No. 12-71

IN THE

MORRIS TYLER MOOT COURT OF APPEALS AT YALE

ARIZONA, ET AL.,
Defendants-Petitioners,
v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., ET AL.,
Plaintiffs-Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Elections Clause, U.S. Const. art. I, § 4, cl. 1, dictates its own standard of federal preemption under which state laws are preempted unless they are harmonious with Congressional enactments; and

2. Whether the National Voter Registration Act, which requires states to "accept and use" a federal voter registration form that does not ask for documentary proof of citizenship, preempts an Arizona law requiring state recorders to reject any registration application that does not include citizenship documents.

PARTIES TO THE PROCEEDING

The petitioners in this action are the State of Arizona; Ken Bennett; Shelly Baker, La Paz County Recorder; Berta Manuz, Greenlee County Recorder; Candace Owens, Coconino County Recorder; Lynn Constable, Yavapai County Election Director; Kelly Dastrup, Navajo County Election Director; Laura Dean–Lytle, Pinal County Recorder; Judy Dickerson, Graham County Election Director; Donna Hale, La Paz County Election Director; Susan Hightower Marlar, Yuma County Recorder; Gilberto Hoyos, Pinal County Election Director; Laurette Justman, Navajo County Recorder; Patty Hansen, Coconino County Election Director; Christine Rhodes, Cochise County Recorder; Linda Haught Ortega, Gila County Recorder; Dixie Mundy, Gila County Election Director; Brad Nelson, Pima County Election Director; Karen Osborne, Maricopa County Election Director; Yvonne Pearson, Greenlee County Election Director; Penny Pew, Apache County Election Director; Helen Purcell, Maricopa County Recorder; and F. Ann Rodriguez, Pima County Recorder.

The respondents 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; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote, Maria M. Gonzales, Luciano Valencia; People for the American Way Foundation; and Project Vote.

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JURISDICTION

The Ninth Circuit issued its ruling on April 12, 2012. This Court granted certiorari on October 15, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution's Elections Clause provides that: "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 National Voter Registration Act provides that: "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." 42 U.S.C. § 1973gg-4(a)(1) (2006).

Arizona's Proposition 200 provides that: "The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16–166(F) (2004).

STATEMENT OF THE CASE

I. The NVRA

In 1993, Congress acted to solve a problem that had threatened the health of American democracy for much of the twentieth century: that "in many parts of America it [was] easier to buy a gun than it [was] to vote." 139 Cong. Rec. 9213 (May 5, 1993) (statement of Rep. Traficant). The National Voter Registration Act (NVRA), now widely known as the "motor voter" law, dramatically simplified and streamlined the federal voter registration process. 42 U.S.C. § 1973-gg *et seq.* (2006). One of the NVRA's most important innovations was the creation of a "federal form," a nationwide application that any citizen in any state could use to register to vote in federal elections. Congress intended the federal form to be an easy alternative to state federal registration procedures, which in many cases had become inconvenient and tedious. Congress enacted the law under authority of the Constitution's Elections Clause, U.S. Const. art. I, § 4, cl. 1.

Congress invested the Federal Elections Commission with the authority to design the federal form.[1] *Id.* § 1973gg-7(b). The current form asks for a range of identifying information about the applicant and requires applicants to attest under penalty of perjury that they are citizens of the United States. *See* 677 F.3d, app. A, at 416. The form does not require any other proof of citizenship. Since 1994, the federal form has taken the shape of a postcard that citizens can quickly complete and mail to their state's registrar. *See* 11 C.F.R. § 9428.5 (1999).

To create uniformity, the NVRA mandated that "each state shall accept and use the [federal form] . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1). Congress also permitted states to "develop and use" their own voter registration

[1] This authority was later transferred from the FEC to the Election Assistance Commission (EAC), an independent agency. *See* 42 U.S.C. §§ 15321, 15532 (2006).

form "*[i]n addition to* accepting and using the [federal form]." *Id.* § 1973gg-4(a)(2) (emphasis added). Whether or not a state created its own supplementary form, every state was required to "ensure that any eligible applicant is registered to vote . . . in the case of registration by mail . . . if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election." *Id.* § 1973gg-6(a)(1)(B). This provision applied to the submission of either a state form or the standardized federal form.

II. Legislative History of the NVRA

In January of 1993, the Committee on House Administration began debating the NVRA. The Committee's Republican minority immediately sought to strike the entire federal form provision, fearing that it would "limit[] the state's [*sic*] ability to confirm independently the information contained in voter registration applications." H. Rep. 103-9, at 35, 36 (1993). When that effort failed, they attempted to amend the text to clarify that states could "preserv[e] state fraud provisions that are stronger than the federal provisions of the bill." *Id.* at 37. This too was unsuccessful.

During debate in the Senate Rules Committee, a number of Republicans expressed a similar fear that the statute's language would be interpreted to bar states from requesting citizenship documents as a supplement to the federal form. This fear motivated a stinging dissent from the Committee's decision to report the bill favorably to the full Senate. *See* S. Doc 103-6, at 52 (1993) (Republican minority noting that the NVRA "would preclude" the states from "requiring proof of citizenship at the time of registration."); *see also id.* at 53 (bemoaning the

fact that, under the NVRA, "states would be prohibited from asking applicants to supply identification.").

During the debate before the full Senate, Senator Alan Simpson offered an amendment that would have inserted the following "rule of construction" as a separate section of the NVRA: "Nothing 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 (Mar. 16, 1993). Senator Simpson, presciently anticipating exactly the type of state law at issue in the instant case, noted that his amendment was intended to "make[] clear that [the NVRA] must not be interpreted to stop any particular State from requiring documents." *Id.*

The Senate adopted the Simpson amendment, thus creating a discrepancy with the House version, which included no such provision. *Id.* at 5099. The bill was sent to conference committee to resolve the inconsistency. The conferees voted not to include the Simpson amendment in the final version of the NVRA. Their report explained that the Simpson amendment was "not necessary or consistent with the purposes of the 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. Rep. 103-66, at 23 (1993) (Conf. Rep.).

The conference bill was then returned to both houses for final passage. In the House, Representative Bob Livingston moved to recommit the conference report with instructions to include the Simpson amendment. By this point, many Members had become confused as to what was being voted on. Congressman Dana Rohrabacher clarified:

> If you agree to vote for [Representative Livingston's] motion, you are agreeing that the States should be permitted to make sure that all those people being registered to vote by this simplified process are actually U.S. citizens. A "no" vote is opposition to permitting the States to screen out illegal aliens and other

> noncitizens from automatically being registered to vote. You are telling the states with a "no" vote, "We don't want you to be conscientious and make sure only citizens register to vote. In fact, we won't let you do that."

139 Cong. Rec. 9224. The House rejected the motion to recommit by a vote of 253 neas to 170 yeas. *Id.* at 9231. Shortly after Representative Livingston's motion was rejected, the House adopted the conference version of the NVRA. *Id.* at 9231-32. Less than a week later, the Senate passed the final bill. *Id.* at 9636, 9640-41.

