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No. 12-71

IN THE
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,
Petitioners,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in approximately 800 communities and in every state.

For more than 90 years, the League has worked to protect every American citizen's right to vote. As part of its mission, the League operates one of the longest-running and largest nonpartisan voter registration efforts in the nation. Moreover, the League has been a leader in seeking to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. To that end, the League has historically endorsed the adoption of simple, uniform voter registration forms that can be submitted through the mail without additional documentary requirements. Mail voter registration has long played a significant role in the League's voter registration drives and served as one

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

of the organization's primary tools for bolstering democratic participation. Accordingly, the League strongly supported the enactment and enforcement of the National Voter Registration Act of 1993, which aimed to increase the number of eligible citizens who register to vote by providing for standardized, non-discriminatory voter registration procedures.

The League's continuous involvement in the instant case reflects the organization's continuing commitment to its founding goals and to maintaining the integrity of the National Voter Registration Act. When this case was first appealed to the Ninth Circuit, the League filed an amicus brief arguing that Arizona cannot require documentary proof of citizenship as a condition for accepting the federal mail voter registration form. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (No. 06-16521). When the case returned to the Ninth Circuit, the League again sought to protect mail registration from debilitating restrictions. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) (No. 08-17094). Subsequently, following the Ninth Circuit's original panel decision, the League filed a third amicus brief, this time urging the court to deny rehearing en banc. Brief for the League of Women Voters as Amicus Curiae Supporting Respondents' Opposition to Appellee's Petition for Rehearing En Banc, *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (No. 08-17094). The League is filing this brief in support of Respondents in order to

ensure the viability of voter registration by mail and in furtherance of the League's mission to increase participation in the democratic process.

SUMMARY OF ARGUMENT

1. The Ninth Circuit, sitting en banc, correctly concluded that that the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, preempts the documentary proof-of-citizenship registration requirement in Arizona's Proposition 200.[2] As that court recognized, one of the NVRA's primary purposes was to increase participation in federal elections by overriding burdensome state registration laws. Specifically, by mandating that states "accept and use" a standard mail voter registration application (the "Federal Form"), Congress sought to establish a single, uniform set of voter registration application requirements for federal elections that would operate independently of state law. This purpose, which is reflected in the NVRA's text and legislative history, is the driving force behind the mail voter registration provisions at issue and must color any interpretation of the statute.

[2] Proposition 200 requires that an Arizona "county recorder shall *reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship" and lists the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. § 16-166(F) (emphasis added).

2. Congress delegated authority to the Election Assistance Commission ("EAC")[3] to develop and administer the Federal Form. Exercising this authority, the EAC engaged in formal notice-and-comment rulemaking pursuant to the Administrative Procedure Act and determined that an attestation of citizenship under penalty of perjury was sufficient to prevent voter fraud. In reaching this decision, the agency concluded that requiring documentary proof of citizenship would violate the NVRA's mandate that the Federal Form "may require *only*" such identifying information as is "*necessary* to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Under *Chevron*, this Court must defer to the EAC's interpretation of what information is "necessary" under the NVRA. The EAC is the agency solely designated by Congress to interpret the NVRA and has codified its view rejecting a documentary proof-of-citizenship requirement in the Code of Federal Regulations, thereby giving its decision the force of law.

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[3] The Federal Election Commission ("FEC") was originally responsible for implementing the mail voter registration provisions of the NVRA. Following the passage of the Help America Vote Act of 2002 ("HAVA"), however, all responsibilities entrusted to the FEC under the NVRA were transferred to the EAC. 42 U.S.C. § 15532. In light of this complete transfer of responsibility, the actions, decisions, and interpretations of the FEC pertaining to the NVRA are imputed to the EAC. This brief thus uses "EAC" to refer to both the FEC and EAC.

3. The EAC's interpretation of the NVRA is controlling under *Chevron* regardless of whether this Court applies a preemption analysis under the Elections Clause or the Supremacy Clause. Although the Ninth Circuit correctly reasoned that history and this Court's precedent dictate that preemption under the Elections Clause operates differently than under the Supremacy Clause, this distinction is of no import with respect to *Chevron* principles. Even under traditional Supremacy Clause principles, Congress clearly intended for the Federal Form to operate independently of state voter registration requirements and delegated authority to the EAC to regulate accordingly. In light of this delegation, the agency's stance that the NVRA preempts Proposition 200's documentary proof-of-citizenship requirement must be taken as conclusive.

