No. _____

In The Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE, and BERNIE ABEYTIA; LUCIANO VALENCIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE; COMMON CAUSE; AND GEORGIA MORRISON-FLORES,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDINGS

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

PARTIES TO THE PROCEEDINGS – Continued

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

PARTIES TO THE PROCEEDINGS – Continued

Abeytia; Luciano Valencia; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote; Common Cause; and Georgia Morrison-Flores.

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

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona, Secretary of State Ken Bennett, and thirteen Arizona Counties (collectively referred to as "the State" or "Arizona") respectfully petition for a writ of certiorari to review the U.S. Court of Appeals for the Ninth Circuit's judgment in this case.

OPINION BELOW

The merits decision of the en banc panel of the Ninth Circuit Court of Appeals is reported at 677 F.3d 383 (9th Cir. 2012) (Pet. App. 1c-122c.) The order of the U.S. District Court for the District of Arizona is included in the Appendix at 1e to 10e.

JURISDICTION

The court of appeals entered judgment on April 17, 2012. (Pet. App. 4c.) This petition has been filed within ninety days of April 17, 2012. Accordingly, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> 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.

This case also involves the National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-7, which is reproduced in the Appendix at 1h-28h.

The case also involves Arizona Revised Statutes ("A.R.S.") Section 16-166. Section 16-166(F) provides as follows:

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

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

(The complete text of A.R.S. § 16-166 is reproduced in the Appendix at 46h-50h.)

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STATEMENT OF THE CASE

A. The National Voter Registration Act.

Congress enacted the National Voter Registration Act ("the NVRA") in 1993 to "establish procedures that will increase the number of eligible citizens who register to vote for Federal office," "make it possible for Federal, State, and local governments to implement [it] in a manner that enhances 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)(1)-(4) (Pet. App. 2h.)

The NVRA required the U.S. Election Assistance Commission ("EAC") to develop the Federal Mail Voter Registration Form ("Federal Form") in consultation with the States. *See* 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h-27h). The NVRA directs the States to "accept and use" the Federal Form when submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2) (Pet. App. 7h.) Since the inception of the NVRA, Arizona has used and accepted the Federal Form for voter registration. (Appellees' Supplemental Excerpt of Record in Nos. 08-17094 and 08-17115, filed in the Ninth Circuit Court of Appeals [SER] 23, ¶ 2.)

"In addition to accepting and using the [Federal Form], 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." 42 U.S.C. § 1973gg-4(a)(2). Included in the § 1973gg-7(b) criteria, the NVRA provides that a mail voter registration form "may require . . . 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) (Pet. App. 26h). Section 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. (*Id*.)

B. The Passage and Implementation of Proposition 200.

Arizona voters passed Proposition 200 in 2004. One of Proposition 200's provisions required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). (Pet. App. 49h-50h.)

Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. (*Id*.) For example, an Arizona driver's license or nonoperating identification number issued after October 1, 1996, may be used. Approximately ninety percent of voting age Arizonans have driver's licenses. (Appellant Gonzalez Excerpts of Record in the Ninth Circuit Court of Appeals [Gonzalez ER] Tab 3 at 9.) Similarly, naturalized citizens have certificates of naturalization, and they need only provide an identification number from that certificate on the form in order to register. (*Id.* at 4.) If a person has none of these numbers to provide, he or she can

provide copies of other documents such as birth certificates, passports, naturalization documents, or "other documents that are meant as proof that [may be] established pursuant to" federal immigration law. (Pet. App. 9d (quoting A.R.S. § 16-166(F)(5)).)

Following approval of the measure by Arizona voters, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. (SER 12-17.) Arizona specifically stated that the measure would "require applicants registering to vote to provide evidence of United States citizenship with the application." (*Id*.) The Department of Justice precleared the measure on January 24, 2005. (*Id*.)

Following the implementation of Proposition 200, Arizona has continued to accept both the Federal Form and Arizona's form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with whichever application form the applicant submits. (SER 23-24, ¶¶ 2-3, 7.) The Arizona Secretary of State makes the Federal Form available to anyone who requests it. (SER 23, ¶ 4.) In addition, that form is publicly available for downloading and printing on the EAC's website. (SER 23, ¶ 4.)