III. Proposition 200

During the 2004 general election, the citizens of Arizona passed Proposition 200. The law ushered in a number of changes to the state's election code. Among the most controversial was a requirement that Arizona's county recorders "reject any application for [voter] registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16–166(F). Acceptable citizenship documents included copies of the applicant's driver's license, passport, birth certificate, naturalization documents, or tribal identification materials. *Id.* § 16–166(F)(1)-(6).

This case presents the question whether the NVRA requires Arizona to treat a timely submitted federal form as a complete application that is sufficient to register a voter, or whether the state may instead require documentary evidence of citizenship as a supplement to the federal form.

IV. Procedural History

Plaintiffs brought suit against Arizona seeking to enjoin the operation of Proposition 200. The district court denied plaintiffs' motion for a temporary restraining order, finding that Proposition 200 was not preempted by the NVRA. *Gonzales v. Arizona*, 435 F.Supp.2d 997 (D. Ariz. 2006). The district court then consolidated the various complaints and denied preliminary injunctive relief on plaintiffs' remaining theories, but did not at that time issue findings of fact or conclusions of law. No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006). Plaintiffs appealed to the Ninth Circuit, seeking an emergency interlocutory injunction pending the disposition of the merits on appeal. A two-judge motions panel granted that injunction in a four-sentence order. Order in Nos. 06-16702, 06-16706 (Oct. 5, 2006). On application for an emergency stay, the Supreme Court vacated the decision of the motions panel, finding that it had "fail[ed] to provide any factual findings or indeed any reasoning of its own" to justify its decision. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). The case was remanded back to the Ninth Circuit for a decision on the merits.

In *Gonzalez v. Arizona* [*Gonzales I*], 485 F.3d 1041 (2007), the Ninth Circuit affirmed the denial of the preliminary injunction. The case was remanded back to the district court, which entered summary judgment for Arizona. Plaintiffs again appealed to the Ninth Circuit. In *Gonzales II*, the court held that the *Gonzales I* panel had "reached a clearly erroneous result . . . on the basis of a misconstruction of the statute," and therefore reversed the determination that the Arizona law was not preempted by the NVRA. 624 F.3d 1162, 1188 (2010). Amid sharp disagreement as to whether the *Gonzales II* panel had improperly disregarded the *Gonzales I* decision, the Ninth Circuit granted rehearing en banc. 649 F.3d 953 (2011).

In *Gonzales III*, the en banc panel unanimously concluded that Elections Clause

preemption was the proper framework for evaluating the case. 677 F.3d 383, 391-93, 450-53 (2012). The panel then voted eight-to-two that Arizona's documents requirement was preempted by the NVRA. 677 F.3d at 398-401. The court found that the NVRA's natural meaning, purpose, and structure were each in conflict with Proposition 200. Chief Judge Kozinski concurred in that judgment, noting that persuasive legislative history confirmed a reading of the NVRA that would preclude states from requiring documentation as a supplement to the federal form. 677 F.3d at 440. Judges Rawlinson and Smith concurred in part and dissented in part, finding that the NVRA did not preempt Proposition 200. 677 F.3d at 453.

This Court denied Arizona's application for a stay of the *Gonzales III* decision, Order No. 11A1189 (June 28, 2012), and granted certiorari, No. 12-71, 2012 WL 2921874 (Oct. 15, 2012).

SUMMARY OF ARGUMENT

Congress has broad power under the Elections Clause to comprehensively regulate federal elections and to define the "principles" governing federal election law. Congressional enactments regarding the "time, place, and manner" of federal elections, U.S. Const. art. I, § 4, cl. 1, supersede all inconsistent or inharmonious state laws on the same "subject." *Ex parte Siebold*, 100 U.S. 371, 397 (1879). Proposition 200's requirement that applicants submit proof of citizenship *in addition to* the federal form conflicts with both the text and the purpose of the National Voter Registration Act, which requires states to accept a completed federal form for the purpose of registration in federal elections. Proposition 200 is therefore preempted.

The Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections. *Ex parte Siebold*, 100 U.S. at 372. The Founders envisioned Congress using this power to prevent a "diversity" of electoral "principles" across states, which

would undermine the fair representation of all people in Congress. Max Farrand, 3 *Records of the Federal Convention* 311 (1911).

This Court has consistently recognized Congress' power to pass broad, systemic, and principled electoral regulations and to impliedly preempt state election law. State powers under the Elections Clause, on the other hand, are necessarily circumscribed. This is because the states have no "pre-existing sovereign" authority over federal elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995). The states' only delegated power is to regulate election "mechanics." *Foster v. Love*, 522 U.S. 67, 69 (1997). This distinctive balance of powers strongly favors the federal government and therefore calls for deferential preemption analysis. The Ninth Circuit was therefore correct to reject tools of statutory interpretation that are intended to protect the inherent police power of the states to act in areas that the "states have traditionally occupied." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

Both the "plain statement rule" and the "presumption against preemption" honor state sovereignty by construing state and federal enactments to avoid conflict and make room for concurrent regulation wherever possible. These tools "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* But this "Court has never held that the 'presumption' applies in an area . . . that has long been 'reserved for federal regulation.'" *Wyeth v. Levine*, 555 U.S. 555, 624 (2009) (Alito, J., dissenting) (quoting *United States v. Locke,* 529 U.S. 89, 111 (2000)). Nor has this Court ever held that this presumption applies where, as here, states have no inherent sovereign power. *See Foster*, 522 U.S. 67; *Siebold*, 100 U.S. 371.

Thus, this Court has no constitutional or precedential basis for construing the NVRA to make room for Proposition 200. This Court's task is instead to consider whether Proposition 200

forms a "harmonious" "system of regulations" with the NVRA's text and purpose. *Siebold*, 100 U.S. at 384. To that end, the Court must consider whether the Arizona law conflicts with a natural reading of the NVRA. It cannot resort to "wordplay" or "imaginative characterization" to avoid a conflict with the federal law. *Foster,* 522 U.S. at 72-73.

To avoid a conflict between Proposition 200 and the NVRA, this Court would have to endorse precisely the kind of "imaginative characterization" that *Foster* warns against. *Id.* The NVRA requires that "each state shall accept and use the [federal form] . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1). Read naturally, this provision requires states to register any eligible applicant who has completed the requirements of the federal form and timely submitted it to the relevant state authority. *See Gonzales III*, 677 F.3d at 399-400. A form that must be *accepted for* the purpose of registering voters must be sufficient for that purpose. Proposition 200 clearly conflicts with this purpose by requiring Arizona county recorders to "reject any application . . . not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16–166(F).

Arizona's imaginative argument that it can "accept and use" the federal form even if it rejects forms that do not contain proof of citizenship is unpersuasive. Under a natural reading of the NVRA, Arizona would not be permitted to reject a whole class of federal forms merely because they fail to provide information that the federal form does not ask for.

