No. 12-71

In the Morris Tyler Moot Court of Appeals at Yale

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ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Elections Clause of the U.S. Constitution authorizes states to regulate the "Times, Places and Manner" of congressional elections, subject to the understanding that Congress may "make or alter such Regulations" at any time. U.S. Const. art. I, § 4, cl. 1. In 2004, Arizona voters passed Proposition 200, which requires state election officials to "reject any application for [voter] registration . . . not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F). It also updates Arizona's state voter registration form to require "evidence of United States citizenship." *Id.* § 16-152(A)(23). In *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), the Court of Appeals for the Ninth Circuit invalidated Proposition 200 as preempted by the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg *et seq.* The questions presented are as follows:

1. Whether the court of appeals erred by creating a new and heightened preemption test under the Elections Clause to govern federal preemption of state election regulations.

2. Whether Proposition 200 is preempted by the NVRA.

LIST OF ALL PARTIES

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 Constable, 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; Linda Haught Ortega, in her official capacity as Gila County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; Lenora Fulton, in her official capacity as Apache County Recorder; Juanita Simmons, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Susie" 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 who have been replaced by succession in office are: Janice K. Brewer, now Governor of Arizona, who was replaced by Ken Bennett; Thomas Schelling, who was replaced by Juanita Simmons; Joan McCall, who was replaced by Carol Meier; Ana Wayman-Trujillo, who was replaced by Leslie Hoffman; Patti Madril, who was replaced by Sue Reynolds; Susan Hightower Marler, who was replaced by Robyn S. Poucette; Gilberto Hoyos, who was replaced by Steve Kizer; Linda Haught Ortega, who was replaced by Sadie Tomerlin; Dixie Mundy, who was replaced by Linda Eastlick; and Penny Pew, who was replaced by Angela Romero.

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

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OPINIONS BELOW

The order of the District Court for the District of Arizona denying Respondents' motion for a preliminary injunction is unreported but is reprinted at 2006 WL 3627297. The order of the motions panel of the Court of Appeals for the Ninth Circuit granting plaintiffs' request for an emergency interlocutory injunction is unreported. The opinion of the Supreme Court vacating the emergency injunction is reported at 549 U.S. 1. The opinion of the Ninth Circuit affirming the district court's denial of the preliminary injunction is reported at 485 F.3d 1041. The order of the district court granting summary judgment to Petitioners is unreported. The opinion of the Ninth Circuit affirming the grant of summary judgment is reported at 624 F.3d 1162. The order of the Ninth Circuit for rehearing en banc is reported at 649 F.3d 953. The opinion of the Ninth Circuit's en banc panel is reported at 677 F.3d 383.

STATEMENT OF JURISDICTION

The opinion of the en banc panel was entered on April 17, 2012. The petition for a writ of certiorari was filed on July 16, 2012, and was granted on October 15, 2012. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, No. 12-71, 2012 WL 2921874 (Oct. 15, 2012). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Elections Clause of the U.S. Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1.

The Supremacy Clause of the U.S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme

Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Pertinent provisions of the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg *et seq.*, and of Arizona's voter registration statute, Ariz. Rev. Stat. Ann. §§ 16-101 *et seq.*, are set out in the appendix to this brief.

STATEMENT

I. STATUTORY BACKGROUND

A. The National Voter Registration Act

In 1993, Congress enacted the National Voter Registration Act ("NVRA") to "increase the number of eligible citizens who register to vote in elections for Federal office"; to help "Federal, State, and local governments . . . "enhance[] the participation of eligible citizens as voters in elections for Federal office"; to "protect the integrity of the electoral process"; and "to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b).

The NVRA prescribes three methods for registering voters for federal elections. One such method allows potential voters to register by mail using a specially designated federal form that all states must "accept and use."[1] *Id.* § 1973gg-4(a)(1). Responsibility for this form's creation is vested in the Election Assistance Commission. *Id.* § 1973gg-7(a)(2). In the course of developing this form, the Commission must act "in consultation with the chief election officers of the States." *Id.* The statute requires the form itself to conform to a small number of specific criteria setting forth what it *must* include, what it *may* include, and what it *may not* include. For example, the form must incorporate a statement that "specifies each eligibility requirement (including

[1] The other two methods are not at issue in this case. The first, popularly known as the "motor-voter" provision, permits voter registration "by application made simultaneously with an application for a motor vehicle driver's license." 42 U.S.C. § 1973gg-2(a)(1). The second permits voter registration "by application in person" at sites designated in accordance with state law or state voter registration agencies. *Id.* § 1973gg-2(a)(3).

citizenship)" and "requires the signature of the applicant, under penalty of perjury." *Id.* § 1973gg-7(b)(2). It may also include "only such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the application." *Id.* § 1973gg-7(b)(1). And it is explicitly prohibited from requiring "notarization or other formal authentication." *Id.* § 1973gg-7(b)(3).

Additionally, the NVRA permits a state to "develop and use" an individualized mail voter registration form "[i]n addition to accepting and using" the federal form. *Id.* § 1973gg-4(a)(2). This form must meet the same criteria enumerated in § 1973gg-7(b) of the statute for the purpose of governing the federal form. Nowhere in the statute does Congress suggest that the state form and the federal form must be identical. The NVRA also does not contain an express preemption clause setting forth the circumstances in which it supersedes state law.

B. Proposition 200

In 2004, Arizona voters passed Proposition 200 with the stated purpose of "combat[ing] voter fraud." *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006). Proposition 200 amended several state election statutes, two of which are relevant here. First, it instructs state election officials to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F). To meet this condition, an registrant must include with her application any one of the following items: "the number of the applicant's driver license or nonoperating identification license issued after October 1, 1996," a "legible photocopy" of the applicant's U.S. passport or birth certificate, the "number of the [applicant's] certificate of naturalization," or the applicant's "Bureau of Indian Affairs card number." *Id.* Second, Proposition 200 updates Arizona's state election form to include a statement requiring

the applicant to "submit evidence of United States citizenship" with her application. Ariz. Rev. Stat. Ann. § 16-152(A)(23).

Proposition 200 did not otherwise alter Arizona's voter registration procedures. Today, Arizona still accepts both the federal form and its own. *See* Office of the Sec'y of State, *How to Register to Vote*, *available at* http://www.azsos.gov/election/voterregistration.htm#How (last visited Nov. 20, 2012) (describing how to obtain copies of the state and the federal form).

Because Arizona is a covered jurisdiction under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.*, it was required to pre-clear Proposition 200 with the Department of Justice to ensure that its new policies did "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." *Purcell*, 549 U.S. at 2. On May 6, 2005, the Attorney General approved all modifications to Arizona's election procedures Proposition 200 had enacted, including the proof-of-citizenship requirement. *Id*. at 3.