ARGUMENT

I. Congress Intended for the NVRA to Preempt State Law and Rejected the Inclusion of a Requirement for Documentary Proof-of-Citizenship on the Federal Form.

Because the NVRA was primarily intended to increase the ease with which citizens could register to vote in federal elections, the League strongly advocated for and participated in the negotiations surrounding the NVRA's passage in 1993. Exercising its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, Congress passed the NVRA in part to address what it perceived as improper barriers to voter registration embedded in state law. As the statute itself acknowledged,

"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." 42 U.S.C. § 1973gg(a)(3). In its long history of promoting voter registration efforts, the League has experienced many of these unfair registration laws and procedures firsthand. Thus, amicus is in full agreement with the NVRA's stated goals of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office" and implementing procedures at all levels of government to "enhance[] the participation of eligible citizens as voters in elections for Federal office." *Id.* § 1973gg(b)(1), (2).

One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions for voters. The centerpiece of these new provisions was the creation of a standardized mail voter registration form that could be utilized by the citizens of any state to register for federal elections. *Id.* § 1973gg-4. By creating a standardized registration form that "[e]ach State shall accept and use," *id.* § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.[4]

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[4] Although the NVRA also permits states to "develop and use" their own forms, § 1973gg-4(a)(2), the implementation of the

The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. *See id.* § 1973gg-4(b) (mandating that state officials make the standardized mail registration form available to "governmental and private entities, with particular emphasis on making them available for organized voter registration programs"). Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. *Gonzalez v. Arizona*, 677 F.3d 383, 401 (9th Cir. 2012) (en banc). Rather, the development and implementation of the Federal Form was a task delegated exclusively to a federal agency – the EAC.

Federal Form was the true heart of the statute's mail provisions. As the Department of Justice has acknowledged, "[t]he principal purpose of [the NVRA] was to require that the states provide prospective voters with uniform and convenient means by which to register for the federal franchise." Craig C. Donsanto & Nancy L. Simmons, U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* 55-56 (7th ed. 2007), *available at* http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf; s*ee also id.* at 63 ("The major purpose of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail."); *ACORN v. Miller*, 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").

The EAC was not without guidance from Congress about how to develop and implement the Federal Form. In particular, the EAC knew exactly how Congress felt about the inclusion of a documentary proof-of-citizenship requirement for the Federal Form. *Gonzalez*, 677 F.3d at 440-42 (Kozinski, J., concurring). As the legislative history reveals, during congressional deliberations on the NVRA, the Senate passed an amendment to the bill providing that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." 139 Cong. Rec. 5098 (1993). Senator Simpson, who sponsored the amendment, stated that the amendment was necessary because "allow[ing] States to check documents to verify citizenship" would provide a safeguard against fraudulent voting practices. *Id.* (statement of Sen. Simpson).

The House version of the bill, however, did not include this amendment, and in reconciling the two versions, the Conference Committee ultimately rejected the Senate amendment. In its report, the Committee explained its decision: "[The amendment] is *not necessary or consistent with the purposes of this Act*. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could *effectively eliminate, or seriously interfere with, the mail registration program* of the Act." H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (emphasis added).

After the bill was reported out of conference, its House opponents moved to recommit the bill to the Committee on House Administration, specifically to direct the Committee to reinsert the Senate amendment permitting states to require documentary proof of citizenship. That motion was defeated, 259 to 164. *See* 139 Cong. Rec. 9219, 9231-32 (1993). Thus, the final version of the NVRA passed by both Houses of Congress did not include any provision permitting states to require documentary proof of citizenship.

In passing the NVRA with only an attestation-of-citizenship requirement, Congress was well aware that states would be prohibited from requiring additional documentation. As the Senate minority emphasized, the bill was understood to effectively "eliminat[e] . . . state verification requirements with [its] mail-in applications." S. Rep. No. 101-140, at 38 (1989). Arguing that this created federalism concerns, the minority proceeded to list a number of state requirements that would be preempted by the NVRA, *id.* at 38-40, and quoted a letter from the Department of Justice highlighting that the federal mail registration form included no "procedures for independently confirming the information provided." *Id.* at 47. Squarely presented with concerns about states' ability to impose documentary proof requirements, Congress nevertheless passed the bill in a form that maximized the ease of registration.