Arizona also argues that Proposition 200 allows the state to "accept" the form for the purpose of gathering biographical data about would-be voters, which is a necessary step in the federal registration process. This argument ignores the text of the NVRA, which requires Arizona to accept the form "*for the registration of voters* in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added). Under Arizona's scheme, the states are required to

"accept and use" the federal form *for completing the first step in the registration process*, rather than "*for the purpose of registering voters*." Both of Arizona's interpretations would require this Court to take the extraordinary and unnatural step of altering or adding to the statute's text.

Moreover, Proposition 200 undermines the careful balance of electoral "principles" embedded in the NVRA. The overarching purpose of the NVRA is to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C § 1973gg(b)(1). These procedures are intended to be both "uniform and nondiscriminatory." 139 Cong. Rec. 9221 (May 5, 1993) (statement of Rep. Conyers). But allowing Proposition 200 to stand alongside the NVRA would make it more difficult for citizens to register by imposing more strenuous registration requirements in Arizona than in other states.

Arizona argues that Proposition 200 helps prevent fraud in federal elections. But the NVRA strikes a deliberate and principled balance between preventing fraud and easing voter registration. Allowing Arizona to upend this balance would directly conflict with the Founders' intention that Congress set consistent "principles" of electoral policy to avoid an unjust diversity among states.

Although this Court's established Elections Clause jurisprudence provides a clear and tailored preemption standard for evaluating this case, Proposition 200 would be preempted even under this Court's standard Supremacy Clause analysis. "The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). Proposition 200 presents a clear obstacle to the achievement of the NVRA's purpose of easing and standardizing voter registration for federal elections.

Protecting the NVRA against the obstacles imposed by state enactments is appropriate because national voter registration "bears an inseparable relationship to the welfare and tranquility of all the states," and because the NVRA is a "complete scheme of regulation." *Hines v. Davidowitz,* 312 U.S. 52, 66 (1941). Indeed, the Elections Clause specifically empowers Congress to enact the type of regulatory program that this Court has long defended against interference by the states. When Congress passes a complete scheme in an area that is, like federal election policy, historically committed to federal power, states may not "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-67. Because Proposition 200 conflicts with the text and purpose of the NVRA, it would be preempted under the Supremacy Clause.

ARGUMENT

I. Proposition 200 is preempted by the NVRA under this Court's Election Clause preemption standard

Congressional enactments regarding the "time, place, and manner" of federal elections, U.S. Const. art. I, § 4, cl. 1, supersede all inconsistent state laws on the same "subject." *Ex parte Siebold*, 100 U.S. at 397. The Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections. *Id.* at 372; *see also Smiley v. Holm*, 285 U.S. 355, 367 (1932). Although states have the power to pass laws regulating the "mechanics of congressional elections," this power extends only "so far as Congress declines to preempt state legislative choices." *Foster*, 522 U.S. at 69. This Court has never required Congress to express its intention to preempt state election laws. Indeed, Congress' exertion of its "supervisory power" over a particular area of federal elections is itself evidence of the intent to form a

"system of regulations" with which state law must become "harmonious." *Siebold*, 100 U.S. at 384. This Court, therefore, does not strain to read federal elections statutes to make room for concurrent state regulations. Rather, it gives federal laws their natural, unstrained reading. Any state laws discordant with that meaning will be preempted.

a. The history, structure, and text of the Elections Clause require a deferential preemption standard

Congress' broad authority to preempt state regulations of federal elections is unique, and it stems from the very heart of our Constitutional scheme. Under the Articles of Confederation, each state retained its "sovereignty, freedom, and independence," which included the powers to "appoint [delegates] in such a manner as the legislature of each state shall direct" and to "recall its delegates . . . at any time within the year." Articles of Confederation of 1781, art. II, art. V, para. 1. Dissatisfied with the Articles' crippled confederation, the Framers of the Constitution formed a new regime with characteristics of both a *federation* among states and a *national* government representing the whole people. *The Federalist No. 39* (James Madison).

The Elections Clause embodies the union's *national* character. In contrast to the Constitution's great federal provision, guaranteeing that all "powers not delegated to the United States by the Constitution . . . are reserved to the States," U.S. Const. amend. X, the Elections Clause delegates limited power over federal elections to the states, while reserving ultimate power to Congress. U.S. Const. art. I, § 4, cl. 1.

Neither the Constitution nor this Court recognizes an inherent right of states to oversee federal elections. *See Gonzalez III*, 677 F.3d at 440 (Kozinski, C.J., concurring) ("The fact remains that the Supreme Court has never articulated any doctrine giving deference to the states

under the Elections Clause."). Indeed, the Constitution "draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995). The Elections Clause grants powers to the states "which exclusively spring out of the existence of the national government." *Cook v. Gralike*, 531 U.S. 510, 519 (2001) (citing Joseph Story, 1 *Commentaries on the Constitution of the United States* § 627 (3d ed. 1858)). Because states lack inherent powers to regulate federal elections, their power is necessarily subservient to federal acts on the same subject. There is no principled basis for this Court to construe federal statutes to accommodate discordant state laws.

The ratification debates make clear that the Elections Clause only protects the power of states to regulate elections in ways that do not interfere with federal electoral policy. At the Constitutional Convention, two delegates from South Carolina, Charles Pinckney and Edward Rutledge, moved to strike the provision for congressional oversight from the Elections Clause. Their motion was defeated on the insistence of James Madison, who raised three objections to state interference with federal election policy. First, states would be tempted to place their interests above those of the nation by "fail[ing] or refus[ing] to consult the common interest at the expense of their local convenience or prejudices"; second, states might structure their electoral policy opportunistically—"whenever the state legislatures had a favorite measure to carry, they would take care to mold their regulations as to favor the candidates they wished to succeed"; and, finally, representational inequalities across states would yield "inequality in their representation in the national legislature." Jonathan Elliot, 5 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401-02 (1836). Gouverneur Morris added that "states might make false returns, and then make no provision for new elections,"

thereby sending fraudulently elected representatives to Washington to make policy binding on the whole nation. *Id.* at 402. These arguments carried the day.

During the Virginia Ratifying Convention, James Madison further explained that the Framers had given Congress "ultimate control over the time, place, and manner of elections" to prevent the states from implementing unfair and inconsistent electoral "principles." Max Farrand, 3 *Records of the Federal Convention* 311 (1911). "Some states," he said, "might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust." *Id.* Thus, the Framers concluded that federal election regulation "should be uniform throughout the continent" to prevent "the people of any state, by any means [from] be[ing] deprived of the right of suffrage." *Id.*

Still, it was "found impossible to fix [these regulations] in the Constitution" itself, *id.,* because permanent provisions would not have been "applicable to every probable change in the situation of the country." *The Federalist No. 59* (Alexander Hamilton). Thus, to promote national uniformity without calcifying election management in constitutional text, the states were given the power to fashion regulations "in the first place," but were always subject to the ultimate "control of the general government, in order to enable it to produce uniformity." Farrand, *Records*, at 312. The state's power over elections stems from their practical "acquaint[ence] with the situation of the people," not from their inherent sovereign interest in the area. *Id.* Thus, in "considering the state governments and general government . . . it was thought that particular regulations should be submitted to the former and the general regulations to the latter." *Id.*

The Elections Clause envisions a unique distribution of power not seen elsewhere in the Constitution, giving states administrative power over election *mechanics*, but reserving broad policymaking power over consequential electoral *principles* to the federal government alone.