II. FACTUAL BACKGROUND AND PRIOR PROCEEDINGS

Shortly after Arizona voters passed Proposition 200, several groups of plaintiffs—Respondents among them—brought suit in the District Court for the District of Arizona to prevent it from taking effect. The district court consolidated the actions and, following an evidentiary hearing, denied the motion for a preliminary injunction. *Gonzalez v. Arizona*, CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006). Respondents appealed. A two-judge motions panel of the Ninth Circuit reversed the district court and enjoined implementation of Proposition 200's proof of citizenship requirement so voters could register before the upcoming election. *Gonzalez v. Arizona*, Orders in Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006).

On October 20, 2006, this Court granted Arizona's petition for certiorari and vacated the order from the court of appeals. *Purcell*, 549 U.S. at 8 (2006). The per curiam opinion, though it

did not pass on the merits of the case, noted Arizona's "compelling interest in preserving the integrity of its election process. . . . Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Id*. at 5 (internal citations and quotations marks omitted).

On remand, Respondents pursued a preliminary injunction with respect to Proposition 200's registration requirement. The district court again denied injunctive relief, and, on appeal, the Ninth Circuit affirmed. *Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041 (9th Cir. 2007). With respect to preemption, the panel focused on the NVRA's provision permitting states to require "such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id*. at 1050. "[R]ead together" with the statute's clear statement that citizenship is a prerequisite for eligibility, the court found that Proposition 200 was not preempted by the NVRA. *Id*. Shortly thereafter, the district court granted Petitioners' motion for summary judgment.

Respondents appealed the district court's rulings. A three-judge panel of the Ninth Circuit affirmed in part and revered in part. *Gonzalez v. Arizona* (*Gonzalez II*), 624 F.3d 1162 (9th Cir. 2010). The panel struck down most of Respondents' claims but found that Proposition 200's registration was preempted by the NVRA. *Id.* at 1169. The panel overruled the contrary holding of *Gonzalez I* on the ground that an exception to the law of the case rule applied: namely, that "the decision is clearly erroneous and is enforcement would work a manifest injustice." *Id*. at 1186-87.

A majority of nonrecused active judges voted to rehear the case en banc. *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2011) (granting rehearing).

III. THE DECISION BELOW

On April 17, 2012, a divided en banc panel of the Ninth Circuit affirmed *Gonzalez II* and concluded that the NVRA preempts Proposition 200's proof-of-citizenship requirements. *Gonzalez v. Arizona* (*Gonzales III*), 677 F.3d 383 (9th Cir. 2012) (en banc). The majority began by distinguishing between the scope of the Elections Clause and the Supremacy Clause. *Id.* at 391. Preemption analysis under the latter framework is subject to a presumption against preemption because courts fear upending the "delicate balance" of sovereignty between the states and the federal government. *Id.* at 392. This fear is not present in the former framework because "states have no reserved authority over the domain of federal elections." *Id.*

The court of appeals then drew upon two Elections Clause cases—*Ex Parte Siebold*, 100 U.S. 371 (1879), and *Foster v. Love*, 522 U.S. 67 (1997)—to enunciate a new approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. *Id.* at 394. First, it considers the state and federal laws "as if they comprise a single system of federal election procedures." *Id.* If state law "complements" the federal scheme, the law is treated if it were "adopted by Congress as part of" that scheme. *Id.* But if Congress has addressed the same subject as the state law in question, the court examines "whether the federal act has superseded the state act." *Id.* "If the two laws do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to 'alter' the state's regulation[] and that regulation is superseded." *Id.* Under the novel framework, no presumption against preemption applies.

The majority applied this framework to Proposition 200 and found its procedures to be "seriously out of tune" with the NVRA. *Id.* at 398. First, Arizona cannot simultaneously "accept and use" the federal form while "rejecting" such forms as insufficient if they did not come with

proof of U.S. citizenship. *Id.* Second, Proposition 200 undercuts the Electoral Assistance Commission's authority to determine the contents of the federal form. *Id.* at 400. Finally, Proposition 200 "is discordant with the NVRA's goal of streamlining the registration process." *Id.* The court of appeals thus concluded that "the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections." *Id.* at 410. This appeal ensued.

SUMMARY OF ARGUMENT

Federal preemption of state law occurs through the direct operation of the Supremacy Clause, which establishes federal dominance when federal and state enactments conflict. However, preemption is not to be lightly presumed. Respect for the United States' system of dual sovereignty requires courts to begin their preemption analysis with the understanding that state law may not be superseded by federal law in the absence of clear and manifest congressional intent.

The judiciary's concern with the proper balance between state and federal sovereignties does not vanish into the ether in the context of federal elections. As the Elections Clause makes clear, the Constitution empowers states to regulate such elections up until the point at which Congress acts. The Framers understood this prerogative to be confined to those situations posing a grave threat to the federal government's safety. True to its mandate, Congress refrained from regulating federal elections for the majority of this country's early history. This Court's Supremacy Clause jurisprudence, and its attendant presumption against preemption, thus applies with full force to state laws regulating federal elections.

The court of appeals erred by creating a new and heightened test to govern preemption in this field, one that resolves all ambiguities in favor of the federal government. Its radical inversion of standard preemption analysis ignores the fact that states possess not only substantial

prerogatives but also a multitude of interests in the context of federal election regulation. And it rests on a fundamental misreading of the Court's two leading Elections Clause cases, both of which actually instantiate traditional principles of Supremacy Clause preemption. This novel test must therefore be rejected.

Applying the proper Supremacy Clause framework reveals that Proposition 200 is not preempted by the National Voter Registration Act (NVRA). The NVRA does not expressly preempt Proposition 200 because it contains not a single preemption provision in its terms. Nor does the NVRA create a scheme of federal regulation so pervasive as to make reasonable the inference that it intended to preempt the entire field of federal election regulation. To the contrary, the structure of the statute actually demonstrates remarkable solicitude toward state interests. The federal interest in this field is not so dominant that Congress may be assumed to have precluded enforcement of state laws on the same subject in spite of statutory silence.

A state law may still be preempted in the absence of express and field preemption when it conflicts with federal law. Such conflict occurs when compliance with both state and federal law is a physical impossibility, and when the challenged state law stands as an obstacle to the accomplishment and execution of Congress's full purposes and objectives. Neither species of conflict is present in this case.

With respect to impossibility, a plain reading of the federal statute reveals that Proposition 200's components are not mutually exclusive with the NVRA's provisions. The plain language of the NVRA permits states to develop their own individual form and to ask an applicant for enough identifying information to verify her eligibility for the franchise. Construing the statute to require complete congruence between state and federal forms would read the NVRA's state form provision out of existence. Likewise, the NVRA does not prevent Arizona

from rejecting any application that does not meet Proposition 200's proof-of-citizenship requirement. The statute merely instructs states to "accept and use" the federal form it creates. Under the ordinary meaning of these terms, it is entirely possible to accept and use something for a particular purpose yet have it be insufficient to satisfy that purpose completely. Moreover, nothing in the NVRA forbids states from requesting such additional identifying information.