C. Procedural History.

After the voters passed Proposition 200, several Plaintiffs brought overlapping Complaints to prevent its implementation. (Pet. App. 7c.) The district court

consolidated the actions and, following briefing and an evidentiary hearing, denied preliminary relief. (Pet. App. 1f-3f.) A two-judge motions panel of the Ninth Circuit reversed the district court and granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006).

This Court granted the State's petition for certiorari and vacated the court of appeals' order. *Purcell v. Gonzalez,* 549 U.S. 1, 8 (2006). However, this Court noted the following important policy considerations:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 7 (internal citations, quotation marks, and brackets omitted). This Court also recognized the Plaintiffs' interest in exercising the right to vote. *Id.* The Court did not, however, express an opinion on the correct disposition of the ultimate issues. *Id.* at 8.

Justice Stevens noted two factual resolutions as key in resolving this case: (1) The scope of the disenfranchisement that the evidence requirements will produce, and (2) the prevalence and the character of the fraudulent practices that allegedly justify those requirements. *Id.* (Stevens, J., concurring).

Following a trial on the remaining claims, including Equal Protection, the district court granted judgment in favor of the State. (Pet. App. 8c-9c.) The district court found that the burdens on potential registrants were not excessive. (Gonzalez ER Tab 3 at 32.) Plaintiffs were able to produce only "one person . . . who is unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate[ ] that . . . persons rejected are in fact eligible to register to vote." (*Id*.) The district court also found that voter fraud was a significant problem. For example, in 2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commission they were not U.S. citizens. (*Id*. at 16) Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now ("ACORN") submitted "garbage" voter-registration forms and had misled noncitizens into registering to vote. (*Id*.; *see also* Appellees' Supplemental Excerpt of Record in No. 08-17094 filed in the Ninth Circuit Court of Appeals at 209-10.)

Following remand, a panel of the court of appeals affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the State from requiring

evidence of citizenship. (Pet. App. 16d-17d) (*Gonzalez v. Arizona I*). Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the district court granted the State's motion for summary judgment on the NVRA claim. (Pet. App. 3e.)

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

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

'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (*Id.*)

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

Chief Judge Kozinski concurred, but observed the following:

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

(Pet. App. 89c.) Chief Judge Kozinski also noted that although this Court "has never articulated any doctrine

giving deference to the states under the Elections Clause," this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." (*Id.* at 91c.) He then concluded that only this Court "can adopt such a doctrine." (*Id.*) Chief Judge Kozinski stated, in effect, that although he joined the majority, he also believed that this case was appropriate for review.

Judges Rawlinson and Smith dissented from the majority's holding that the "application of Proposition 200's proof-of-citizenship provision to prospective voters using the [Federal Form] is precluded by the . . . NVRA." (Pet. App. 100c.) The dissent disagreed with the majority opinion's interpretation of the Elections Clause, finding that it was not supported by this Court's decisions. (Pet. App. 116c-121c.) According to the dissent, this Court's Elections Clause decisions "emphasize the respect that should be accorded the procedures implemented by states," clarify that "preemption extend[s] only as far as a conflict exists," and hold that "a conflict exists only if the [state and federal] regulations cannot co-exist." (*Id.* at 116c, 121c.) The dissent therefore concluded that "[b]ecause the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause." (*Id.* at 121c.)

The dissent articulated several reasons, supported by the NVRA itself, that there was no conflict. For

example, drawing on an analogy first articulated by Chief Judge Kozinski in an earlier opinion in this case (Pet. App. at 96a-97a), the dissent observed:

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

(Pet. App. at 105c.)

The dissent further found that § 1973-7(b) expressly "permits states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" (*Id.* at 107c (quoting 42 U.S.C. § 1973gg-7(b)(1)).) This showed Congress's intent that state officials should be able to require evidence of citizenship. (*Id.*) The dissent concluded that Congress could not have intended that the States could not deviate from the Federal Form because the NVRA expressly allows the States to develop their own form as long as it complies with 42 U.S.C. § 1973gg-7(b). (*Id.* at 109c-110c.) Consequently, the dissent concluded that Arizona did not defy "the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form." (*Id.* at 106c.)

REASONS WHY THE PETITION SHOULD BE GRANTED

The Court should grant review because the court of appeals' newly created Elections Clause preemption analysis is contrary to this Court's precedent and conflicts with the Elections Clause analysis of other federal circuit courts. The Court should resolve the conflict among the circuit courts about the correct analysis to be used when analyzing challenges to state laws under the Elections Clause.