Congress' constitutional power to prevent an unjust diversity of electoral principles requires this Court to give effect to both the text and the purpose of its regulations, particularly when state law advances competing aims. States have power under the Elections Clause "to issue procedural regulations," but they do not have the power to "dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits*, 514 U.S. at 833-83.

Indeed, absent a concurrent Congressional act, this Court has recognized the power of states to avoid "voter confusion, ballot overcrowding, or the presence of frivolous candidacies," *Munro v. Socialist Workers Party,* 479 U.S. 189, 194-195 (1986), to "guard against irregularity and error in the tabulation of votes," *Roudebush v. Hartke,* 405 U.S. 15, 25 (1972), and to "assure that elections are operated equitably and efficiently," *Burdick v. Takushi,* 504 U.S. 428, 433 (1992).

But it has never recognized the states' interest in articulating their own *principles* of federal electoral policy. In *U.S. Term Limits,* this Court found that states could not use their delegated power under the Elections Clause to define the qualifications of representatives for federal office, even absent a Congressional action on the same subject. *U.S. Term Limits*, 514 U.S. at 780-81. *See also Cook v. Gralike*, 531 U.S. 510 (holding that states do not have the power under the Elections Clause to indicate on the ballot whether incumbent candidates support a particular policy position).

This Court has, on the other hand, long upheld Congress' broad power under the Elections Clause to define and execute the substantive principles governing elections. "The Clause gives Congress comprehensive authority to regulate the details of elections, including the power to impose the numerous requirements as to procedure and safeguards which experience shows are

necessary in order to enforce the fundamental right involved." *Foster v. Love*, 522 U.S. at 72 (internal citations omitted) (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *United States v. Gradwell*, 243 U.S. 476, 480, 488 (1917) (holding that the Elections Clause empowers Congress to create "a comprehensive" and "elaborate system of supervision" over elections in order to vindicate the right of the people "to honest and fair elections.").

b. Congress' enactments under the Elections Clause preempt any state laws not in harmony with the enactments' text or purpose

The Elections Clause's unusually broad delegation of power to Congress must guide this Court's assessment of state laws that are inconsistent with federal enactments. The Ninth Circuit, therefore, was correct to reject tools of statutory interpretation that are intended to protect the "*usual* constitutional balance between the States and the Federal Government," which assumes that states have inherent sovereign authority over the area at issue. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (emphasis added).

Both the "plain statement rule" and the "presumption against preemption" are intended to protect the inherent police powers of the states in areas that "states have traditionally occupied." *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). In such cases, the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* This assumption establishes a presumption against preemption.

However, this "Court has never held that the "presumption" applies in an area . . . that has long been 'reserved for federal regulation.'" *Wyeth v. Levine*, 555 U.S. 555, 624 (2009) (Alito, J., dissenting) (quoting *United States v. Locke,* 529 U.S. 89, 111 (2000)). The "plain statement rule

is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461.

Though our constitutional scheme protects state powers in many areas, the Elections Clause is not one of them. The Clause does not recognize inherent "powers reserved to the States," but only "those *delegated* to the States by the Constitution." *Cook v. Gralike*, 531 U.S. 510, 518-19 (2001) (emphasis added). The 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. at 69. Congress always maintains the "power to override state regulations by establishing uniform rules for federal elections." *Id.* (internal quotation marks omitted).

Because Congress retains ultimate control, and states act only through delegated power, this Court need not hesitate to "attribute to Congress an unstated intent to intrude on traditional state authority." *Gregory*, 501 U.S. at 453.

To the contrary, when state and federal laws act on the same "subject," this Court's primary task is to preserve Congress' "paramount" power to alter disparate state policies. *Ex parte Siebold*, 100 U.S. at 384. In both cases where this Court has addressed state and federal laws that have acted on the same election "subject," this Court has declined to read federal law unnaturally to avoid a conflict with the state enactments.

Plaintiffs in this Court's first such case, *Ex parte Siebold*, 100 U.S. 371, were state elections supervisors challenging federal jurisdiction to try them for violating a state election law. Congress had made it a federal crime to violate any elections law—state or federal—but did not specify when federal jurisdiction should supersede state jurisdiction if both were available.

The Court read the federal law broadly, inferring Congress' intent to make federal jurisdiction available in every case. Only then could the state and federal laws form a "harmonious system" to advance Congress' objective. *Id.* at 386.

In *Foster v. Love*, 522 U.S. 67, the Court similarly declined to construe a federal elections law narrowly in order to make space for a concurrent state regulation. *Foster* addressed whether there was a meaningful conflict between a federal law establishing a national election day in November and a Louisiana law providing for an open primary in October, during which candidates receiving more than fifty percent of the vote were designated Congressmen- or Senators-elect. Louisiana argued that Congress' election day law should be construed only to require the possibility that candidates for Congress *could* be chosen on that day, not to require that all meaningful choices be delayed until November. This Court declined, however, to "par[e] the term 'election' . . . down to the definitional bone" in order to vindicate the Louisiana law. 522 U.S. at 72. The Court instead deferred to Congress' broad objective of remedying the "evil arising from the election of members of Congress occurring at different times in the different States," and struck down Louisiana's primary system. *Id.* at 73.

Both cases confirm that state laws that are inconsistent with the text or purpose of Congressional enactments under the Elections Clause are preempted. For "in so far as [state laws] are *inconsistent* with the laws of Congress on the same *subject*, [they] cease to have effect as laws." *Ex parte Siebold*, 100 U.S. at 397 (emphasis added).

To evaluate whether federal law "supersedes" a particular state law, this Court begins by construing the state and federal laws not as independent acts by separate sovereigns, but rather as a single "system of regulations" over which Congress exerts "general supervisory power." *Id.* at 384, 387. The Court does not use "wordplay" or "imaginative characterization," *Foster,* 522 U.S.

at 72-73, to avoid federal "conflicts with the regulations of the state." *Siebold*, 100 U.S. at 397. Instead, it gives effect to state laws only insofar as they are capable of joining with federal enactments to form a "harmonious combination into one system" overseen by Congress. *Id.* at 384. To discern whether a state law is in "harmony" with the federal system, the Court must consider both the text and the purpose to which the system is directed. Harmony is only possible when the "rightful authority of the general government" over the "whole subject" is at "once conceded and acquiesced in." *Id* at 372, 387.

c. The NVRA requires a strained reading to avoid a conflict with Proposition 200

Siebold and *Foster* require the Court to assess whether the requirements of Proposition 200 are consistent with the natural meaning of the NVRA. To make this determination, the words of the statute must "be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979).