With respect to obstacle preemption, Proposition 200 accords with the NVRA's dual purposes: to maximize voter enfranchisement while minimizing voter fraud. Proposition 200 represents Arizona's attempt to square this circle by introducing fraud protections while maintaining close to current levels of voter outreach. By attributing only a single purpose—enfranchisement—to the NVRA, the court of appeals fails to engage in the holistic analysis of statutory purpose that this Court's precedents recommend. Because the Arizona law does not pose a significant threat to the accomplishment of federal objectives, it is not preempted by the NVRA.

Importantly, Proposition 200 is not preempted even under the court of appeals' erroneous test, which finds preemption when two election statutes do not operate harmoniously in a single procedural scheme. Although this test does not merely jettison the presumption against preemption but actually places a thumb on the scale in favor of federal preemption, Petitioners still prevail because they do not rely solely on the presumption against preemption to prove their point. Indeed, to reach the opposite conclusion, the court of appeals must ignore two cardinal principles of statutory construction, construe the NVRA's operative phrases in isolation, and disregard the plain meaning of the NVRA's language.

For these reasons, the judgment of the court of appeals should be reversed.

ARGUMENT

I. THE SUPREMACY CLAUSE GOVERNS FEDERAL PREEMPTION OF STATE ELECTION LAWS ISSUED PURSUANT TO THE STATE'S ELECTIONS CLAUSE AUTHORITY.

A. The Supremacy Clause supplies the appropriate legal standards to govern the preemption of state election laws regulating federal elections.

The United States' federal system rests on the bedrock principle "that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Because the existence of two sovereigns raises the possibility that laws may conflict, the Constitution provides a clear rule for mediating such disputes. *Id.* Preemption of state law "occurs through the direct operation of the Supremacy Clause," *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265 (2012), which provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI, cl. 2.

This Court's Supremacy Clause jurisprudence establishes the general contours for determining when state laws are preempted. In particular, the Court has repeatedly warned that preemption is "not to be lightly presumed" when the judiciary is asked to give the Supremacy Clause effect. *Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 280-81 (1981) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Supremacy Clause preemption doctrine begins from the premise that "the powers of the State [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations and internal quotation marks omitted). Although this "interpretive presumption" is especially strong when the state statute relates to a "fiel[d] of traditional state regulation," *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), it

has been deployed "[i]n *all* pre-emption cases," *Lohr*, 518 U.S. at 485 (emphasis added). The presumption safeguards the Framers' constitutional vision by restricting "freewheeling judicial inquir[ies] into whether a state statute is in tension with federal objectives": inquiries that would "undercut the principle that it is Congress rather than the courts that preempts state law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring).

The judiciary's concern with the proper balance between state and federal sovereignties does not vanish into the ether in the context of federal elections. Because the Framers "intended the States to keep for themselves . . . the power to regulate elections," *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970), the question of whether a congressional statute passed under the authority of the Elections Clause preempts state regulations is no different from other inquiries undertaken under the ambit of the Supremacy Clause and should be analyzed using an identical lens.

As the text of the Elections Clause makes clear, the Constitution obliges state legislatures to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. This duty is subject to the understanding that "Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* The Clause therefore clarifies that the responsibility for regulating federal elections resides in the individual states in the absence of congressional action. *Foster v. Love*, 522 U.S. 67, 69 (1997). In this manner, the Elections Clause replicates the Supremacy Clause's more general prescription on preemption, differing only in that it imposes an affirmative duty on states where the Supremacy Clause does not. "Unless Congress acts, [the Elections Clause] empowers the States to regulate." *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

The history of the Elections Clause provides additional evidence that the Framers intended to entrust the conduct of elections to state laws and state officers in the first instance. As

James Madison observed at the Virginia Ratifying Convention, the Framers found it "necessary to leave the regulation of [federal elections] to the state governments" because those governments were "best acquainted with the situation of [their] own people." 3 The Records of the Federal Convention of 1787, at 311 (Max Farrand ed., 1911). Such delegation, as Hamilton wrote in the Federalist Papers, was "both more convenient and more satisfactory." The Federalist No. 59 (Alexander Hamilton).

For similar reasons, the Framers intended that Congress interfere with state regulations only when "extraordinary circumstances might render that interposition necessary to [the federal government's] safety." *Id.* This supervisory authority was meant to trigger "only in situations that threatened destruction or serious prejudice"; for example, Congress could intervene to prevent the states from declawing the federal government by refusing to hold federal elections altogether. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 39 (2010); *see U.S. Term Limits v. Thornton*, 514 U.S. 779, 808-09 (1995). Seven state ratifying conventions proposed constitutional amendments making that prohibition explicit, amendments ultimately withdrawn after leading Federalists argued that, "even without amendment, the Clause should be construed as limited to emergencies." Natelson, *Original Scope*, *supra*. These assurances notwithstanding, three states—New York, North Carolina, and Rhode Island—adopted "resolutions of understanding" making explicit this implied restriction on congressional power.[2] *Id.*

Cognizant of its limited mandate, Congress left the business of regulating federal elections to the states for the overwhelming part of the eighteenth, nineteenth, and early

[2] New York's resolution is illustrative, declaring its "full Confidence . . . that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding [congressional] Elections . . . unless the Legislature of this State shall neglect or refuse to make Laws or regulations for the purpose . . . ." Natelson, *Original Scope*, *supra*, at 40 n.189.

twentieth centuries. *United States v. Gradwell*, 243 U.S. 476, 482 (1917). Indeed, Congress took "no . . . action whatever" on the subject from the date of the Founding until 1842, when it enacted a law requiring that members of the House of Representatives be elected by districts. *Id.* Not until 1870 did Congress erect a "comprehensive system for dealing with congressional elections," *id.* at 483—one it promptly repealed just over two decades later, *id.* The *Gradwell* Court thus concluded that "the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers," and that "whenever [Congress] has assumed to regulate such elections it has done so by positive and clear statutes." *Id.* at 485. In the absence of "positive and clear" language indicating Congress's intent to override state election law, the Court refused to read a vague federal statute criminalizing fraud as criminalizing *election* fraud as well. *Id.*

It is true that, after *Gradwell*, the judiciary has adopted a less constrained reading of federal authority under the Elections Clause. *See Ass'n of Cmty. Orgs. for Reform Now v. Edgar*, 56 F.3d 791, 794-95 (7th Cir. 1998). But this gradual development has been accompanied by the states' simultaneous evolution of individualized, "comprehensive, and in many respects complex" election codes extending far beyond any they possessed during the time of the Founding. *Storer v. Brown*, 415 U.S. 724, 730 (1974). And even if such evolution had not occurred, this Court does not permit the expansion of federal authority into a field traditionally occupied by the states to obliterate the presumption against preemption. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983) (applying the presumption to state regulation of electrical generation despite the expansion of federal Commerce Clause authority to encompass electricity transmitted in interstate commerce). Under

such circumstances, the presumption against preemption—and its attendant consideration of state sovereign prerogatives—becomes more vital than ever.