Accordingly, the NVRA's "text, context, purpose, and . . . drafting history all point in the same direction." *United States v. Hayes*, 555 U.S. 415, 429

(2009). Congress did not intend for states to add their own registration requirements to the Federal Form. Reading the statute's command that every state "shall accept and use" the Federal Form as anything other than an imperative would effectively override Congress's deliberate exclusion of a documentary proof-of-citizenship requirement from the statute. Adopting Petitioner's position would also undermine the driving principles behind the statute's mail voter registration provisions. Indeed, it would be counterintuitive if the very mechanism for circumventing burdensome state registration requirements was itself subject to them. The Ninth Circuit recognized this truism in holding that "the NVRA does not give states room to add their own requirements to the Federal Form," and this Court should adopt the same conclusion. *Gonzalez*, 677 F.3d at 401.

II. The EAC's Determination That Documentary Proof of Citizenship Is Not Necessary for the Federal Form is a Valid Exercise of Delegated Power and Entitled to Deference Under *Chevron*.

In the NVRA, Congress mandated that states must "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). However, Congress did not dictate exactly what the Federal Form should look like. Instead, it delegated the task of developing and implementing the Federal Form to the EAC. Consistent with long-standing principles of administrative law, this Court is required to defer to the EAC's reasonable interpretation of the NVRA

and its determination that no documentary proof-of-citizenship requirement is necessary for voter registration.

1. The EAC is uniquely positioned to interpret the NVRA, and specifically, its mail voter registration provisions. As explained above, a standardized mail voter registration form was one of the centerpieces of the NVRA. The contents of this new Federal Form, however, were not explicitly defined in the statute. Rather, the NVRA directed the EAC to "develop a mail voter registration application form for elections for Federal office" by "prescrib[ing] . . . regulations." 42 U.S.C. § 1973gg-7(a)(2), (1). This delegation of power, while broad, was accompanied by several limitations.

First, the EAC could "require only such identifying information . . . as [wa]s 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." *Id.* § 1973gg-7(b)(1). Second, the Federal Form was required to specify "each eligibility requirement (including citizenship)." *Id.* § 1973gg-7(b)(2)(A). Third, the form was required to contain "an attestation that the applicant meets each such requirement." *Id.* § 1973gg-7(b)(2)(B). Fourth, the form must "require[] the signature of the applicant, under penalty of perjury." *Id.* § 1973gg-7(b)(2)(C). Fifth, the form must list the "penalties provided by law for submission of a false voter registration application." *Id.* §§ 1973gg-6(a)(5)(B), 1973gg-7(b)(4)(i). And finally, the statute dictated that the

Federal Form could "not include any requirement for notarization or other formal authentication." *Id.* § 1973gg-7(b)(3).

Following the NVRA's enactment, the EAC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form in accordance with the statute's goals and mandates. *See* Nat'l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). While this rulemaking was ongoing, the EAC released a guide containing its preliminary views to assist states in implementing the NVRA. In this guide, the agency noted that it was constrained by the statute to *only* request identifying information "necessary to . . . assess the eligibility of the applicant," and was therefore prohibited from asking for superfluous data such as an applicant's race, gender, or weight. Nat'l Clearinghouse on Election Admin., Fed. Election Comm'n, *Implementing the National Voter Registration Act of 1993* at 3-2, 3-3 (1994) (quoting 42 U.S.C. § 1973gg-7(b)(1)), *available at* http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%201%201994.pdf. Based on this interpretation, the EAC declared that the Form was required to include an attestation of citizenship, but made no mention of documentary proof. *Id.* at 3-4. This omission was not a fluke – the three sample mail registration forms that the EAC composed and included in the

guide explicitly required an attestation and nothing more.[5] *Id.* at 3-10, 3-11, 3-13.

Once rulemaking was complete, the EAC did not deviate from its initial views. After consulting with state officials and referring to public comments, the agency developed a single-sheet registration form that an applicant could simply fill out, stamp, and mail as a postcard. *See* 11 C.F.R. § 9428.5. This design choice for postcard registration reflected three important conclusions reached by the EAC. First, by making the Federal Form a postcard, the EAC conveyed that the "necessary" information to determine voter eligibility could be contained on a single sheet of paper, and that further documentation was not required under the NVRA. *Implementing the National Voter Registration Act* at 3-4. Second, the design reflected the agency's belief that the risk of voter fraud was sufficiently mitigated