The court of appeals' use of the incorrect preemption analysis is important because it resulted in a hypertechnical interpretation of a single provision of the NVRA, while ignoring the NVRA's plain language and the NVRA's stated purpose. The court of appeals' interpretation of the NVRA is also inconsistent with the recognition of this Court and another federal court of appeals that the NVRA does not limit the information that the State may request in the registration process.

The court of appeals' heightened Elections Clause analysis and its interpretation of the NVRA disrupt the delicate balance necessary to maintain federalism principles and interfere with the States' ability to protect the integrity of their elections. Because both Arizona law requiring prospective voters to provide sufficient evidence of citizenship and the NVRA's requirement that States accept and use the Federal Form can be enforced without conflict, the NVRA does not preempt the Arizona law. Moreover, the Arizona

law does not interfere with Congress's objectives in enacting the NVRA because requiring evidence of citizenship imposes a minimal burden on a limited number of persons and furthers the federal government's and the States' broad interest in protecting election integrity. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199-200 (2008) (plurality opinion) (upholding state law requiring photo identification against a facial attack because the "State's interest in protecting election integrity" outweighed the burdens on a small number of voters).

This Court should accept review here to clarify that like this Court's Supremacy Clause preemption analysis, the Elections Clause preemption analysis must take into account federalism principles. (*See* Pet. App. 91c) (Kozinski, J., concurring) (observing that this case is suitable for addressing whether the Court defers to the compelling state interest in "avoiding fraudulent voting by large numbers of unqualified electors.")

I. The Court of Appeals' Holding that Traditional Preemption Doctrines Do Not Apply to Preemption Analysis Under the Elections Clause Is Contrary to This Court's Precedent and Conflicts with Other Federal Circuit Court Decisions.

A. This Court's Cases Apply State-Deferential Preemption Principles in the Elections Clause Context and in Other Contexts in Which the Federal Government Has Constitutional Authority.

The court of appeals concluded that the "presumption against preemption" and the "plain statement rule," which apply to preemption analysis under the Supremacy Clause, did not apply to preemption analysis under the Elections Clause because the States "have no reserved authority over the domain of federal elections." (Pet. App. at 16c.) But this conclusion is contrary to this Court's Elections Clause precedent and ignores the fact that the Elections Clause expressly gives the States authority to act. And the court of appeals' reasoning is inconsistent with the Court's application of state-deferential preemption principles even in areas in which Congress has broad constitutional authority.

Since this country's founding, States have administered federal elections. The Elections Clause "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 511 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208,

217 (1986)). Accordingly, States have express authority to promulgate election codes, to regulate registrations, to prevent election fraud, and to supervise voting. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also Purcell*, 549 U.S. at 4 (explaining that States enact comprehensive election codes that apply to both state and federal elections for the purpose of ensuring the "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of our participatory democracy"); *United States v. Classic*, 313 U.S. 299, 311, 315 (1941) (stating that "the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of the representative in Congress" and that this discretion is limited only to the extent that Congress has "restricted state action by the exercise of its powers to regulate elections under [the Elections Clause].").

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Because of the States' constitutional role in the regulation of elections for federal office, this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause.

Consistent with the presumption against preemption, the Court has held that an Election Clause challenge fails where the congressional act at issue "does not expressly pre-empt state legislation," thus leaving the State free to enforce its law. *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93, 186 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). Similarly, to the extent that Congress does legislate pursuant to the Elections Clause, a conflict extends "only so far as the two [provisions] are inconsistent and no farther." *Ex Parte Siebold*, 100 U.S. 371, 386 (1879); *see also Smiley v. Holm*, 285 U.S. 355, 369-72 (1932) (evaluating state procedures for enacting congressional districts to determine if there was a conflict with the Elections Clause or federal statute and concluding that no conflict existed). The Ninth Circuit's decision in this case, which makes no finding of express preemption and does not find a conflict between the NVRA and Proposition 200, is directly contrary to these two holdings by this Court.

The court of appeals relied on *Siebold* and *Foster v. Love*, 522 U.S. 67 (1997), to conclude that no presumption against preemption applies under the Elections Clause. (Pet. App. 17c-20c.) But neither of those cases supports the court of appeals' conclusion that the Court disregarded state-deferential preemption principles or warrants striking down a state law that does not conflict with any federal statute and that expressly furthers a federal objective (that is, ensuring

the registration of eligible voters). The Ninth Circuit's decision is therefore without supporting authority.