On balance, the text, history, and implementation of the Elections Clause establish that the regulation of federal elections is a field traditionally occupied by the states. And they indicate that congressional preemption of state election laws should not lightly be presumed, especially when the question of preemption is close or uncertain.

B. The court of appeals erred by creating a new and heightened preemption test to govern federal preemption of state election laws regulating federal elections.

The overwhelming weight of this Court's jurisprudence indicates its reluctance to derogate from the presumption against preemption, a central tenet of traditional Supremacy Clause jurisprudence. Such extraordinary derogation occurs only in rare cases involving uniquely federal areas of regulation—and even then, the Court does not automatically deem the presumption inapplicable.[3] Because the regulation of federal elections implicates the federalism concerns that encouraged this Court to adopt the presumption in the first place, the court of appeal's decision to abandon existing Supremacy Clause doctrine and forge a novel test for "Elections Clause preemption" was error.

The court of appeals takes great pains to emphasize the extent to which it has unmoored itself from traditional preemption principles. "Because states have no reserved authority over the domain of federal elections," it asserts, courts "need not be concerned with preserving a 'delicate

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[3] *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (declining to deploy the presumption against preemption in the context of policing fraud against federal agencies); *United States v. Locke*, 529 U.S. 89 (2000) (doing the same in the context of regulating international maritime commerce). These contexts are far cry from the one at issue here.

Even when state statutes implicate uniquely federal areas of regulation, the Court does not automatically hold the presumption inapplicable. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), which involved a conflict between congressionally imposed trade sanctions on Burma and a Massachusetts statute with more restrictive requirements. Although it recognized that states have never had the prerogative to "speak for the United States among the world's nations," a unanimous Court nevertheless elected to resolve the issue by "[a]ssuming, *arguendo*, that *some* presumption against preemption is appropriate." *Id.* at 374 n.8 (emphasis added).

balance' between competing sovereigns." *Id.* As a "standalone preemption provision," the Elections Clause "establishes its own balance." *Id.* Though the en banc majority fails to specify what this balance would entail, the original panel opinion holds that it "resolv[es] all conflicts in favor of the *federal government*." *Gonzalez II*, 624 F.3d at 1174 (emphasis added). Thus, the court of appeals' theory of "Elections Clause preemption" does not merely jettison the presumption against preemption but actually places a thumb on the scale in *favor* of preemption. This radical inversion of this Court's jurisprudence badly misreads the relevant history and precedents.

As a threshold matter, the mere fact that states' sole authority to regulate federal elections "aris[es] from the Constitution itself," *U.S. Term Limits*, 514 U.S. at 805, does not liberate courts from the requirement that they weigh competing state and federal interests. This weighing is particularly important when Congress has failed to provide positive and clear indications of its intent to override state election law. And its absence is especially pernicious in the context of federal elections, where states possess not only substantial prerogatives but also a multitude of substantial interests.

This Court has made clear that the states' power to prescribe the "Times, Places and Manner" of elections sweeps broadly. It encompasses the authority "to provide a complete code for congressional elections, not only as to times and places,"

> but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Smiley v. Holm, 285 U.S. 355, 366 (1932). The scope of this power is best analogized to the plenary control a state exercises over the rules, procedures, and penalties that apply to the

election of its own officials. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). A state's procedural regulations are constitutional as long as they do not "dictate electoral outcomes," "favor or disfavor a class of candidates," or "evade important constitutional restraints." *U.S. Term Limits*, 514 U.S. at 833-34.

The breadth of state power under the Elections Clause is matched by the breadth of state interests implicated by the regulation of federal elections. In just the last half-century, this Court has approved the states' interest in maintaining "fair and honest" elections, *Cook v. Gralike*, 531 U.S. 510, 524 (2001); in unburdening its general election ballot from "frivolous candidacies," *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); in avoiding "voter confusion," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986); in tabulating votes with procedures free from "irregularity and error," *Roudebush*, 405 U.S. at 25; in "seeking to assure that elections are operated equitably and efficiently," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); in ensuring that "order[] rather than chaos . . . accompany the democratic process," *Storer*, 415 U.S. at 730; and in preserving the confidence of its citizens "in the integrity and legitimacy" of the American system of "representative government," *Crawford v. Marion Cnty. Electoral Bd.*, 553 U.S. 181, 197 (2008). *See also Gonzalez III*, 677 F.3d at 440 (Kozinski, C.J., concurring) ("While the federal government has an interest in how elections for federal office are conducted, the states are not disinterested bystanders.").[4]

The court of appeals' decision ignores all of these state powers and state interests. Instead, relying on just two cases from this Court—*Ex Parte Siebold*, 100 U.S. 371 (1879) and its recent elaboration in *Foster v. Love*, 522 U.S. 67 (1997)—it crafts a novel doctrine of

[4] Judge Kozinski's concurrence identifies several other interests this Court has not yet approved. These include the state's interest in ensuring that its representatives are chosen by qualified voters, in guaranteeing that elections conducted using its own resources are conducted "efficiently and fairly," and in "ensuring that [its] reputation[] [is not] soiled" by allegations of fraud or malfeasance "for decades, maybe longer." *Gonzalez III*, 677 F.3d at 440 (Kozinski, C.J., concurring).

"Elections Clause preemption" that rests on a fundamental misunderstanding of the two cases it cites. Far from justifying the court of appeals' position, these precedents actually stand for the much narrower principle that "the action of Congress, *so far as it extends and conflicts* with the [electoral] regulations of the state, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879) (emphasis added).

In *Siebold*, the Court confronted the question of whether Congress could enact a partial electoral regulatory scheme to be implemented alongside existing state law. *Id.* at 382. Although the *Siebold* Court answered in the affirmative, it went on to explain that partial federal regulations would only preempt state law "so far as the two are inconsistent, *and no farther*." *Id.* at 386 (emphasis added). It then defined inconsistency in limited terms, observing that "[t]he one [regulation] does not exclude the other, except when both cannot be executed at the same time." *Id.* at 395. Thus, contrary to the court of appeals' reading, *Siebold* in no way preaches a doctrine of untrammeled federal authority. Rather, it recognizes that "the State and national governments are co-ordinate and altogether equal" until state law comes into conflict with federal law, at which point the former must give way. *Id.* at 398-99.