The NVRA requires that "each state shall accept and use the [federal form] . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1). The natural meaning of this language is that states must register any applicant who has mailed in her federal form more than thirty days before the relevant election. *See Gonzales III*, 677 F.3d at 399-400. This flows from the joint meaning of the words "accept" and "for." 42 U.S.C. § 1973gg-4(a)(1). *See Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). A form that must be *accepted for* the purpose of registering voters must be sufficient for that purpose.

Arizona argues that it "accept[s] and use[s]" the federal form even when it *refuses* to process the form until the applicant has completed the additional task of submitting proof of

citizenship. This conclusion, however, requires precisely the type of "imaginative" reading that *Foster* warns against. 522 U.S. at 72-73. Arizona reads the NVRA to require states to "accept and use" the federal form for the registration of voters *only after the registrant has met additional state requirements.* This unnatural interpretation can only be reached if the Court adds to and alters language in the statute that Congress wrote. Indeed, to generate a reading of the NVRA that does not conflict with Proposition 200, Arizona makes several imaginative interpretive moves.

i. A form cannot be both "accepted" and "rejected"

First, Arizona's interpretation of the statute cannot be squared with the natural definitions of the words "accept" and "reject." The NVRA requires state recorders to "accept" the federal form. 42 U.S.C. § 1973gg-4(a)(1). Proposition 200, on the other hand, requires Arizona county recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16–166(F). Thus, an Arizona county recorder reading each statute will find herself commanded to accept and reject the same form. These competing commands are the exact opposite of a "harmonious system." *Siebold*, 100 U.S. at 386.

"Accept" and "reject" are antonyms. *See* Accept Definition, *Merriam-Webster Dictionary Online*, http://www.merriam-webster.com/dictionary/accept (last visited Nov. 12, 2012). The states' options are limited: they may either accept the form for the given purpose or reject the form for that purpose. 42 U.S.C. § 1973gg-4(a)(1). A state can only accept or reject the form. It cannot do both. It cannot do neither.

Arizona's imaginative reading of "accept" also risks confusing the very voters that the NVRA is designed to protect. "A consumer would rightly cry foul if a merchant claimed it would 'accept and use' mailed-in credit card information for a purchase, but then refused to complete the transaction because the consumer failed to include additional information that the merchant had not requested." *Gonzales III*, 677 F.3d at 401 n.27. Arizona should not be permitted to reject applicants whose only error was failing to attach citizenship documents that the federal form does not ask for. Such a policy would fail to supply reasonable notice to would-be voter registrants. This type of trickery is plainly at odds with the NVRA's purpose of promoting seamless voter registration. Such "wordplay" upends the common meaning of the statute's text, and cannot be what Congress intended. *Foster*, 522 U.S. at 72-73.

ii. The federal form must be accepted "for the registration of voters"

Second, Arizona's strained reading nullifies the phrase "for the registration of voters." Arizona argues that it "accepts" the form as a device for collecting information about the applicant, while requiring the form *plus proof of citizenship* to actually register the applicant to vote. This reading is inconsistent with a natural reading of the NVRA, which requires states to accept the form "*for the registration of voters* in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added). If the statute had omitted any mention of what the form needed to be accepted *for*, Arizona's reading might be plausible. In such a world, Arizona would also be free to "accept" the form as a way to collect scratch paper or evaluate its citizens' penmanship. But the statute is not silent as to what the form must be accepted for. It must be accepted "*for the registration of voters*." Arizona's reading to the contrary requires yet another dose of imagination. Under Arizona's scheme, the states are required to "accept and use" the

federal form *for completing the first step in the registration process*, rather than "*for the purpose of registering voters.*" This interpretation reduces the federal form to a mere tool of data collection.

iii. Arizona's reading errs by rendering some statutory language superfluous

Third, the NVRA requires states to "accept and *use*" the federal form. Arizona's reading of the statute would violate a time-worn principle of statutory interpretation by rendering the word "accept" superfluous. The Supreme Court has held that "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute." *Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883). *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (applying this principle). "A statute should not be construed in such a way as to render certain provisions superfluous or insignificant." *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976). *Accord* C. Dallas Sands, Sutherland Statutory Interpretation § 46.06 (Rev. 3d ed. 1973). Arizona contends that they "accept" the federal form because it is one medium by which voters can supply information to the state. But this strained definition of "accept" is already captured by the meaning of the word "use." By including the word "accept," Congress intended to add something that would not have been conveyed by the word "use" alone. Indeed, Congress' addition of the word "accept" foreclosed an interpretation that would have allowed states to take in the federal form but not process it as a complete application.

iv. Congress anticipated placing burdens on the states

Arizona defends its interpretation on the grounds that it could not have been Congress' intent to impose the administrative burden of managing a list of voters who, because they lack proof of citizenship, are eligible to vote in federal elections but not state elections. *See Gonzales III*, 677 F.3d at 449 (Rawlinson, J., concurring in part and dissenting in part) (arguing that such a scheme could not have "be[en] what Congress intended."). On the contrary, the NVRA contemplated and accepted this possibility. *See Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006).

Arizona does not dispute that Congress could have required the states to accept the federal form as the exclusive means of registering voters for federal elections. *See Gonzales III*, 677 F.3d 399. This may have imposed a more taxing administrative burden on the states, since they would not have been permitted to use their state form to register voters for federal elections. But Congress chose not to require two separate forms. Congress instead allowed states to "develop and use" a single state form to register voters for both state and federal elections, so long as they also accepted a stand-alone federal form "in addition to" their state form. 42 U.S.C. § 1973gg–4(a)(2). These "state forms" may ask for more information than the federal form requires. But nothing in Congress' grant of power to create a state form allows Arizona to alter the requirements of the federal form, which must be accepted as the EAC designs it.

Indeed, Congress' choice to make the federal form mandatory may have been a conscious effort to encourage states not to require any more information than the federal form called for. Congress was aware that making the federal form mandatory might pose an inconvenience on the states. But Congress also made sure that any inconvenience would be the states' choice; if they wish to avoid it, they can simply allow voters who have completed the

federal form to vote in state elections. Some states, such as Arizona, have decided to use a two-track system. *See ACORN v. Edgar*, No. 95 C 174, 1995 WL 532120, at *1 (N.D. Ill. Sept. 7, 1995) ("Almost alone among the states (apparently Mississippi is the only other state that has made the same choice), Illinois *has opted for a cumbersome and expensive dual-registration approach* to compliance with the [NVRA].") (emphasis added). But given that these states have affirmatively opted into the administrative burdens posed by using two forms, the argument that such a burden is unreasonable is not persuasive.

In any event, it is not this Court's "task to assess the consequences of each approach and adopt one that produces the least mischief." *Lewis v. Chicago,* 130 S. Ct. 2191, 2200 (2010). The choice of which gifts to extend, and which to withhold, rests with Congress. Here Congress has found the middle ground, allowing states to create their own forms but also protecting voters by requiring the state accept a federal form if the voter chooses to submit it.