In *Siebold*, the petitioners challenged their prosecution for violations of a federal statute that criminalized conduct in federal elections. 100 U.S. at 378-82. The petitioners argued that if Congress chose to regulate congressional elections, it must do so comprehensively rather than partially. *Id.* at 382-83. The Court rejected this proposition, concluding that Congress may alter the law respecting state practices "either wholly or partially" under the Elections Clause. *Id.* at 383. Although "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them," *id.* at 383-84, the conflict extends only "so far as the two are inconsistent, and no farther," *id.* at 386. A conflict arises "if both cannot be performed." *Id.* The Court explained that it was "bound to presume that Congress has [legislated] in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." *Id.* at 393. *Siebold*'s conclusion "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395; *cf. Roudebush*, 405 U.S. at 25-26 (holding that state election procedure "usurp[s]" federal law regarding qualification of members "only if it frustrates" Congress's "ability to make an independent final judgment" on qualifications).

The analysis in *Foster* is consistent with the analysis in *Siebold*. At issue in *Foster* was the validity of the Louisiana open primary statute that could determine who would fill the offices of U.S. Senator and Representative a month before the election date set by federal statute, 2 U.S.C. § 7. *Foster,* 522 U.S. at 68-69. The Court found that the state law was invalid because there was an irreconcilable conflict between the federal statute and the state law:

> Without paring the term "election" in § 7 down to the definition bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act or law in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 72. This Court noted that it was issuing a very narrow opinion that would not unduly interfere with state election procedures: "This case thus does not present the question whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4.

In contrast to the Court's broad definition of "election" in *Foster* that avoided creating an unforeseen conflict with state law, the court of appeals here construed the phrase "'accept and use' the federal form" narrowly or hypertechnically. (*See* Pet. App. 89c) (Kozinski, J., concurring) (stating that construing the

phrase "'accept and use' the federal form" to mean that the State "must employ the form as a complete registration package" would construe the phrase "narrowly or exclusively," whereas giving the phrase "a broad or inclusive construction," would allow States to "'accept and use' the federal form while also requiring registrants to provide documentation confirming what's in the form.") As will be discussed in Section I(B) *infra,* the court of appeals' interpretation of *Foster* is contrary to the Fifth Circuit Court of Appeals' interpretation of *Foster* in *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000), and is at the least inconsistent with another Ninth Circuit panel's interpretation of *Foster* in *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001).

In addition to the decisions in *Siebold* and *Foster*, the Court's use of state-deferential preemption principles even in areas in which Congress possesses broad constitutional powers, such as immigration, indicates that the Court would not abandon those principles when analyzing state statutes under the Elections Clause.

In *Arizona v. United States*, No. 11-182, 2012 WL 2368661, at *4 (U.S. June 25, 2012), the Court addressed whether federal law preempted four provisions of Arizona law that concerned illegal aliens within Arizona's borders. At the outset, the Court noted the federal government's "broad, undoubted power over the subject of immigration and the status of aliens." *Id.* at *5 (citing U.S. Const. art. I, § 8, cl. 4 and *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). But the

Court noted that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States" and examined the four provisions of Arizona law under traditional preemption principles. *Id.* at *7-8. The Court noted that federal law preempts state law where there is an express preemption provision, where Congress has indicated "its intent to displace state law altogether, and where state law conflicts with federal law." *Id.* And the Court instructed that "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* at *8 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Applying the traditional preemption principles, the Court found that federal law preempted one provision of Arizona law because Congress intended to preclude all state regulation on the subject of alien registration, *id.* at *10, and two other provisions because they were inconsistent with federal policy and objectives, *id.* at *12, *14. But the Court held that it was improper to enjoin enforcement of one Arizona provision "without some showing that enforcement of the provision *in fact* conflicts with federal immigration law and its objectives." *Id.* at *18 (emphasis added).

If the court of appeals had applied traditional preemption principles in the present case, it would have found that Proposition 200's evidence-of-citizenship requirement was consistent with the

language and purpose of the NVRA as well as other federal laws. *See* Section II *infra*; *see also* (Pet. App. 90c) (Kozinski, J., concurring) (noting that there would be "ample justification" for adopting "the Clear Statement Rule or the Presumption Against Preemption" for Election Clause Preemption given the States' vital interest in making sure that qualified electors choose their federal representatives).