The court of appeals' invocation of *Foster* is equally unavailing. That case involved a Louisiana statute that resolved congressional elections using an "open primary" held in October of a federal election year. 552 U.S. at 70. A candidate who won a majority in her open primary was deemed "elected" as a matter of Louisiana law, thus removing her seat from contention on Election Day proper. *Id.* At oral argument, Louisiana's attorney general conceded that the open primary system "certainly allows for the election of a candidate in October, as opposed to actually electing on Federal Election Day." *Id.* at 73. Unsurprisingly, the *Foster* Court held this scheme clearly preempted by federal statutes establishing "the Tuesday after the first Monday in

November in an even-numbered year" as the single Election Day for the entire Union. *Id.* at 68-69. In so doing, it relied upon *Siebold*'s recognition of explicit "conflict" as the touchstone for preemption, reaffirming that the preeminence of federal law over state law applies only "so far as the conflict extends." *Id.* at 69 (quoting *Siebold*, 100 U.S. at 384).

Neither *Siebold* nor *Foster* supports the court of appeals' conclusion that the Elections Clause does not require solicitude for state sovereignty when explicit federal-state conflict is not present. Indeed, the *Siebold* Court went out of its way to emphasize that "[s]tate rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. . . . [I]n endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." *Siebold*, 100 U.S. at 394. By holding otherwise, the court of appeals uses the unquestioned supremacy of federal law over conflicting state law to justify a novel and expansive preemption test that fails to even acknowledge the breadth of state powers or state interests. The Court's Elections Clause jurisprudence provides no authority for this logical leap.

Finally, the court of appeals errs by asserting that preemption under the Elections Clause is somehow distinct from preemption under the Supremacy Clause. This remarkable proposition is apparently derived from the court's "survey of Supreme Court opinions deciding issues under the Elections Clause," one that "reveal[ed] no case where the Court relied on or even discussed Supremacy Clause principles." *Gonzalez III*, 677 F.3d at 392.

The court's results are puzzling, to say the least. In *Siebold*, the Court expressly invoked the Supremacy Clause three times to clarify that the determination of when federal election law preempts state law rests on the "words of the Constitution itself": "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

Siebold, 100 U.S. at 395. And although *Foster* does not contain any formal reference to the Supremacy Clause, the Court voided Louisiana's statutory scheme because "it was impossible to hold a [c]ongressional election on the designated day if the election was in fact completed on an earlier date." *Gonzalez III*, 677 F.3d at 453 (Rawlinson, J., dissenting). This understanding of impossibility-as-conflict is an integral part of standard Supremacy Clause preemption analysis. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (finding conflict preemption when "compliance with both federal and state regulations is a physical impossibility"). Indeed, this Court has actually cited *Foster* to explain the bounds of conflict preemption in general.[5]

For these reasons, the court of appeals' novel Elections Clause preemption test should be rejected and the decision below reversed.

II. PROPOSITION 200 IS NOT PREEMPTED BY THE NATIONAL VOTER REGISTRATION ACT.

A. Under the preemption analysis prescribed by the Supremacy Clause and erroneously rejected by the court of appeals, Proposition 200 is not preempted by the NVRA.

This Court has found state law preempted under the Supremacy Clause in three circumstances. State law is preempted to the extent that Congress has adopted express language defining the existence and scope of preemption. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). In the absence of express preemption, state law may still be impliedly preempted if Congress has enacted "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that [it] left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When Congress has not occupied an entire field of regulation, state

[5] *See Wyeth v. Levine*, 555 U.S. 555, 588 (2009) ("Pre-emption must turn on whether state law conflicts with the text of the relevant federal statute or with the federal regulations authorized by that text. See *Foster v. Love*, 522 U.S. 67, 71, 118 S.Ct. 464, 139 L.Ed.2d 369 (1997) (finding that conflict pre-emption question "turn[ed] entirely on the meaning of the state and federal statutes" at issue before the Court).").

law is still preempted "to the extent of any conflict with a federal statute." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

In all circumstances, the presumption against preemption operates to resolve potential ambiguities in favor of the state.[6] "[R]espect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of actions." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009). Thus, a federal statute will preempt state law only when Congress has manifested the "clear and manifest" to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

In this case, the text of the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg *et seq.*, contains no provision expressly preempting state law.[7] Applying the implied preemption analysis prescribed by the Supremacy Clause—and erroneously rejected by the court of appeals—confirms that Proposition 200 is not preempted by the National Voter Registration Act (NVRA).

1. Field Preemption

The NVRA does not create a scheme of "federal regulation . . . so pervasive as to make reasonable the inference that [it] left no room for the States to supplement it." *Rice*, 331 U.S. at

[6] Suggestions that the Court's reliance on the presumption has waned in the *express* preemption context, *see Altria Grp., Inc. v. Good*, 555 U.S. 70, 99 (2008) (Thomas, J., dissenting), are premature. Indeed, in *Good* itself, a six-Justice majority invoked the doctrine to hold that the Federal Cigarette Labeling and Advertising Act's express preemption provision did not preempt a suit for fraud under state law. *See id.* at 76-77 (majority opinion). However, the issue of whether the presumption against preemption applies in the express preemption context is not presented by this case, as the NVRA contains no such provision.

[7] The NVRA thus stands in sharp contrast with other federal statutes that do include such provisions. *See, e.g.*, 12 U.S.C. § 25b (establishing "state law preemption standards" to govern state consumer financial laws); 29 U.S.C. § 1144(a) (declaring that the Employment Retirement Income Security Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described" in the Act). Given the complete absence of similar language in the NVRA, there is no colorable argument that it expressly preempts Proposition 200.

230. The "mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply" that Congress intended that scheme to preempt the field. *English v. Gen. Elec. Co.*, 496 U.S. 72, 87 (1990). Since "every subject that merits congressional legislation is, by definition, a subject of national concern," any other rule would permit "every federal statute [to] oust[] all related state law" and eviscerate the "federalist structure of joint sovereigns" mandated by the Constitution. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). For this reason, even the presence of a "detailed" and "comprehensive" federal regulatory scheme cannot support an inference that Congress, in constructing it, has extinguished all state law in that field. *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 415 (1973). Field preemption is only wrought by a "manifestation of congressional intent to occupy an entire field such that even without a federal rule on some particular matter within the field, state regulation on that matter is pre-empted, leaving it untouched by either state or federal law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 115 (1992) (Souter, J., dissenting).