The dissent below argues that a plain reading of the "text of the NVRA allows for Arizona's proof-of-citizenship requirement" because the NVRA permits states to create their own mail-in form. *Gonzalez III*, 677 F.3d at 444. This interpretation stems from the NVRA's command that all mail-in forms shall "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). The dissent interprets subsection 7(b)(1) as a grant of authority to the states to determine the type of "identifying information" that is "necessary" to discern the eligibility of the applicant.

This subsection, however, appears in section 1973gg–7, which enumerates the power of the Election Assistance Commission to "develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a). Subsections 7(b)(1)-(4) tell the *EAC* what

it can and cannot require on the federal form. It can "require only such identifying information…as is necessary" to demonstrate citizenship, § 1973gg-7(b)(1), and it cannot require "notarization or other formal authentication," *id*. Nowhere does this section discuss an independent state authority to decide what is "necessary." The dissent's "plain text" reading thus ignores both the structural placement and the manifest purpose of the "necessary" provision.

The discretion to determine what is "necessary to enable the appropriate State election official to assess the eligibility of the applicant" is expressly committed to the EAC. 42 U.S.C. § 1973gg–7(b)(1). That agency alone has the power to create a binding determination as to the meaning of the word "necessary." *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). The EAC has decided that citizenship documents are not "necessary" to enable the states to assess an applicant's eligibility. *See* 416 F.3d, app. A, at 416 (final version of the federal form). Unless and until the EAC alters that determination, citizenship documents cannot be required from applicants using the federal form.[2]

v. Arizona's "imaginative" reading has been widely repudiated

The natural meaning of the statute is evinced by the nearly unanimous interpretation of the various authorities that have considered the question. Eight of the ten judges in the court of appeals agreed that the "natural reading" of the NVRA is that "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." *Gonzales III*, 677 F.3d at 398. This opinion was shared by George H.W. Bush's Justice Department, which advised Congress during the debate over the NVRA that the

[2] When simultaneous compliance with both a state law and a valid federal administrative rule is impossible, the administrative rule preempts state law. *United States v. Shimer*, 367 U.S. 374, 382 (1961).

statute would "limit[] significantly the ability of the states to use a variety of techniques to verify the applicant's identity and eligibility." Letter from W. Lee Rawls, Assistant Attorney General, U.S. Department of Justice, to Wendell Ford, Chairman, U.S. Senate Committee on Rules and Administration (Apr. 17, 1991), at 10-11. The Election Assistance Commission, the administrative agency charged with designing and implementing the form, also agrees with this interpretation. They have advised Arizona that it "may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship" because such a policy "would effectively result in a refusal to accept and use the" federal form. Letter from Thomas R. Wilkey, Executive Director, Election Assistance Commission, to Jan Brewer, Secretary of State, State of Arizona (Mar. 6, 2006), *reprinted in* 5 Election L.J. 227 (2006). Even political scientists with expertise in this field have agreed that the NVRA does not permit states to reject a federal form merely for failure to include supplemental documentation. *See* Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets: The Persistence of Corruption in American Politics* 321 (1996) (noting that NVRA's mail-in requirement, by preventing states from requiring documentation, removes "the safeguards that can be present during in-person registration").

The vast majority of the federal courts that have considered this question have likewise found that the statute's "accept and use" language bars states from requiring information in addition to the federal form. In *Charles H. Wesley Educational Foundation, Inc. v. Cox*, the Eleventh Circuit considered the fate of a package of federal forms that had been collected during a charity's voter registration drive. 408 F.3d 1349, 1351 (2005). The Georgia Secretary of State, citing a state law that prohibited anyone except a voter registrar from collecting applications, rejected the forms sent in by the charity. Georgia claimed "that the NVRA only requires that

mailed registration forms be accepted when delivered both in a timely fashion *and* pursuant to additional state requirements." 408 F.3d at 1354. The Eleventh Circuit disagreed, finding that the Secretary was required to accept the federal forms as valid and complete applications for voter registration. *Id.* In so holding, the panel affirmed the district court's finding that "Congress simply did not allow the states to impose restrictions that would permit denial of an application that otherwise satisfies the federal requirements." 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004). *Accord ACORN v. Edgar*, No. 95-C-174, 1995 WL 532120, *1 (N.D. Ill. Sept. 7, 1995) (Illinois's attempt to require an address verification form as a supplement to the federal form was invalid because it "impos[ed] a requirement that is not authorized by [the NVRA].").

Much like the petitioners here, Georgia's main argument in the *Cox* case was that "under a 'conservative' reading of [NVRA] § 1973gg–6(a)(1)(B), [the state] would be permitted to reject those applications sent in a bundle." 324 F. Supp. 2d at 1367. In rejecting this argument, the court noted that it "simply does not see how *any* interpretation of that section can avoid the plain conclusion that a timely, mailed, postmarked application must be accepted for processing." *Id.* The *Gonzales III* panel reached an identical conclusion. 677 F.3d at 399-400.

If Congress is aware of a consistent interpretation of a statute and declines to amend the statute to correct it, this Court will apply the "acquiescence rule" and assume that such an interpretation is correct. *See Zuni Pub. Sch. Dist. No. 89 v. Dep't of Education*, 127 S. Ct. 1534, 1541 (2007). In this case, both the relevant agency and the majority of courts have found that the NVRA's "accept and use" language requires states to accept the federal form as a complete application. Congress must have been aware of this interpretation in 2002, when it passed the Help America Vote Act. Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.). That legislation made a number of modifications to the NVRA's scheme, including

shifting supervision of the federal form from the FEC to the EAC. 42 U.S.C. §§ 15321, 15532 (2006). The fact that Congress tinkered with the federal form without correcting the dominant interpretation of "accept and use" weighs heavily in favor of abiding by that interpretation. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155, 162-63 (2000).

d. Proposition 200 conflicts with the purpose of the NVRA

In addition to being unnatural, Arizona's reading of the NVRA is also discordant with the purpose of the "system of regulations" that Congress designed. *Ex parte Siebold*, 100 U.S. at 384; *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (the "purpose of Congress is the ultimate touchstone in every pre-emption case.").

The NVRA has two central purposes: to increase voter registration and to continue to prevent voter fraud. 42 U.S.C § 1973gg(b)(1)-(4). Under the Elections Clause, Congress has final authority to balance these two electoral "principles" in a careful system of regulations. And "[t]hough Arizona has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context." *Gonzales III*, 677 F.3d at 403*; see ACORN v. Edgar,* 56 F.3d 791, 795–96 (7th Cir. 1995) (rejecting Illinois's request to disobey the NVRA because it would "open[] the door to voter fraud"). Indeed, Arizona's attempt to second-guess and relitigate the tradeoffs contained in the NVRA contravenes basic preemption principles.