[5] Petitioner portrays the EAC's guide as permitting states to reject a voter registration application if it fails to meet any state registration requirement. Pet'r's Br. 36-37. But this is not the case. In a preliminary section of the guide, the EAC clarified that an application received by state officials may be subject to "whatever verification procedures are currently applied to all applications." *Implementing the National Voter Registration Act* at 1-6. Allowing states to utilize verification *procedures* after a complete application is accepted, however, is far different than permitting states to impose burdensome requirements during the application process. Moreover, in the section of the guide discussing the Federal Form, the EAC made clear its view that the NVRA "*requires* States to accept and use what amounts to a national voter registration form." *Id.* at 3-1 (emphasis added).

by requiring an applicant to attest under penalty of perjury that she meets the state's eligibility requirements, and that the information provided is true. 11 C.F.R. § 9428.4(b). Third, the postcard format signaled the EAC's commitment to facilitating voter registration drives by national organizations, such as the League. *See* 42 U.S.C. § 1973gg-4(b).

Although the Federal Form has undergone minor revisions in recent years, its postcard format and attestation requirement have remained unchanged. The significance of this consistency is underscored by the fact that both Congress and the EAC could have chosen to change the Federal Form when the Help American Vote Act ("HAVA") was passed in 2002. HAVA presented an opportunity to modify the form to require more information from applicants. But instead of demanding any sort of documentation, Congress merely added one mandatory question asking the applicant to check a box affirming that she is a United States citizen.[6] 42 U.S.C. § 15483(b)(4)(A)(i). In implementing HAVA's directives, the EAC similarly refused to exercise its broad authority to change the content or format of

[6] Other HAVA provisions established new procedures for states to "verify" the eligibility of voter registration applicants after their completed applications were received, 42 U.S.C. § 15483(a)(5)(B)(i), and set ID requirements at the polls for certain persons who registered to vote "by mail." *Id.* § 15483(b)(1)(A), (B). However, there was no change made to the Federal Form other than the addition of the check box.

the Federal Form, adding the new check box and nothing more.

2. Over the past eighteen years, the EAC has consistently reiterated that documentary proof of citizenship is not "necessary . . . to assess the eligibility of the applicant" under the NVRA. 42 U.S.C. § 1973gg-7(b)(1). The agency's preliminary views, its final version of the Federal Form, and its implementation of HAVA all reflect this stance by requiring only an attestation of citizenship on the postcard form. *Implementing the National Voter Registration Act* at 3-2, 3-4; 11 C.F.R. § 9428.4(b)(2). Thus, when specifically asked by Arizona's Secretary of State whether Proposition 200 was consistent with the NVRA, the EAC had no difficulty concluding that it was not. *See* Letter from Thomas R. Wilkey, Executive Director, U.S. Election Assistance Comm'n to Jan Brewer, Arizona Secretary of State (March 6, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf.

In a letter to Arizona's Secretary of State in March 2006, the EAC emphasized that it was the sole entity charged with "creating and regulating the Federal Form," and in this capacity, it had decided that documentary proof-of-citizenship was not necessary under the NVRA. *Id.* Because the agency had already "set[] the proof required to demonstrate voter qualification," the EAC concluded that any effort by Arizona to "condition acceptance of the Federal Form upon receipt of additional proof" was

preempted. *Id.*; *see Gonzalez*, 677 F.3d at 399 (explaining that the NVRA preempts Proposition 200 because the latter'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").

Moreover, following the March 2006 letter, the EAC commissioners twice voted on proposals to amend the Federal Form to accommodate Arizona's Proposition 200. Election Assistance Comm'n, Tally Vote In the Matter of Arizona Request for Accommodation (July 31, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF; Election Assistance Comm'n, Public Meeting (Mar. 20, 2008), *available at* http://www.eac.gov/assets/1/Events/minutes%20public%20meeting%20march%2020%202008.pdf. In both instances, the vote failed, resulting in no modification of the agency's position. As Commissioner Ray Martinez, III explained, the EAC has "established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from our predecessor agency, the Federal Election Commission." Ray Martinez III, Commissioner, Election Assistance Comm'n, Position Statement on EAC Tally Vote Dated July 6, 2006: "Arizona's Request for Accommodation" at 5 (July 10, 2006), *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona's%20Request%20for%20Accomodation.pdf. Under this

precedent – which remains intact – the "language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls." *Id.* (quoting Letter from Gavin Gilmour, Associate General Counsel, Election Assistance Comm'n to Dawn Roberts, Director, Division of Elections, Florida Dept. of State (July 26, 2005), LWV App. 6a).