Congress has manifested no such intent here. In fact, it has arguably demonstrated the exact opposite. As befits a statute partially designed to help "Federal, State, and local governments . . . enhance the participation of eligible citizens as voters in elections for Federal office," the NVRA explicitly invites state participation in the regulatory scheme it enacts. 42 U.S.C. § 1973gg(b)(2). Its rhetorical commitment to state autonomy manifests in its substantive provisions. For example, the NVRA permits states to "develop and use" a mail voter registration form that differs from the federal form as long as the state form adheres to certain criteria. *Id.* at § 1973gg-4(a)(2). It also authorizes them to require "such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the

applicant." *Id.* § 1973gg-7(b)(1). Consequently, states have adopted a kaleidoscope of different requirements a prospective applicant must satisfy before her federal form will be accepted.[8]

Nor does the NVRA's limited delegation of authority to the Election Assistance Commission suffice to prove preemptive intent. As a matter of law, Congress cannot "oust all of state law from a field" just by granting a federal agency regulatory authority over that entire field. *Kurns*, 132 S. Ct. at 1270 (Kagan, J., concurring). Even if it could, no such grant is present here. The NVRA does not empower the Commission to promulgate regulations outside the realm of developing a federal form, 42 U.S.C. § 1973gg-7(a), to enforce the NVRA or the regulations it writes, *id.* § 1973gg-9, or to conduct its own independent investigations. Indeed, the statute actually commands the *Commission* to consult with state representatives when executing its duties. *Id.* § 1973gg-7(a). The only affirmative statement in this section of the NVRA thus underlines the importance of state authority.

In sum, "[h]ad Congress meant to enact a comprehensive code of voter registration, it could have said so in the NVRA, but it didn't." *Gonzalez II*, 624 F.3d at 1208 (Kozinski, C.J., dissenting). The NVRA's text and structure clearly preclude any conclusion that Congress intended the statute to foreclose any state action in the field.

Even if the statute were ambiguous on this count, the presumption against preemption would militate against a finding of field preemption. The NVRA exists in a field where original legislative authority has been allocated to the states, where states possess significant interests, and where individual states routinely legislate alongside with federal statutes. It is therefore *not* akin to immigration, naturalization, alien registration, and other fields where field preemption is

[8] *See Gonzalez II*, 624 F.3d at 1207 (Kozinski, C.J., dissenting) (citations omitted) ("In Alabama, '[y]our social security number is requested.' Connecticut requires a 'Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.' Hawaii tells applicants that '[y]our full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application.' There's more, but you get the idea.").

properly and typically found. In those areas, the federal government, "representing as it does the collective interests of [all fifty] states, is entrusted with *full and exclusive* responsibility." *Hines*, 312 U.S. at 63 (emphasis added). Here, by contrast, the "federal interest" is not so dominant that Congress can be "assumed to [have] preclude[d] enforcement of state laws on the same subject" in spite of its silence. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

2. Conflict Preemption

A state law may still be preempted in the absence of express or field preemption when it conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Neither species of conflict is present here.

Establishing conflict via impossibility involves a "demanding" inquiry, *Levine*, 555 U.S. at 573, that finds preemption only when "it is impossible for a . . . party to comply with both state and federal requirements," *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). This narrow vision of conflict reflects the uncontroversial principle that, when application of both state and federal law would generate an absurd result by imposing contradictory requirements on regulated actors, the state law must give way. The *Foster* Court relied upon this exact theory to invalidate Louisiana's open primary statute. *See Foster v. Love*, 522 U.S. 67 (1997).

The challenged components of Proposition 200 survive this test. By updating Arizona's state voter registration form to require "evidence of United States citizenship," Ariz. Rev. Stat. Ann. § 16-152(A)(23), Proposition 200 replicates the NVRA's requirement that any state form include "only such identifying information . . . as is necessary to enable the appropriate State

election official to assess the eligibility of the applicant and to administer voter registration and other parts of the electoral process," 42 U.S.C. § 1973gg-7(b)(1), 1973gg-4(a)(2). Insofar as American citizenship is an undisputed prerequisite to any exercise of the franchise, Proposition 200's citizenship verification requirement falls well within the ambit of the NVRA. At the very least, the provision does not make it "impossible" for Arizona "to comply with both state and federal requirements," as the NVRA does not *prohibit* the state from requesting such evidence.

Holding this aspect of Proposition 200 preempted on the basis of impossibility would be particularly inappropriate because nothing in the NVRA requires that the state form be identical to the federal form in every way. Rather, § 1973gg7-(b) creates a band of acceptable designs in which a putative state form must remain, prescribing as it does both *minimum* and *maximum* standards.[9] By establishing both a statutory floor and a statutory ceiling, the NVRA accords states the leeway they require to tailor their individual form to their individual needs.

Construing § 1973gg-7(b) as barring state forms from deviating from their federal counterparts would not merely fly in the face of the NVRA's plain language. It would also violate the "cardinal principle of statutory construction that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks and citation omitted). The relevant provision here is 42 U.S.C. § 1973gg-4(a)(2), which authorizes states to "develop and use" their own voter registration form "for the registration of voters in elections for Federal office." Should states be prohibited from requesting proof of eligibility on their state form that the federal form does not require, a state would have only two options when developing its own form: a form

[9] For an example of a statutory floor, consider the NVRA's requirement that all voter registration forms to include a statement that "specifies each eligibility requirement," "contains an attestation that the applicant meets each such requirement," and "requires the signature of the applicant, under penalty of perjury." 42 U.S.C. § 1973gg7-(b)(2). For an example of a statutory ceiling, consider the NVRA's absolute bar on "any requirement for notarization or other formal authentication." *Id.* § 1973gg7-(b)(3).

substantively identical to the federal form, or a form that required additional proof of eligibility but which could only be used to register voters for *state* elections.

It is not clear why any state would expend resources to develop the former, given the existence of the federal form. And the state already possesses the sovereign right to develop the latter because the NVRA does not presume to interfere with the administration of nonfederal elections. *See Gonzales III*, 677 F.3d at 400. Either way, requiring substantive symmetry between the state and the federal form would strip § 1973gg-4(a)(2) of substance. This Court does not read statutes in a manner that would render a key provision "nonsensical and superfluous."[10] *Corley v. United States*, 556 U.S. 303, 314 (2009).

Likewise, Proposition 200's instruction that Arizona election officials "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," Ariz. Rev. Stat. § 16-166(F), is not mutually exclusive with the NVRA's requirement that states "accept and use" the federal form it creates, 42 U.S.C. § 1973gg-4(a)(1). The ordinary meanings of "accept" and "use" do not have such preclusive effect. It is "entirely possible to accept and use something for a particular purpose, yet not have it be sufficient to satisfy that purpose." *Gonzalez II*, 624 F.3d at 1206 (Kozinski, C.J., dissenting). And although the phrase "accept and use" *could* be interpreted in a preclusive fashion once excised from its statutory context, courts "do not construe statutory phrases in isolation." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010). Reading the words "accept and use" "with a view to their place in the

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[10] This reading has the additional disadvantage of imposing significant burdens on the process of statewide voter registration. Under this view of the statute,

> an Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials. States that desire a proof-of-citizenship requirement in their state forms (as the majority suggests is allowed by the NVRA) would be forced to track whether their residents are registered to vote for federal elections, state elections, or both.

