No. 12-71

In the Supreme Court of the United States

THE STATE OF ARIZONA, *ET AL.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *ET AL.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In pertinent part, Arizona's Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote. ARIZ. REV. STAT. §16-166(F). The National Voter Registration Act of 1993 ("NVRA") requires the States to "accept and use" a voter-registration form developed by a federal agency, 42 U.S.C. §1973gg-4(a)(1), but also allows States to adopt their own forms, *id.* §1973gg-4(a)(2), which may include "such identifying information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." *Id.* §1973gg-7(b)(1). Although Proposition 200 is consistent with a permissible construction of the NVRA, the Ninth Circuit rejected traditional preemption analysis – which requires clear congressional intent to preempt State law and includes a presumption against preemption – and instead applied a new form of heightened review for federal statutes implementing the Elections Clause, U.S. CONST. art. I, §4, cl. 1.

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 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 Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended not only the Constitution's federalist structure, but also its limits on both State and federal power. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged with the Clerk the parties' written consent to the filing of this *amicus* brief. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

to reduce voter fraud and to maximize voter confidence in the electoral process. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This litigation concerns three fundamental issues in our democracy: (1) the fundamental right of citizens both to vote and to avoid dilution of their votes by non-citizens who fraudulently or mistakenly register to vote; (2) the division of power between the States and Congress on the fundamental issue of voter qualifications; and (3) the mechanisms that federal courts will use to weigh divisions between the States and Congress in our federalist system of dual sovereignty.

"[T]he political franchise of voting … is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). As this Court held when this litigation came here on an interlocutory appeal over the Ninth Circuit's preliminary injunction, non-citizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006). Voter fraud "'debase[s] or dilute[es] … the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (*quoting Reynolds v. Sims,* 377 U.S. 533, 555 (1964)); *see Crawford v. Marion County Election Bd.,* 553 U.S. 181, 189 (2008) (States have an interest in preventing voter fraud and ensuring voter confidence). While "even rational restrictions on the right to vote [can be]

invidious if they are *unrelated to voter qualifications, Crawford,* 553 U.S. at 189 (emphasis added), Proposition 200 addresses the single-most fundamental voter qualification of all: citizenship. *Reynolds,* 377 U.S. at 554-55 (collecting cases). The idea that a federal law would seek to deter Arizona here is breathtaking.

As Madison explained at the Constitutional Convention, "'[t]he qualifications of electors and elected [are] fundamental articles in a Republican [Government] and ought to be fixed by the Constitution,'" and "'[i]f the Legislature could regulate those of either, it can by degrees subvert the Constitution.'" *Oregon v. Mitchell,* 400 U.S. 112, 210 (1970) (*quoting* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249-50 (1911)) (Harlan, J., concurring in part and dissenting in part). Significantly, this litigation has demonstrated that the registration of unqualified non-citizen voters is prevalent in Arizona. (Gonzalez ER Tab 3 at 16.) *Amicus* Eagle Forum respectfully submits that concern over that actual subversion should override any concern over ambiguities in federal laws, which Congress easily can correct if Congress disagrees with Arizona's means of remedying that subversion or this Court's deference to Arizona's remedy.

Constitutional Background

Since the Founding, the Constitution's Elector-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each State. U.S. CONST.

art. I, §2, cl. 2.[2] In addition, the Elections Clause provides that State legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, §4, cl. 1, subject to the power of "Congress [to] at any time by Law make or alter such Regulations." *Id.* art. I, §4, cl. 2. Under the Supremacy Clause, the "Constitution, and the Laws of the United States which shall be made in pursuance thereof[,] … shall be the supreme law of the land …, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Statutory Background

In 1993, Congress enacted the National Voter Registration Act, 42 U.S.C. §§1973gg to 1973gg-10 ("NVRA"), to promote the right of eligible citizens to vote in federal elections, 42 U.S.C. §1973gg(a), while at the same time "protect[ing] the integrity of the electoral process." 42 U.S.C. §1973gg(b)(3). Although the NVRA also addresses registering in person and registering in conjunction with applying for a driver's license, 42 U.S.C. §§1973gg-2(a), 1973gg-3, 1973gg-5, this litigation concerns only NVRA's provisions for registration by mail. 42 U.S.C. §§1973gg-2(a)(2), 1973gg-4.

