell* itself. The state's attempt to do so merely exposes its false alchemy in seeking to transform registration procedures into substantive qualifications. In seeking to distinguish the plurality view in *Mitchell* that the Fourteenth Amendment supports congressional adoption of elector criteria, Arizona casually shifts from characterizing Proposition 200 as imposing a "proof-of-citizenship" or "evidence-of-citizenship" requirement to addressing the issue as one of citizenship vel non. Again, no one disputes that all electors must be U.S. citizens, and Arizona's unsupported assumption that those who cannot timely meet the state's particular documentation requirements are necessarily non-citizens has no basis in fact or logic. The concern in this case is about U.S. citizens who avail themselves of the opportunity

to register to vote using the Federal Form and Arizona's rejection of their registration forms on the grounds that the registrants must engage in an additional state-mandated procedure to be registered to vote.

Thus, the proposition that Arizona sets up to prove – that the Fourteenth Amendment does not empower Congress to require states to allow non-citizens to vote – is a complete irrelevance. Were this case at this stage the appropriate forum for a constitutional determination under the Fourteenth Amendment, the question would be whether Congress could conclude that more onerous authentication requirements could affect, in a constitutionally remediable way under the Fourteenth Amendment, the voting rights of particular citizens. On this more relevant question, Arizona is completely and peculiarly silent.

That silence and Arizona's tortured attempt to convert manner into substance demonstrate why the late-asserted argument of "constitutional avoidance" should not influence the Court's construction of the NVRA.



CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

THOMAS A. SAENZ
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

DANIEL R. ORTEGA, JR.
ORTEGA LAW FIRM
361 E. Coronado Rd.
Phoenix, AZ 85004

KARL J. SANDSTROM
PERKINS COIE
607 14th St. NW
Washington, DC 20005

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Counsel for Jesus M. Gonzalez, Bernie Abeytia, Debbie Lopez, Georgia Morrison Flores, Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., Arizona Hispanic Community Forum, Common Cause, Project Vote