Gonzales III, 677 F.3d at 449 (Rawlinson, J., dissenting). Assuming the NVRA was sufficiently ambiguous as to render this strained reading a possibility, the presumption against preemption would advise strongly against adopting it.

overall statutory scheme," *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007), provides further evidence in support of the proposition that Congress meant "accept and use" in the ordinary sense.

As a general rule, the NVRA does not forbid states from requiring additional identifying information from potential voters to verify their eligibility prior to accepting their federal form. This rule admits only a single exception: the express statutory prohibition on requiring "notarization or other formal authentication" in § 1973gg-7(b)(3). This prohibition is of particular significance because it occurs in the same section of the statute that recognizes citizenship as one of several "eligibility requirement[s]" a voter must possess as a precondition of registration. 42 U.S.C. § 1973gg-7(b)(2)(A). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Nken v. Holder*, 556 U.S. 418, 430 (2009). *Expressio unius est exclusio alterius*. Where, as here, the legislative history of the statute establishes that the question of proving eligibility was not an "unnamed possibility," *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), the *expressio* canon takes on even greater power. *See* 139 Cong. Rec. H505-02 (Feb. 4, 1993).[11] The statute's

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[11] The Senate actually passed the so-called "Simpson Amendment," which would have explicitly permitted states to require "presentation of documentation relating to citizenship of an applicant for voter registration." *See* H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.). Though the Amendment was later rejected in conference, *id.*, the conference report does not support an inference that Congress intended to bar such action.

As a matter of doctrine, this Court has cautioned that "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation" of a statute. *Rapanos v. United States*, 547 U.S. 715, 749 (2006). The present case provides an apt illustration of the perils of such reliance. Here, strong evidence indicates that the bill's sponsor read "accept and use" broadly and thus found the amendment superfluous. *See* 129 Cong. Rec. 5098, 5099 (Mar. 16, 1993). The conference report neither refutes nor confirms this understanding of "accept and use." Instead, it merely states that the amendment "is not necessary or consistent with the purposes of the act." H.R. Rep. No. 103-66, at 23. The report thus gives no indication as to whether the committee thought the amendment superfluous or inconsistent. For this reason, the rejection of the Simpson Amendment "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002).

individualized ban on notarization is strong evidence in favor of the suggestion that states may demand other types of verification information without coming into conflict with the NVRA.

Though this Court has not had occasion to pass upon this question, at least one circuit court has adopted this reasoning. In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit upheld a Tennessee law requiring residents to provide a social security number to register to vote. Writing for a unanimous panel, Judge Norris rejected the argument that the NVRA only permits states to require the minimum amount of information necessary to prevent duplicate voter registration. *Id.* at 756. Because the statute "does not specifically forbid use of social security numbers," it could not preempt the Tennessee law. *Id.*

The letter from the Electoral Assistance Commission declaring the existence of conflict, *see Gonzalez II*, 624 F.3d at 1182, does not affect any of these conclusions.[12] Under the NVRA, the Commission simply does not have the authority to interpret the provisions of its organic statute. *See* 42 U.S.C. § 1973gg-7(a)(1). And even if it did, this Court would still "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption." *Levine*, 555 U.S. at 576.

Taken together, these various analytical strands prove that the NVRA's text and structure are not compromised by Proposition 200. Arizona's alterations to its state registration form occurred with the NVRA's statutory blessing, and the content of Proposition 200 falls well within the NVRA's statutorily imposed floor and ceiling. *Cf. Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (noting with approval Arizona's decision to go "the extra mile in ensuring that its law closely tracks [the governing federal statute] in all material

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[12] The Commission's letter warned Arizona that it could not "refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." *See Gonzalez II*, 624 F.3d at 1182.

respects”). There is no basis with which to find Proposition 200 preempted by way of impossibility.

Conflict preemption by way of “obstacle” requires the Court to engage in an altogether different inquiry. Determining whether state law constitutes a “sufficient obstacle” to the accomplishment and execution of federal objections “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purposes and intended effects.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). This indeterminate test necessitates a greater role for the presumption against preemption, which “serves as a limiting principle that prevents federal judges from running amok with our potentially boundless (and perhaps inadequately considered) doctrine of implied conflict pre-emption based on frustration of purpose.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907-08 (2000) (Stevens, J., dissenting). Indeed, so perilous is this inquiry that Justice Thomas has elected to withdraw from it altogether.[13]

To understand Congress’s purpose in enacting a statute, courts “must begin[] with the language of the statute itself.” *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012). Happily, the NVRA does not force judges to speculate about Congress’s motives. The statute’s “Purposes” section outlines the four principles underlying the NVRA’s enactment: to “increase the number of eligible citizens who register to vote” in federal elections; to help “Federal, State, and local governments . . . enhance the participation of eligible citizens as

[13] *See Levine*, 555 U.S. at 583 (Thomas, J., concurring) (“[T]his brand of the Court’s pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the ‘purposes and objectives’ embodied within federal law. . . . Because such a sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws, I can no longer assent to a doctrine that pre-empts state laws merely because they ‘stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives’ of federal law as perceived by this Court.”).

voters"; to "protect the integrity of the electoral process"; and to ensure the maintenance of "accurate and current voter registration rolls." 42 U.S.C. § 1973gg(b).

The NVRA's explicit language establishes that Congress intended to walk the thin line between its goal of maximizing voter enfranchisement and its concurrent goal of minimizing voter fraud—a familiar balancing act that reverberates throughout this Court's jurisprudence. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191-92 (2008) (interpreting the NVRA in this manner and weighing the state's "interest in deterring and detecting voter fraud" against the "burdens [a voter I.D. law] imposes on voters and potential voters").

Proposition 200 represents Arizona's effort to square the circle. Its proof-of-citizenship requirement reinforces Congress's intent to "protect the integrity of the electoral process" by ensuring that potential voters registering by mail are "eligible citizens," as the NVRA demands. 42 U.S.C. § 1973gg(b)(1)(2). At the same time, it does not disturb those provisions of the NVRA most relevant to Congress's other goal of maximizing the franchise. Most significantly, it does not alter the statute's "motor voter" component, which the House of Representatives termed "the broadest, most effective, and [most] cost-efficient method of registration" because approximately ninety percent of the voting-age population possesses a driver's license or identification card issued by a motor vehicle agency. H.R. Rep. 103-9, at 4 (1993). It also refrains from imposing independent constraints on aspiring voters who register at agencies designed to assist "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principle place to register under this Act." H.R. Rep. 103-66, at 19 (1993) (Conf. Rep.). Because the same twin purposes animating the NVRA inform Proposition 200 and guide its intended effect, the federal and state statutes align.