With respect to registration by mail, the NVRA directs the Election Assistance Commission to adopt a mail voter registration application form ("Federal Form"), 42 U.S.C. §1973gg-7(a)(2), which the States "shall accept and use." 42 U.S.C. §1973gg-4(a)(1). In

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[2] The Seventeenth Amendment extended this same requirement to voter qualifications for elections for Senators. U.S. CONST. amend. XVII, cl. 2.

addition, however, the States also may develop their own forms that meet the criteria of §1973gg-7(b). Chief among those criteria is the criterion that the form "may require only such identifying information … and other information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1).

In November 2004, the people of Arizona passed Proposition 200, the Arizona Taxpayer and Citizen Protection Act, which requires *inter alia* that applicants seeking to register to vote provide proof of U.S. citizenship in order to register to vote. ARIZ. REV. STAT. §16-166(F). Because Arizona is a "covered jurisdiction" for purposes of the federal Voting Rights Act, 42 U.S.C. §§1973-1973q, Arizona sought and received preclearance from the Department of Justice before Proposition 200 could take effect. *See Purcell,* 549 U.S. at 2-3.

In *Purcell,* this Court vacated a preliminary injunction against Proposition 200, finding that Arizona "indisputably has a compelling interest in preserving the integrity of its election process." 549 U.S. at 4 (*quoting Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 231 (1989)). In doing so, this Court noted that "the facts in these cases are hotly contested" and thus did not resolve any fact-based issues other than the Ninth Circuit's lack of an adequate basis for issuing a preliminary injunction. 549 U.S. at 5-6.

STATEMENT OF FACTS

The facts are not materially in dispute. The registration of non-citizens under the NVRA is a

significant problem. Pet. at 8. As Arizona explains in its petition, *id.,* in 2005, jury commissions in two counties identified approximately 200 non-citizens registered to vote. (Gonzalez ER Tab 3 at 16.) The Federal Form requires applicants to attest to their eligibility to register, but does not require proof of an applicant's attestation. Given the prevalence of non-citizen registration, further proof plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration" under the terms of 42 U.S.C. §1973gg-7(b)(1).

SUMMARY OF ARGUMENT

The Ninth Circuit's heightened deference to ambiguous federal legislation in an area of traditional State regulation conflicts not only with general preemption doctrines and federalism, Section I.A, *infra,* but also with at least two Elections Clause decisions of this Court. *See Ex parte Siebold,* 100 U.S. 371, 393 (1880); *U.S. v. Bathgate,* 246 U.S. 220, 225 (1918). Section I.B *infra.* More recently, the Sixth Circuit has recognized that the traditional canons of this Court's preemption jurisprudence – such as the presumption against preemption – apply to litigation under federal laws enacted pursuant to the Elections Clause. *Millsaps v. Thompson,* 259 F.3d 535, 537-39 (6th Cir. 2001). By adopting a heightened standard favoring preemption, the Ninth Circuit decision here splits with these authorities.

Although *amicus* Eagle Forum disagrees with this Court's fractured decision in *Oregon v. Mitchell,* 400 U.S. 112 (1970), on the authority of Congress under the Elections Clause to override the authority

of the States under the Elector-Qualifications Clause, that issue is not before this Court. But the very difficult nature of that decision requires the very opposite of the Ninth Circuit's actions here. If the Court is to develop a new, non-traditional form of preemption analysis under the Elections Clause, that new form of review should include even more deference to the States, not to Congress, given the fundamental nature of the sovereign issues involved. Section II, *infra.*

Finally, given the ambiguity in the NVRA, the standard of review – whether deferential to the States or to Congress – will determine the outcome. Section III, *infra.* While *amicus* Eagle Forum respectfully submits that Arizona should prevail, the bigger issue is that any new standard of review should come from this Court and apply nationwide, not from the Ninth Circuit, particularly in light of the split with the Sixth Circuit in *Millsaps.*

ARGUMENT

I. THE NINTH CIRCUIT'S HEIGHTENED TEST FOR PREEMPTION UNDER THE ELECTIONS CLAUSE VIOLATES THE CENTRAL TENETS OF FEDERALISM

The Ninth Circuit's heightened deference to federal regulation is altogether foreign to this Court's preemption analysis, which defers to the States to avoid assuming that Congress cavalierly would override the laws of another sovereign. In addition to running counter to this general spirit of dual sovereignty in our federalism, the Ninth Circuit's new test also runs counter to decisions of this Court

and the courts of appeals under the very Elections Clause that the Ninth Circuit seeks to reinterpret.

Federalism's central tenet permits and encourages state and local government authority:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth v. Levine,* 555 U.S. 555, 583 (2009) (interior quotations and citations omitted) (Thomas, J., concurring). Federalism requires rejecting the Ninth Circuit's heightened deference to Congress.

Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted). To avoid replacing either the States' autonomy on issues of State concern with federal commands or democratic legislative action with court

injunctions, this Court should reaffirm the principles that underlie its traditional preemption analysis by requiring clear and manifest preemptive intent from Congress and reviewing preemption claims with a presumption against preemption.

A. Federal Courts Review Preemption Claims Deferentially to States in Areas of Traditional State Concern and Regulation

As signaled above and throughout this Court's preemption doctrines, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth,* 555 U.S. at 565; *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947); *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator,* 331 U.S. at 230; *Wyeth,* 555 U.S. at 565. Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)).

As this Court has held, federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* 514 U.S. 645, 654 (1995) (*citing Maryland v. Louisiana,* 451 U.S. 725 (1981)). Of course, "never" means *never,* not "in all cases except ones under the Elections Clause."

Indeed, the Ninth Circuit's adoption of a special standard for preemption cases under the Elections Clause seems misplaced here. The States' power to set elector qualifications is not unlimited:

> [O]f course, the States have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment, *or any other provision of the Constitution.*

Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (emphasis added). *Amicus* Eagle Forum respectfully submits that the Supremacy Clause – not the Elections Clause – provides the constitutional limit on which the plaintiffs here seek to rely to void Proposition 200. The NVRA predated Proposition 200 by ten years and does not purport to "make or alter" Proposition 200. *See* U.S. CONST. art. I, §4, cl. 2. Instead, the Supremacy Clause provides the basis for the plaintiffs' federal claims and therefore should dictate the standard of preemption analysis.

B. The Ninth Circuit's Heightened Test for Preemption under the Elections Clause Conflicts with Precedents of this Court and the Courts of Appeals

As indicated in the prior section, this Court's general preemption and sovereignty jurisprudence should have guided the Ninth Circuit to a different conclusion, assuming *arguendo* that this Court and other courts of appeals had not already reached the precise issue of preemption under the Elections Clause. But the Ninth Circuit's heightened test for preemption under the Elections Clause conflicts with both *Siebold* and *Bathgate*. Beyond ignoring this Court's decisions, the Ninth Circuit also has split with the Sixth Circuit on the standard of preemption review under the Elections Clause. This Court should grant the petition to review the Ninth Circuit's unprecedented creation of a heightened test for federal preemption in this area of traditional State concern.

In at least two Elections Clause decisions, this Court has applied traditional preemption analysis, requiring a clear federal statement and presuming that the federal government acted with deference to State laws. In *Siebold,* 100 U.S. at 393, the Court "presume[d] that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with State laws." Similarly, in *Bathgate,* 246 U.S. at 225-26, the Court required Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections and

"consider[ed] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." Both of these decisions negate a heightened form of preemption analysis like the one adopted by the Ninth Circuit here.

More recently, in *Branch v. Smith,* 538 U.S. 254 (2003), Justices Breyer and Souter joined Justice Stevens' partial concurrence, indicating that Congress must "clearly express[] its intent to repeal or to pre-empt" and weighing the presumption against preemption under the Elections Clause. *Id.* at 285 (Stevens, J., concurring in part and concurring in the judgment). Justice Thomas joined Justice O'Connor's partial dissent, indicating that the general rules of preemption and commandeering jurisprudence apply to the Elections Clause, just as they apply under the Commerce Clause and any other congressional power. *Id.* at 301-02 (O'Connor, J., concurring in part and dissenting in part). The plurality did not dispute these views so much as find them inapposite to the plurality's position.

In *Millsaps,* the Sixth Circuit relied on the Supremacy Clause – and thus traditional preemption analysis – to review the preemptive effect of federal legislation on the timing of elections enacted under the Elections Clause. *See Millsaps,* 259 F.3d at 537-39; *accord Love v. Foster,* 100 F.3d 413, 414-15 (5th Cir. 1996) (Dennis, J., dissenting from denial of rehearing *en banc*). The Ninth Circuit's heightened test for preemption under the Elections Clause squarely conflicts with the Sixth Circuit's decision in *Millsaps,* concerns an issue of State sovereignty that the Elector-Qualifications Clause directly confers on

the States, and relates to the fundamental right of citizens to vote without non-citizens' diluting that fundamental right. *Purcell,* 549 U.S. at 4. Moreover, unlike in *Purcell,* the facts now are clear, and Proposition 200 indeed seeks to rectify a significant problem of non-citizen registered voters in Arizona.