B. The Circuit Courts of Appeals Are Split Concerning the Appropriate Preemption Analysis for Challenges to State Laws Under the Elections Clause.

In finding that the "presumption against preemption" and the "plain statement rule" are not transferable to the Elections Clause context, the court of appeals relied on *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008). But *Harkless* is not a preemption case and other circuit court decisions apply traditional preemption principles to Elections Clause challenges.

In *Bomer*, 199 F.3d at 774, the Fifth Circuit addressed whether federal election statutes that require that the election of members of Congress and presidential electors occur on federal election day preempted provisions of the Texas Election Code that permitted unrestricted early voting in federal elections. The court relied on *Foster*, 522 U.S. at 68, and *Classic*, 313 U.S. at 311, to determine the governing preemption analysis: "Thus, a state's discretion and flexibility in establishing the time, place and manner

of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the same subject." *Bomer*, 199 F.3d at 775 (emphasis added); *see also McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985) (holding in the context of a different Elections Clause issue that "[a] federal law preempts state law only when the two inevitably *conflict* or the law contains an *explicit* preemption clause") (emphasis added) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), which the Court decided under the Supremacy Clause).

The *Bomer* court relied on this Court's definition of "election" in *Foster* to conclude that the state statutes allowing early voting did not contravene federal election statutes "because the final selection [was] not made before the federal election day." 199 F.3d at 776. The court reasoned that its "conclusion [was] consistent with the Supreme Court's refusal to give a hyper-technical meaning to 'election' and its refusal to '[pare] the term "election" in § 7 to the definitional bone.'" *Id.* (quoting *Foster*, 522 U.S. at 72).

In *Keisling*, 259 F.3d at 1176, the Ninth Circuit upheld an Oregon statute that allowed early voting by mail. Although the court noted that the text and history of the federal election day statutes seemed to imply that multiday elections were not permitted, it concluded that "[t]he *Foster* definition of 'election' implie[d] that there [was] only a single election day in

Oregon, when the election [was] 'consummated,' even though there [were] prior voting days." *Id.* at 1175.

The Fifth Circuit in *Bomer* and the Seventh Circuit in *McIntyre* determined that an actual conflict must exist for a federal law to preempt a state law under the Elections Clause. In contrast to the conflict preemption analysis that the *Bomer* and *McIntyre* courts applied, the court of appeals here applied a newly created test that did not require an actual contradiction between the federal law and the state law. (Pet. App. 20c.) As shown above, the Court's reliance on *Foster* for its new theory is incorrect.

The court of appeals' analysis is also inconsistent with the analysis in *Bomer* and *Keisling*. Those courts recognized that this Court had defined "election" broadly to accommodate state election procedures and upheld state election laws that could have been interpreted to conflict with federal law. In contrast to *Bomer* and *Keisling*, the court of appeals here narrowly defined "accept and use the Federal Form" to invalidate Arizona's evidence-of-citizenship requirement even though it does not directly conflict with the NVRA and it is consistent with the NVRA's overall statutory scheme and purposes.

While the Sixth Circuit determined that the plain statement rule did not apply to the NVRA in *Harkless,* 545 F.3d at 454-55, the case addressed whether the Ohio Secretary of State could be sued for

failure to comply with the NVRA and not whether the NVRA preempted state law.[1] *Harkless* provides no support for the court of appeals' newly created preemption test.

The Court should grant review to resolve the conflicts among circuits and between the Ninth Circuit and this Court and to clarify that traditional preemption principles apply to challenges to state law under the Elections Clause.