3. Under the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the EAC's interpretation of the NVRA to preclude a state from adding a documentary proof-of-citizenship requirement to the Federal Form is entitled to deference. In *Chevron*, the Supreme Court "held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Filling these gaps "involves difficult policy choices that agencies are better equipped to make than courts," and as such, "*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* (citing *Chevron*, 467 U.S. at 843-44 & n.11, 865-66).

Deference is required regardless of whether the agency's interpretation conflicts with state law; as long as the "agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,

[courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985) (viewing agency understanding of preemptive effect of regulations as "dispositive").

Viewing the instant case in light of *Chevron*, the EAC interpreted the NVRA as permitting it to request only "necessary" identifying information. 42 U.S.C. § 1973gg-7(b)(1). Building upon this interpretation, the agency determined that documentary proof of citizenship was not "necessary," and thus could not be required of applicants. This interpretation is eminently reasonable. Congress deliberately refused to allow states to condition their acceptance of the Federal Form on proof of citizenship. *See* H.R. Rep. No. 103-66, at 23-24. Furthermore, through rulemaking, the EAC had the opportunity to gather information, balance the risks of voter fraud, and ultimately make an educated decision regarding what information was "necessary" for the Federal Form. 59 Fed. Reg. 32,311.

Petitioner implies that it is better suited to determine what information is "necessary" under the NVRA. Pet'r's Br. at 35-37. But for better or worse, Congress delegated authority to the EAC to determine what information is "necessary" for state officials to determine eligibility — not to state

officials.[7] Under these circumstances, the agency's view must prevail over Petitioner's, even if this Court finds the statutory language to be ambiguous. *United States v. Eurodif S.A.*, 555 U.S. 305, 316, (2009) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (quotation marks omitted; brackets in original)); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.").

The EAC's determination that the NVRA specifically preempts Proposition 200's proof-of-citizenship requirement is likewise entitled to deference under *Chevron*. In the agency's March 2006 letter, the agency determined that "Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law." March 6, 2006 Letter from Thomas Wilkey to Jan Brewer at 3. Petitioner argues that EAC Executive Director Wilkey's letter does not reflect the agency's position. Pet'r's Br. at 18-19, 46. This is simply not true; the letter speaks

[7] As part of the regulatory process, the EAC was directed to "consult" with state election officials in developing the Federal Form. 42 U.S.C. § 1973gg-7(a)(1), (2). This further clarifies that the role of the states is a consultative one, not a prescriptive one; the authority to craft the Federal Form rests with the EAC.

with the authority of the EAC — not any of its individual members — and is consistent with the agency's policies. Moreover, regardless of whether the letter carries the force of law, the EAC's determination "certainly may influence courts facing questions the agencies have already answered." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

Two votes by the Commission on Arizona's Proposition 200 subsequently confirmed that the agency would not deviate from its precedent of reading the NVRA to require that states accept the Federal Form "without supplementation." Ray Martinez III Position Statement (July 10, 2006) (quoting July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 6a); *see also* EAC Tally Vote (July 31, 2006); EAC Public Meeting (Mar. 20, 2008). While several of Petitioner's amici focus on the fact that a majority of EAC commissioners were unable to agree on an official position concerning Proposition 200 and deadlocked in their tally votes to amend the Federal Form, these arguments overlook the agency precedent on preemption. In 2005, the EAC's General Counsel, with the unanimous consent of the commissioners, advised Florida that it could not require applicants to answer additional questions about mental capacity and felony status on the Federal Form. July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 2a. The advisory went on to clarify the agency's position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.* at 7a. Thus, regardless of any failed tally votes

as to Arizona's Proposition 200, the last time a majority of commissioners spoke on the issue of preemption, they took the position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.*; *see also* 42 U.S.C. § 15328 (requiring that any official action by the EAC must be approved by a majority of commissioners). This official position requires deference. Arizona may not now attempt an end-run around the EAC by indirectly challenging the agency's refusal to accommodate Arizona's Proposition 200 when Arizona never instituted any such challenge directly as required under the Administrative Procedure Act.

In any event, the EAC has long regulated with the assumption that the Federal Form's requirements preempt state law. In establishing the content of the Federal Form, for example, the agency labored to prevent applicants from having to provide unnecessary information. *See* 59 Fed. Reg. 32,311. The fact that the agency expended such effort is evidence of its belief that states could not unilaterally require additional information from applicants, and demonstrates that the EAC has a "thorough understanding of its own regulations and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)); *see also New York v. FCC*, 486 U.S. at 64. In light of this expertise, coupled with the broad delegation of authority to EAC in the text of the NVRA, 42 U.S.C. § 1973gg-7(a)(1), (2), the agency's

stance regarding the preemptive power of its own regulations must be given deference.