In determining whether Proposition 200 conflicts with the purpose of the NVRA, this Court need not reason from a blank slate. The conference committee explicitly considered Arizona's interpretation (embodied by the Simpson amendment), and found that it was not "consistent with the purposes of the Act." H. Rep. 103-66, at 23 (Conf. Rep.). The conferees were worried that the Simpson amendment would allow States to upend the purpose of the

NVRA by doing exactly what Arizona has now done: erect supplemental registration "requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.*

The Supreme Court has signaled that conference reports are "due great weight" in determining Congressional intent. *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Service*, 462 U.S. 810, 833 n.28 (1983) (citing Kenneth Culp Davis, *Administrative Law Treatise* § 3A.31, at 175 (1970 Supp.) ("The content of the law must depend upon the intent of both Houses, not of just one.")). Indeed, it is now well understood that the conference report is a uniquely authoritative source for determining how Congress intended the statute to operate. *See Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) ("Because the conference report represents the final statement of terms agreed to by both houses, next to the statute itself it is the most persuasive evidence of congressional intent.").

i. Access to registration

The overarching purpose of the NVRA is to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C § 1973gg(b)(1). *See, e.g.*, Neil P. Kelly, *Lessening Cumulative Burdens on the Right to Vote: A Legislative Response to* Crawford v. Marion County Election Board, 19 Cornell J.L. & Pub. Pol'y 243, 249 (2009) ("Enacted in light of widespread declines in voter turnout, Congress promulgated the NVRA with the goal of increasing registration among all voters").

In designing the federal form, the EAC took several steps to advance this purpose. First, the agency chose not to require that citizenship documents be submitted with the form. *See* 59 Fed. Reg. at 32,316 (June 23, 1994) ("The issue of U.S. citizenship is addressed within the oath

required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form."). Because the form does not call for proof of citizenship, it can be completed quickly. Voters are spared the time-consuming process of locating and photocopying their documents. Although these may seem like small tasks, potential voters with full-time jobs might be discouraged from registering by the unpleasant prospects of having to track down an original copy of a birth certificate or order a new passport. These chores—chores that are required by Proposition 200—present exactly the type of obstacle to voter registration that the NVRA was intended to eliminate. Indeed, it is well documented that requiring proof of citizenship imposes a substantial burden on certain voters. The population most harmed by these requirements "includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged.)" *Applewhite v. Pennsylvania*, 54 A.3d 1, 4 (Pa. 2012).

Second, the EAC designed the federal form so that it could be mailed as postcard. Under the Arizona scheme, applicants would no longer be able to take advantage of the ease and simplicity of the postcard. They would instead be forced to photocopy their documents and enclose them in an envelope alongside the federal form.

Congress' purpose of increasing voter registration is further reflected in the NVRA's insistence on national uniformity. The nationwide applicability of the federal form was highly controversial during the debates over the NVRA. *See, e.g.*, 139 Cong. Rec. 9216 (statement of Rep. Coble) (noting that the NVRA's insistence on uniformity forced the states to "[l]isten to Big Brother in Washington"). Over spirited Republican objection, Congress ultimately decided that

such uniformity was necessary to prevent certain states from erecting obstacles to registration that would jeopardize equal access to federal elections across the nation.

But instead of promoting uniformity across the states, Arizona's interpretation would make it more difficult for a citizen to register for a federal election in Arizona than in other states. If states are unrestricted by the purpose of the NVRA, then a state hostile to the federal form might require a supplemental form that was intentionally tedious and time-consuming. They might also require difficult-to-locate documents, such as an original copy of a birth certificate or social security card. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 492-94 (2008) (discussing this possibility). By approving Arizona's scheme, this Court would green light a whole host of burdensome schemes that would undermine the federal form's utility. This could not have been what Congress intended.

ii. Fraud prevention

A second purpose of the NVRA was to prevent fraud and "protect the integrity of the electoral process." 42 US.C. § 1973gg(b)(3). Congress pursued this goal vigorously and deliberately.

The final version of the NVRA adopted a number of strict anti-fraud measures, but stopped short of allowing states to request documentary evidence of citizenship. Perhaps the most powerful anti-fraud measure was to make fraudulent registration a federal crime for the first time in American history. 42 U.S.C. § 1973gg-10; *see* 139 Cong. Rec. 9224 (statement of Rep. Swift) (this crime "ha[d] never existed before."). Another measure was to require that new registrants attest that they met the registration requirements under penalty of perjury. *Id.* § 1973gg-7(b)(2)(B)-(C); *see* 139 Cong. Rec. 5104 (Senator Ford noting that the perjury provision

"would make [him] stop and think" before fraudulently filling out the federal form). Knowing that some states might wish for even more fraud protection, Congress also allowed states to require voters who had registered by mail to vote in-person the first time after registration. 42 U.S.C. § 1973gg-4(c)(1)(A).

Proposition 200's one-track obsession with fraud prevention favors election integrity over voter access in a way that Congress expressly considered but ultimately rejected. When Senator Simpson proposed yet another fraud prevention measure, Congress found that his amendment was simply "not necessary or consistent with the purposes of the Act." H. Rep. 103-66, at 23 (1993) (Conf. Rep.).

Under the "rejected proposal rule," courts will decline to interpret a statute in the manner suggested by language that Congress considered and then rejected. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 580 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation."); *Doe v. Chao*, 540 U.S. 614, 622-23 (2004) (Congress' decision to cut drafted statutory language allowing for "general damages" can be interpreted as a "deliberate elimination of any possibility" of awarding such damages); *Runyon v. McCrary*, 427 U.S. 160 (1976).

The Simpson amendment, which was ultimately rejected by both Houses of Congress, is strong evidence of Congress' intent not to permit states to add additional anti-fraud measures. As indicated below, "both [the House and the Senate] affirmatively rejected efforts to authorize precisely what Arizona [sought] to do" by passing Proposition 200. *Gonzales III*, 677 F.3d at 441-42 (Kozinski, C.J., concurring). These decisions should now "weigh heavily against" Arizona's strained interpretation of the NVRA. *Hamdan*, 538 U.S. at 580.

II. The NVRA would also preempt Proposition 200 under the Supremacy Clause's ordinary principles of preemption

It is this Court's practice to use the principles embedded in the history and text of the Elections Clause to decide preemption cases related to federal elections. In *Foster*, for instance, this Court affirmed a preemption decision by the Fifth Circuit, but rejected that Court's Supremacy Clause analysis, opting instead to limit its reasoning to the principles of the Elections Clause itself. *See Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996), *aff'd* 522 U.S. 67 (1997) ("[T]he Louisiana system as applied to federal elections must yield under the Supremacy Clause."). As in *Foster*, however, Proposition 200 would be preempted by the NVRA even under this Court's standard Supremacy Clause analysis.

a. State laws that stand as an obstacle to the achievement of the full purpose of the NVRA would be preempted under the Supremacy Clause

As noted in Part I.b, *supra,* the "presumption against preemption" is inapplicable when Congress acts in a traditional sphere "reserved for federal regulation." *Wyeth v. Levine*, 555 U.S. 555, 624 (2009) (Alito, J., dissenting) (quoting *United States v. Locke,* 529 U.S. 89, 111 (2000)); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("Policing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' such as to warrant a presumption against finding federal pre-emption of a state-law cause of action.") (internal citations omitted). The plain statement rule is similarly inapposite. *See supra* Part I.b.