Statutes whose multiple purposes are in tension with each other present particular hazards in the obstacle preemption context. As this Court has warned, judges must remain wary of the temptation to force a statute with several competing motivations into a single narrative of statutory purpose. Should they succumb, they risk preempting state law based on "the arbitrary selection of one purpose to the exclusion of others." *Pharm. Research Mfrs. of Am. v. Walsh*, 538 U.S. 644, 678 (2003) (Thomas, J., concurring). Here, the court of appeals has fallen victim to this trap.

Notably, a holistic analysis of the NVRA's purposes is entirely absent from the court of appeals' opinion. Instead, the court cherry-picks just one of the NVRA's two goals—"streamlining the registration process"—and enshrines it as the statute's central purpose. *See Gonzalez III*, 677 F.3d at 400-01. Having restricted the statute's scope in this artificially narrow fashion, it is no surprise the court then felt constrained to "assume that Congress wanted to pursue those policies at all costs—even when the text reflects a different balance." *Levine*, 555 U.S. at 601 (Thomas, J., concurring) (internal quotation marks and citation omitted).

This cramped interpretation of the NVRA's purposes infects major portions of the court of appeals' opinion. For instance, the court at one point declares that "[r]ejecting 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." *Gonzalez III*, 677 F.3d at 399. In reality, such rejection might frustrate the NVRA's interest in increasing voter registration but would almost certainly advance its co-equal interest in restricting the franchise to "eligible citizens." 42 U.S.C. § 1973gg(b). The court's description of the federal form's purpose thus elides the complexity brimming beneath its assertion that obstacle preemption obtains.

Another example of such distortions derives from the court of appeals' breezy treatment of the federal form's design. The en banc majority attaches great significance to the fact that the federal form takes the shape of a postcard, which can "be easily filled out and mailed on its own." *Gonzalez III*, 677 F.3d at 401. By requiring certain registrants to photocopy their proof of citizenship and include it alongside their federal form in an envelope, Proposition 200 deprives some aspiring voters of this simple convenience. True enough. But this observation does not lead inexorably to the conclusion that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200." *Id*. Indeed, the court can point to no statutory text, case law, or even legislative history[14] to confirm its valorization of the postcard as an inviolable component of the NVRA's enfranchisement efforts.

Only from the court's blinkered perspective is this absence surprising. In fact, the alleged disharmony between this aspect of Proposition 200 and the NVRA vanishes once the analytical lens is widened to encompass the full breadth of the NVRA's purposes. Certainly, Proposition 200 imposes a modicum of hardship on those eligible voters who, lacking an unexpired driver's license or identification card, cannot easily jot down an identifying number on the federal form. But this hardship is justified by Congress's interest in "the integrity of the electoral process"—a purpose once again elided in the court of appeals' analysis.

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[14] Both the House and Senate committee reports go to great lengths to explain the convenience rationale underlying "motor-voter" applications. The Senate's comments are illustrative.

> The driver's license procedure appears to be ideally suited to the purpose of registering voters. A procedure for licensing motor vehicle drivers is in place in every State. The States have developed exacting procedures to assure proper and correct identification of all licensees and to assure that a person has but a single license. Driver license applications require most of the information needed to determine the eligibility of a voting registration applicant, and include the additional protection of a photograph. This provision for simultaneous motor-voter applications permits the voter registrars to piggy-back on the identification techniques developed to assure accuracy in the licensing process.

S. Rep. 103-6, at 5 (1993). By contrast, not a single committee report mentions the postcard's concededly superior convenience factor.

The court of appeals' decision to set aside the difficult balance of interests baked into the NVRA's explicit language constitutes reversible error: the sort of error the presumption against preemption was intended to prevent. Because Proposition 200 does not pose a significant obstacle to the accomplishment and execution of federal objectives, it is not preempted by the NVRA.

B. Proposition 200 survives the new and heightened preemption test created by the court of appeals.

The court of appeals erred by departing from the settled principles of Supremacy Clause preemption and creating a new and heightened test to govern preemption for state election laws regulating federal elections. On that basis alone, its decision should be reversed. But the court of appeals also misapplied its own test. Proposition 200 survives even the Ninth Circuit's radical reading of this Court's Elections Clause jurisprudence.

As explained *supra*, the court of appeals' theory of "Elections Clause preemption" ignores the traditional balance between state and federal sovereignties that lies at the heart of this Court's Supremacy Clause jurisprudence. Instead, it adopts a new balance that "resolv[es] all conflicts in favor of the *federal government*," *Gonzalez II*, 624 F.3d at 1174 (emphasis added)—which as a practical matter boils down to no balance at all. This novel theory essentially operates as a form of conflict preemption on steroids, one that does not merely jettison the presumption against preemption but actually places a thumb on the scale in *favor* of federal preemption of state law.

The court of appeals' recommended test begins from the premise that "state and federal laws . . . comprise a single system of federal election procedures." *Gonzalez III*, 677 F.3d at 394. If a federal election law "addresse[s] the same subject as the state law," the court will hold state law preempted "[i]f the two statutes do not operate harmoniously in a single procedural scheme

for federal registration." *Id.* In conducting this inquiry, the court establishes conflict "based on a natural reading of the two laws," *id.*, and the presumption against preemption does not apply, *id.* at 392. Any ambiguities are to be resolved in favor of the federal government.

As Petitioners have shown in the traditional Supremacy Clause context, the NVRA requires no creative bending to allow it to coexist with Proposition 200. Petitioners do not rely solely on the presumption against preemption to prove that the state and federal enactments do not conflict. Indeed, to reach the opposite conclusion, the court of appeals must ignore two cardinal principles of statutory construction, must construe the NVRA's operative phrases in isolation, and must disregard the plain meaning of the NVRA's language. No recapitulation of Petitioners' foregoing analysis is required to show that it is the court of appeals that has failed to engage in a "natural reading" of the two laws.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be REVERSED.

Respectfully submitted,

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APPENDIX

National Voters Registration Act

(Selected Provisions)

Sec. 1973gg 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 subchapter 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.

Sec. 1973gg-2. 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. . . .

Sec. 1973gg-4 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.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address. . . .

Sec. 1973gg-5 VOTER REGISTRATION AGENCIES

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies –

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities. . . .

Sec. 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

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

PROPOSITION 200

Ariz. Rev. Stat. Sec. Ann. § 16-166 VERIFICATION OF REGISTRATION

. . .

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.
6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.