Indeed, the EAC's conclusions are entitled to further deference because they carry the force of law. Following the official rulemaking proceedings, the EAC codified the content of the Federal Form in the Code of Federal Regulations. 11 C.F.R. § 9428.4. In so doing, the agency formalized its conclusions that an attestation of citizenship under penalty of perjury was sufficient and that requiring further documentation was not appropriate under the NVRA. *Id.* § 9428.4(b)(2), (3); 59 Fed. Reg. at 32,316 ("The issue of U.S. Citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury."). Even absent *Chevron* deference, such codified requirements are controlling. As this Court has recognized, "an agency regulation with the force of law can pre-empt conflicting state requirements." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). This is especially true where, as here, the agency's regulations are clear manifestations of Congress's objectives and directly conflict with state law. *Id.* at 565, 576-77; *Geier*, 529 U.S. at 884.

Amicus does not contest that additional, documentary proof of citizenship might, under some circumstances, be helpful to state officials in assessing some applicants' eligibility to vote. But Congress's clear mandate is that the Federal Form require "*only* such . . . information . . . as is *necessary*," not "all" or "any" such information as "might be helpful" to state election officials. 42

U.S.C. § 1973gg-7(b)(1) (emphasis added). In its capacity as the sole agency charged with designing the Federal Form, the EAC interpreted this mandate, and its reasonable conclusion that an attestation under penalty of perjury is sufficient to verify citizenship is entitled to deference. As the Ninth Circuit opined, even though the petitioner "has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context." *Gonzalez*, 677 F.3d at 403.

III. The NVRA Preempts Proposition 200's Documentary Proof-of-Citizenship Requirement Regardless of Whether the Court Applies a Preemption Analysis Under the Elections Clause or the Supremacy Clause.

No matter what conclusions this Court reaches regarding the proper preemption analysis under the Elections Clause or the Supremacy Clause, the EAC's interpretation of the NVRA dictates the outcome of this case. The NVRA was passed to override burdensome state voter registration laws and streamline the registration process. In order to effectuate these goals, Congress intended the statute to have preemptive effect and for the Federal Form's registration requirements to exist independent of state law. Under either the Elections Clause or the Supremacy Clause, such clear congressional intent is sufficient to empower the EAC to preempt Proposition 200's documentary proof-of-citizenship requirement.

1. The Elections Clause grants Congress "a general supervisory power over the whole subject" of

federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). Under the Clause, Congress wields broad authority to craft "a complete code for congressional elections," including details regarding "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." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Congress has such plenary power because 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 v. Love*, 522 U.S. 67, 69 (1997) (citation omitted).

Based on the history of the Elections Clause and this Court's precedent on the matter, the Ninth Circuit correctly concluded that the "Elections Clause operates quite differently from the Supremacy Clause." *Gonzalez*, 677 F.3d at 391. In reaching this conclusion, the court reasoned that the "Elections Clause affects only an area in which the states have no inherent or reserved power," and as such, courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Id.* at 392. The court then proceeded to examine the NVRA and Proposition 200 to determine if there was an actual conflict. On this question, the court had no difficulty holding that the two provisions, "when interpreted naturally, do not operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, . . .

[Proposition 200's] registration provision, when applied to the Federal Form, is preempted by the NVRA." *Id.* at 403.

This Court has never conflated the analysis required under the Elections Clause with that mandated by the Supremacy Clause, and in light of their differing histories and purposes, there is no basis for doing so now. Maintaining federal administrative oversight over elections has long been viewed as vital to the integrity of this nation's government, and to this end, it is imperative that Congress remain empowered to regulate this subject matter as needed. *See* The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Preemption is thus appropriate whenever a federal provision passed under the Elections Clause directly conflicts with a state law, regardless of other factors or concerns. *Gonzalez*, 677 F.3d at 394. Under this standard, Proposition 200's documentary proof-of-citizenship requirement is preempted because it conflicts with both the EAC's determination of what information is "necessary" and the NVRA's command that states "accept and use" the Federal Form. *Id.* at 403.