In spheres where "there has been a history of significant federal presence," *Locke,* 529 U.S. at 90, the "Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388

(2000). Indeed, a "failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine." *Crosby*, 530 U.S. at 387-88. Congress has long supervised a comprehensive system of electoral regulations without plainly stating its intent to preempt state law. *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (providing an early history of Congressional election regulations). Congress' ability to *impliedly* preempt state election regulations is well settled. *See, e.g.*, *Foster*, 522 U.S. 67, *Ex parte Siebold*, 100 U.S. 371.

Where express preemption is not required, "state law must yield to a congressional Act if Congress intends to occupy the field . . . or to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. at 363 (2000). A conflict occurs where it is "impossible for a private party to comply with both state and federal law" or "where the state law is an obstacle to the accomplishment and execution of Congress' full purposes and objective." *Id.*

Obstacle preemption is an accepted practice in areas that, like federal elections, implicate strong national interests. *See Arizona v. United States*, 132 S. Ct. at 2505 ("The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"); *see also Crosby*, 530 U.S. at 373 (2000) (preempting a state law that interfered with United States foreign policy); *United States v. Locke*, 529 U.S. 89, 108 (2000) (preempting a state law that interfered with the federal regulation of national waters); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (preempting a state law that interfered with federal regulation of natural gas).

In *Hines v. Davidowitz,* 312 U.S. 52 (1941), this Court established a two-part inquiry for determining whether obstacle preemption analysis is appropriate. First, it considered whether the

area Congress is regulating "bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one." 312 U.S. at 66. And second, it considered whether Congress had the purpose of "enact[ing] a complete scheme of regulation." *Id.* Because the NVRA seeks to regulate an area with clear national importance through a comprehensive regulatory scheme, Arizona cannot, "inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Id.* at 66-67.

The NVRA amply satisfies the first prong of the *Hines* preemption test. Federal elections "bear[] an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one." *Hines*, 312 U.S. at 66. Congress has the ultimate constitutional power to ensure that the regime used to elect federal representatives does not substantively advantage or disadvantage some states relative to others. *See* Max Farrand, 3 *Records of the Federal Convention* 311 (1911).

The NVRA seeks precisely the type of national uniformity that the Founders envisioned and to which the Supremacy Clause defers. The whole point of the federal form is to minimize the burdens imposed by individual states' registration procedures. 42 U.S.C § 1973gg(b)(1); *see also* 139 Cong. Rec. 9220 (statement of Rep. Livingston) (noting that the NVRA "nationalize[s] all voter registration laws.").

Given the emphasis the Founders placed on reducing the diversity of electoral principles among states and on preventing "the people of any state, by any means [from] be[ing] deprived of the right of suffrage," Max Farrand, 3 *Records of the Federal Convention* 311, it is clear that federal elections are an "aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 68.

The NVRA also satisfies the second prong of the *Hines* preemption test. The NVRA is a comprehensive regulatory scheme intended to prevent states from enacting regulations related to the federal form beyond those specifically permitted by the statute. A "single integrated and all-embracing system" of regulation is strong evidence that Congress intended to preempt any additional state laws. *See Hines*, 312 U.S. at 74 (finding a scheme to "obtain the information deemed to be desirable in connection with aliens" to be a complete system of regulation).

The NVRA establishes a complete and independently sufficient form for federal election registration. 42 U.S.C. § 1973gg-4(a)(1). All states are required to "accept and use" this form. *Id.* The NVRA also requires states to designate agencies to receive the federal form, *id.* § 1973gg-5, to inform applicants of the registration eligibility requirements, *id.* § 1973gg-6, and to notify applicants if they are removed from the list of eligible voters, *id.* Moreover, Congress designated specific areas of state discretion. States, for example, may require that mail-in registrants vote for the first time in-person. *Id.* § 1973gg-4(c)(1)(A). States may also create their own state forms "*in addition to* accepting and using the federal form," so long as that form meets all federal criteria. *Id*. § 1973gg-4 (emphasis added). Congress' express delegation of power to the states to create their own additional form suggests their intention to preclude states from modifying or adding to the federal form itself.

These requirements alone are evidence of Congress' intention for its system of voter registration to be a comprehensive set of federal registration regulations that cannot be altered, enhanced, or changed by the states.

The fact that Congress delegated power to the Election Assistance Commission to advise and guide states into compliance with the federal rules is also strong evidence of its intention to preclude the states from reinterpreting the requirements of the NVRA. *See Garner v. Teamsters,*

Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485, 490 (1953) (finding that Congress' delegation of power to an agency suggests its desire to ensure "uniform application of its substantive rules"); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law.") (internal citation omitted).

b. The power of states to enact elections regulations in areas concurrently regulated by Congress is highly circumscribed

When Congress has provided an "integrated scheme for regulation" of a "matter of national moment," the states' power to "conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" is necessarily limited. *Hines*, 312 U.S. at 66-67. Indeed, "[a]ny concurrent state power that may exist is restricted to the narrowest of limits." *Id.* at 68. States do not maintain "an equal and continuously existing concurrent power," but "whatever power a state may have is subordinate to supreme national law." *Id.*

Although Arizona argues that the NVRA establishes a floor and not a ceiling on the requirements for federal voter registration, this Court has consistently found unpersuasive the idea that states may "complement" comprehensive federal regulatory schemes through additional or auxiliary regulations. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000) (holding that Congress' ability to preempt is not "rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals."); *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265-66 (1929) ("States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.").

This bar on complementary regulation applies even where states seek to advance one of the purposes of the Congressional scheme. A state law impermissibly interferes with the "execution of the full purposes" of a Congressional scheme when it upsets the "careful balance struck by Congress." *Arizona v. United States*, 132 S. Ct. at 2505. Inherent in Congress' ability to create comprehensive regulatory programs is its power to balance competing interests and policy goals. A state effort to enhance one policy goal but not others necessarily undermines Congress' balance. This is particularly true in the area of federal election regulations, where Congress has consistently sought to strike a principled balance between easing access to the polls and preventing fraud. Arizona' contention that Proposition 200's proof of citizenship requirement should be permitted on the grounds that is an important anti-fraud measure upsets the careful balance that Congress extensively deliberated and ultimately enacted. *See* H. Rep. 103-9, at 35, 36 (1993); H. Rep. 103-66, at 23 (1993).

This Court has similarly recognized the impact that different modes of implementation can have of the effectuation of Congress' purpose. A "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am. v. Lockridge*, 403 U.S. 274, 287 (1971). Thus, states undermine the "purposes and objectives of Congress" when they use implementation techniques that substantively change the impact of the law, as does Proposition 200's citizenship requirement. *See also Arizona v. United States*, 132 S. Ct. at 2505 ("Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement.").

Thus, whether analyzed under the principles of the Elections Clause or under this Court's ordinary Supremacy Clause jurisprudence, Proposition 200 must be preempted by the NVRA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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