II. ANY PREEMPTION TEST TAILORED TO THE ELECTIONS CLAUSE SHOULD DEFER TO STATE AUTHORITY UNDER THE ELECTOR-QUALIFICATIONS CLAUSE

The Elector-Qualifications Clause vests each State with the authority to set the qualifications for federal elections in that State. In *Oregon v. Mitchell,* 400 U.S. 112 (1970), however, a deeply divided Court held that the right of the States to set electors' qualifications for federal elections was subject to the power of Congress under the Elections Clause:

> In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed it advisable to do so.

Oregon, 400 U.S. at 119. *Amicus* Eagle Forum respectfully submits that the unmodified power of the States to set elector qualifications in one section of Article I is in no way subject to the limited power of Congress to regulate the "time, place, and manner" of elections in a different section of Article I. As Justice Harlan explained in his partial dissent for four justices, "[i]t is difficult to see how words could be clearer in stating what Congress can control and

what it cannot control" and "nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress." *Oregon,* 400 U.S. at 210 (Harlan, J., concurring in part and dissenting in part). In the event that it will not revisit Oregon, this Court should nonetheless hold that when Congress exercises its Elections Clause authority to override the States' authority under the Elector-Qualifications Clause, Congress must do so expressly, subject to a rigorous presumption against preemption.

Writing for himself and four concurring justices, Justice Black quoted *U.S. v. Classic,* 313 U.S. 299, 315 (1941), for the proposition that the Elections Clause and the Necessary and Proper Clause trumped the States' powers under the Elector-Qualifications Clause:

> While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states … this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Oregon, 400 U.S. at 121 (*quoting Classic,* 313 U.S. at 315, alteration in *Oregon*). Justice Black then quoted *Smiley v. Holm,* 285 U.S. 355 (1932), for the proposition that congressional authority over the "times, places and manner of holding elections for senators and representatives … embrace[s] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to … registration" among the "numerous requirements as to procedure and safeguards … necessary … to enforce the fundamental right involved." *Oregon,* 400 U.S. at 122 (*quoting Smiley,* 285 U.S. at 366). While each discusses congressional authority generally, neither *Classic* nor *Smiley* actually addresses the issue of whether congressional authority under Article I, Section 4 overrides the States' elector-qualification authority under Article I, Section 2.

Although *amicus* Eagle Forum agrees with Justice Harlan's *Oregon* dissent, Arizona has not asked this Court to reverse *Oregon* by removing Congress from setting voter qualifications. At the very least, however, this Court should recognize that the ambiguity of whether Congress even intended the NVRA to preempt State laws like Proposition 200, *see* Section III, *infra;* Pet. at 25-33, should weigh heavily against finding preemption here.[3] Clearly, this is an area of fundamental State concern and traditional State regulation since the Founding of this Nation. Moreover, if the Elections Clause applies

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[3] The Court did not need to address presumptions for or against preemption in *Oregon* because setting the voting age at 18 versus 21 did not present any ambiguity.

to limit the Elector-Qualifications Clause, Congress would retain the power to correct any perceived error that results from this Court's deference to the States. Thus, contrary to the Ninth Circuit, if federal courts should apply a new, non-traditional form of preemption jurisprudence under the Elections Clause, that jurisprudence should defer more strongly *to the States,* not against them as the Ninth Circuit would have it.

III. THE NVRA DOES NOT PREEMPT REQUIRING PROOF OF CITIZENSHIP IN ORDER TO REGISTER TO VOTE

As Chief Judge Kozinski explained in concurring with the Ninth Circuit's *en banc* decision, the NVRA's application here is susceptible to both Arizona's and the plaintiffs' interpretations. Pet. App. 89c. Arizona is perfectly capable of "accepting and using" the Federal Form without deeming it dispositive on the issue of U.S. citizenship. 42 U.S.C. §1973gg-4(a)(1). Moreover, given the demonstrated instances of non-citizens registering to vote, the additional proof that Arizona requires plainly "is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 42 U.S.C. §1973gg-7(b)(1). Under the circumstances, the outcome hinges on the standard of review for preemption cases like this.

Under the traditional preemption analysis, *see* Section I.A, *supra,* "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group,*

555 U.S. at 77 (*quoting Bates,* 544 U.S. at 449). Moreover, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic,* 518 U.S. at 485. If federalism requires deference to the States as distinct sovereigns – as it would under traditional preemption doctrines – then Arizona must prevail. *Amicus* Eagle Forum respectfully submits that this Court must resolve this important issue, particularly given the split in authority with the Sixth Circuit. State authority over voter qualifications should be uniform nationwide, which cannot occur under a circuit split as wide as that dividing the Sixth and Ninth Circuits.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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