2. Even if this Court agrees with Petitioner that preemption principles derived from the Supremacy Clause are applicable in the Elections Clause context, it still must find that the NVRA preempts

Proposition 200's documentary proof-of-citizenship requirement. The analysis under the Supremacy Clause is governed by congressional intent, which serves as the "ultimate touchstone in every pre-emption case." *Wyeth*, 555 U.S. at 565 (quotation marks omitted). Consequently, when faced with a possible conflict between state and federal law, courts begin by examining whether Congress intended for federal law to prevail. Congress may express its intent either directly in the statute's language, or implicitly through its structure and purpose. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Here, Congress expressly delegated authority to the EAC in the NVRA to determine what information was "necessary" for the Federal Form. The EAC acted pursuant to that delegation, and in doing so, preempted state law to the contrary. It is well-established that even under Supremacy Clause preemption principles, a "formal agency statement of pre-emptive intent" is not necessary. *Geier*, 529 U.S. at 884. "To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Id.* at 885. Moreover, if the conflict between state and federal law is clear and insurmountable, preemption must follow. *Id.*

There are undeniable conflicts between Proposition 200's documentary proof-of-citizenship requirement and the Federal Form. Arizona

dictating the content of the Federal Form directly contradicts Congress's exclusive delegation of authority to the EAC to develop the form and determine what identifying information is "necessary." 42 U.S.C. § 1973gg-7(b). And as the Ninth Circuit explained, "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form."[8] *Gonzalez*, 677 F.3d at 398. Such direct conflicts, coupled with a clear Congressional desire to supplant state law, are sufficient to overcome even the strongest interpretation of the presumption against preemption.

Petitioner's claim that Congress expressly denied the EAC preemptive authority in the NVRA is wrong and plainly misreads the statute. Pet'r's Br. at 44-45. Though Congress prohibited the EAC from imposing some requirements on states, Congress expressly carved out the EAC's authority to impose requirements on states "*to the extent permitted under section 1973gg-7(a)*." 42 U.S.C. § 15329 (emphasis added). Section 1973gg-7(a), in turn, granted the EAC broad power to "prescribe such regulations as are necessary" to "develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(1), (2). Congress

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[8] Indeed it is difficult to imagine formulations more at odds with one another than Arizona's requirement to "reject" and the NVRA's requirement to "accept" the same registration application. *Compare* Ariz. Rev. Stat. § 16-166(F) *with* 42 U.S.C. § 1973gg-4(a)(1).

thus explicitly exempted the EAC's authority to craft and regulate the Federal Form from any limitations otherwise imposed on the agency. If anything, this exemption demonstrates congressional awareness that the Federal Form would necessarily preempt state law.

The EAC's position that a state cannot add a proof-of-citizenship requirement to the Federal Form is thus dispositive regardless of what preemption principles the Court employs. Under either standard, the NVRA carries preemptive force, and because the statute delegates authority to the EAC, the agency is likewise empowered to preempt state law. *See New York v. FERC*, 535 U.S. 1, 18 (2002) ("[A] federal agency may pre-empt state law . . . if it is acting within the scope of its congressionally delegated authority." (quotation marks omitted)). Aware of its preemptive authority, the EAC decided that it could not require documentary proof of citizenship on the Federal Form, and under *Chevron*, Petitioner has no basis for questioning this reasonable decision.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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January 22, 2013

Counsel for Amicus Curiae

APPENDIX

APPENDIX A

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

RECEIVED
DEPARTMENT OF STATE
05 AUG – 1 AM 11:51
DIVISION OF ELECTIONS
TALLAHASSEE, FLORIDA

July 26, 2005

Ms. Dawn Roberts
Director, Division of Elections
Florida Department of State
500 South Bronough Street
Tallahassee, Florida 32399

Dear Ms. Roberts,

This letter responds to your June 1, 2005 request for guidance from the U.S. Election Assistance Commission (EAC) regarding Florida's proposed policies governing the acceptance of the Federal Mail Voter Registration Form.[1] As you know, use and

[1] You have also requested guidance from EAC regarding Florida's policies as they relate to the Federal Postcard Application. The EAC is not the appropriate agency to provide guidance on the use and acceptance of that form, rather, the

acceptance of this Federal form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg *et seq.*, (NVRA). After review of your letter and its attachments, the EAC concludes that the policies you propose effectively result in a refusal to accept and use the Federal Voter Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4(a)).