II. The NVRA Does Not Preempt Proposition 200 as to the Federal Form or Otherwise.

If the court of appeals had applied traditional preemption principles, it would have found that Proposition 200's evidence-of-citizenship requirement was valid. (*See* Pet. App. 90c) (Kozinski, J., concurring) (noting that traditional rules of preemption would be useful to resolve case); (*see also id.* at 31c) (majority opinion) (applying court's own Elections

[1] In contrast to the Sixth Circuit Court of Appeals in *Harkless,* the Eighth Circuit Court of Appeals recognized that the plain statement rule is likely to be appropriate under the Elections Clause in *United States v. Missouri*, 535 F.3d 844, 850 n.2 (8th Cir. 2008). Although ultimately avoiding the issue, the Eighth Circuit explained that while the Elections Clause does not speak in terms of reserved powers, that is really only a logical extension of the fact that federal elections post-date the federal government. *Id.* Accordingly, there is no functional difference between Elections Clause regulation and other federal impositions upon the States. *Id.*

Clause analysis).[2] Conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 2012 WL 2368661 *8 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and *Hines v. Davidowitz*, 312 U.S. 52 (1941), respectively). This Court "assume[s] that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). Under these principles, the court of appeals should have found that Proposition 200 was valid.

A. Proposition 200 Does Not Conflict with the NVRA.

"Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 573. Nothing in the court of appeals' opinion suggests that it is impossible for persons who register to vote to use the Federal Form and provide sufficient evidence of citizenship. After trial on other counts, the district court found that there was no excessive burden on persons seeking to register. (Gonzalez ER Tab 3 at 33.) The court of

[2] The court of appeals did not find that Congress had expressly preempted Proposition 200 or that Congress had occupied the field concerning voter registration. There would be no basis for such a finding because the NVRA expressly requires state involve-ment in the registration process. *See, e.g.,* 42 U.S.C. § 1973gg-2(a)(3)(B) (Pet. App. 3h.)

appeals acknowledged as much, dispatching Arizona's argument regarding the NVRA's burden on the basis of interference with the NVRA, rather than on the basis of impossibility. (Pet. App. 30c-31c.)

Congress enacted the NVRA to achieve four goals:

> 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 Act 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.

42 U.S.C. § 1973gg(b) (emphasis added) (Pet. App. 2h.) While the NVRA's goals indicate Congress's intent to increase voter registration, they also emphasize Congress's concern with the integrity of the electoral process, including ensuring that only eligible voters are registered. Because only U.S. citizens are eligible to vote, Proposition 200's evidence-of-citizenship requirement is consistent with the NVRA's express goals.

The court of appeals did not consider whether Proposition 200 was an obstacle to Congress's

purposes and objectives in enacting the NVRA because it rejected preemption principles. (*See* Pet. App. 16c.) Had the court addressed Congress's express purposes for enacting the NVRA and its objectives in light of the entire statutory scheme, it would have concluded that Congress did not intend the NVRA to bar States from properly assessing whether an applicant who registers to vote is eligible to vote. Rather, the opposite is true.

The NVRA builds upon the States' role in administering federal elections by providing certain requirements (and barring others, such as notarization) while "still leav[ing] room for policy choice" including what information to require from applicants. *Young v. Fordice*, 520 U.S. 273, 286 (1997) ("The NVRA does not list . . . all the other information the State may – or may not – provide or request.").

The Sixth Circuit's decision in *McKay v. Thompson* is illustrative and conflicts, at least in principle, with the Ninth Circuit's approach here. 226 F.3d 752, 755-56 (6th Cir. 2000). In that case, a plaintiff challenged a state requirement that people provide their social security numbers when registering to vote, claiming that this requirement violated the NVRA. *Id.* The requirement of a social security number is not authorized expressly by the NVRA. As with Arizona's requirements, the NVRA neither expressly authorizes nor expressly forbids the additional information being required of the applicant. Therefore, the Sixth Circuit concluded that the NVRA did not preclude the use of the numbers. *Id.* Indeed, as Judge Rawlison explained,

"the NVRA itself . . . expressly authorizes a state . . . to require additional information outside of the Federal Form for voter registration." (Pet. App. 102c) (Rawlinson, J., dissenting). The majority attempted to distinguish *McKay* by suggesting that because the United States Election Assistance Commission accepted the state requirement on the Federal Form, there was no conflict with that decision. (Pet. App. 34c.) That misses the point. The NVRA itself nowhere authorizes the use of social security numbers, and the Sixth Circuit expressly based its decision on the lack of a prohibition in the *statute*: "The NVRA does not specifically forbid use of social security numbers." 226 F.3d at 755-56. Similarly, in this case, the NVRA does not "specifically forbid" a request for evidence of citizenship. Therefore, under the Sixth Circuit rule, Arizona is not prevented by the NVRA from requesting evidence of citizenship.