Proposed Policy. In your letter, you conclude that Florida law requires all registration applications to contain three boxes that must be checked in order to affirmatively respond to voter qualification questions regarding felony status, mental incapacity and citizenship. This mandate has been deemed to apply to the Federal Mail Voter Registration Form. As two of the Florida required "checkboxes" are not present on the Federal Registration Form,[2] the State intends to treat all Federal forms received as incomplete. Under Florida's proposed policy, applicants using the Federal form will be notified that their submission was incomplete and will be required to submit supplemental information prior to "book closing." Failure of applicants to take such action will result in an invalid registration and the loss of voting rights.

Department of Defense's Federal Voting Assistance Program is the cognizant authority. 42 USCS § 1973 ff *et seq.*

[2] The Federal Mail Registration Form does not have check boxes to affirm mental capacity and felony status. However, the Help America Vote Act of 2002 required the addition of a check box to affirm citizenship status. 42 U.S.C. §15483(b)(4).

The State's position on this matter is based upon Florida Statutes and changes thereto contained in a newly passed bill (HB 1567). This bill was recently signed into law by Florida's Governor. The changes to the Florida Statutes noted in your letter include an amendment to section 97.052. This change adds the aforementioned "checkboxes" to the "uniform statewide voter registration application." Also included in the changes, is an amendment to section 97.012, stating that a voter registration is complete only if there is a mark in each if [sic] these "checkboxes." The letter also cites section 97.-052(5), noting that the voter registration application prescribed by the Election Assistance Commission will be accepted only if it contains information required by State law. Based upon the information we have received, the Florida Legislature has not changed its voting qualifications found in Section 97.041 of the Florida Statues.

Federal Authority. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th

Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp 330, 351 – 355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections… or to 'alter' the laws initially promulgated by the states. Thus… article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller*, 129 F.3d at 836.

In this way, while it is clear that Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NRVA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration applicant proscribed by*

the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Florida has sole authority to determine voter qualifications, the manner in which it registers voters is subject to Federal regulation. Florida's voting qualifications remain unchanged and are contained in Section 97.041 of the Florida Statutes. The Federal Mail Registration Form, per its State instructions section, accurately reflects these qualifications. The statutory changes Florida has initiated, requiring the use of a "checkbox" in its registration forms, do not alter its voter qualifications. Rather, the "checkbox" scheme is merely a means to determine, document and communicate existing voter eligibility requirements.

As such, Florida's statutory changes deal with the manner in which registration is conducted and are, therefore, subject to Federal law. Congress has clearly regulated in this area by prescribing the

Federal Mail Registration form. The NVRA and HAVA have determined the manner in which voter eligibility shall be documented and communicated on this Federal form. State voter requirements are documented by the applicant via a signed attestation.[3] 42 U.S.C. §1973gg-7(b)(2).

In this way, Florida's proposed policy, to treat all Federal Mail Registration Forms received as incomplete, violates the provisions of the NVRA. The NVRA requires States to both "accept" and "use" the Federal Form. 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.

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[3] As previously noted, HAVA requires the Federal form to document citizenship and age requirements (common to all States) through the use of two "checkboxes." 42 U.S.C. §15483(b)(4).

Given that Florida's proposed policy conflicts with the NVRA, these policies are untenable. Article I, Section 4 and Article II, Section 1 of the U.S. Constitution grant the Congress the authority to regulate the manner in which States conduct voter registration in Federal elections. Congress has chosen to regulate voter registration through HAVA and the NVRA; this regulation, therefore, supersedes State law. Thus, states may not create policies or pass laws which conflict with these authorities.[4]

Conclusion. Florida's proposed policy violates NVRA requirements. The State may not refuse to accept and use the Federal form. If you have any questions regarding this letter or wish to discuss alternative policies, please contact the undersigned at (202) 566-3100.

/Gavin S. Gilmour/

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[4] While the EAC does not make a practice of interpreting State law, it is important to note that the statutory changes identified in the June 1st letter do not necessarily prohibit acceptance of the Federal form. The changes to section 97.052 clearly alter the State form, not the Federal form. The changes to section 97.012, requiring boxes to be checked before a form is complete, may also be reasonably interpreted to apply only to the State registration form. Similarly, Section 97.052(5), requiring the Federal form to be accepted only if it complies with State requirements, must be interpreted to reject the form only when it fails to reflect State voter eligibility requirements. Otherwise, the section would contradict Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, which grants Congress authority to regulate the manner in which Federal elections are held.

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