Nor could the conclusion that Proposition 200 presents an obstacle to the NVRA be squared with this Court's decision in *Crawford*. In *Crawford*, the Court explained that certain burdens may arise where a photo identification is required in order to vote, such as the loss of the identification, but "[b]urdens of that sort, arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question" about the Indiana law requiring voters to provide photo identification. *Id.* at 197. Even if the burden may be "somewhat heavier . . . on a limited number of persons" this is not sufficient to sustain a "broad attack" on a state statute. *Id.* at 199-200.

Indeed, the NVRA itself does not suggest that Proposition 200 is an obstacle. The NVRA does not mandate the exclusive use of the Federal Form, but expressly authorizes States to develop and use their own form if the form meets the criteria in § 1973gg-7(b). 42 U.S.C. § 1973gg-4(a)(2) (Pet. App. 8h.) The state form "may require . . . indentifying information . . . as is necessary to enable the appropriate State election official to *assess the eligibility* of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added) (Pet. App. 26h.) Citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2) (Pet. App. 26h.) Therefore, the state form may require evidence of citizenship. If Congress had intended to preclude States from requiring evidence of citizenship, it would not have allowed States to develop and use their own form that requires such evidence. *Cf.* 42 U.S.C. § 1973gg-7(b)(3) (barring the States from requiring notarization) (Pet. App. 26h.) Instead, reading the NVRA provisions as a whole, it is logical to conclude that Congress intended that the Federal Form would set the minimum requirements and would allow a State to impose additional requirements, such as evidence of citizenship, that enable it to assess the applicant's eligibility to vote. *See Samanter v. Yosuf*, ___ U.S. ___, 130 S. Ct. 2278, 2289 (2010) (stating that the Court does not "'construe statutory phrases in isolation; [it] read[s] statutes as a whole'") (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)); *see also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986) ("Where possible, provisions of a statute should be read so as not to create a conflict.").

Congress's concern that only *eligible* voters register is evidenced throughout the NVRA. For example, the NVRA requires administrators of federal elections to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added) (Pet. App. 15h.) It also requires election administrators to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. 42 U.S.C. § 1973gg-6(a)(4) (Pet. App. 16h.) "Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place." *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) (explaining that the NVRA "protects only 'eligible' voters from unauthorized removal"). "[E]ligibility is the definitive criterion for registration and list maintenance obligations" and as a result, "States must strive to add eligible voters to their lists and to remove ineligible ones." *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010) (rejecting argument that the NVRA precluded a State from sending an address confirmation to a mail-in voter registrant). These NVRA provisions confirm that Congress wanted the States to register eligible voters and that Proposition 200 does not stand as an obstacle to the accomplishment and execution of Congress's purposes in enacting the NVRA.

Without the Arizona provision that was stricken by the Ninth Circuit, Arizona is forced to accept what

amounts to an honors system as to whether applicants are citizens or not. Although the applicant is required to sign a statement under oath that he is a citizen, someone willing to commit voter fraud will be willing to sign that statement. Only by requiring evidence of citizenship can the State screen out non-citizens who are attempting to vote. This is consistent with the purposes of the NVRA and is nowhere prohibited in the NVRA.

B. Because There Are Two Possible Interpretations of the Term "Accept and Use the Federal Form," the Court of Appeals Erred in Choosing the Interpretation that Is Contrary to the Plain Statement Rule and the Presumption Against Preemption.

The history of this case demonstrates that multiple federal judges have interpreted the phrase "accept and use the Federal Form" to allow States to require additional information to enable them to assess an applicant's eligibility. (Pet. App. 122c, 16d-17d, 3e; *cf. id.* at 97a-99a.) If the court of appeals had applied the plain statement rule or the presumption against preemption, it would have adopted an interpretation of the NVRA that avoided invalidating Proposition 200. *See Medtronic*, 518 U.S. at 485 ("In all preemption cases . . . [this Court] start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.") (internal

citations and quotation marks omitted); *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976) (stating that even in areas where Congress possesses broad authority, such as immigration, the Court will not presume that Congress intended to "preclude even harmonious regulation touching on aliens in general, or the employment of illegal aliens in particular"). The court of appeals erred in adopting an interpretation of the NVRA that ignores the plain statement rule and the presumption against preemption.

CONCLUSION

For the forgoing reasons, the State requests that the Court grant the Petition for Writ of Certiorari.

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