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 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 PETITIONERS

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QUESTIONS 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?

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Legislative History

Rules, Regulations and Orders

Other Authorities

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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

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

community, Eagle Forum has supported efforts both 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

Various plaintiffs (collectively, "Plaintiffs") sue the State of Arizona, Arizona's counties, and state and county officials (collectively, "Arizona") to enjoin the requirement of Arizona's Proposition 200 that those seeking to register to vote provide proof of U.S. citizenship in order to register. Plaintiffs contend that Arizona's effort to enforce the most basic prerequisite to the right to vote conflicts with the National Voter Registration Act ("NVRA"). Arizona argues that the NVRA does not preclude Proposition 200 and that, in any event, Congress lacks authority to set voter-qualification standards, which the Voter-Qualifications Clause entrusts to the several states.

This litigation thus raises 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 preemption analysis that federal courts use to weigh the divisions between the states and Congress in our federalist system of dual sovereignty. This Court resolved the first issue when this litigation reached this Court in an interlocutory appeal in *Purcell v. Gonzalez,* 549 U.S. 1 (2006). This appeal on the merits now presents the second and third issues.

Before assessing the appropriate state-federal balance under the relevant constitutional provisions involved here, however, *amicus* Eagle Forum first takes an analytical step back to consider how our Nation got here. As explained below, "here" involves numerous, demonstrated *non-citizens* registered to vote. Voting is the most fundamental element of our citizenship, and it defines our political community and nationhood. In enacting the NVRA, Congress laudably sought to expand voter registration among eligible citizens. But nothing in the NVRA prohibits states like Arizona from using reasonable, proactive additional measures when faced with non-citizen registration. Apart from whether Congress would have the authority to preempt Arizona's actions and how this Court must balance deference to federal agencies under separation of powers versus deference to the states under federalism, Congress could not plausibly have intended to prevent sovereign states from ensuring that only citizens register to vote.

Election Fraud from Non-Citizen Voters

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)). "[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). Non-citizen voting constitutes "[v]oter fraud [that] drives honest citizens out of the

democratic process and breeds distrust of our government." *Purcell,* 549 U.S. at 4.

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). Surely the Congress that passed the NVRA did not intend to facilitate non-citizen registration.

Divided Federal-State Power over Elections

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 at any time by Law [to] make or alter such Regulations." *Id.* art. I, §4, cl. 2. The question presented here is

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

whether the power of Congress to supersede the states on the time, place, and manner of elections includes the power to supersede the states on the qualifications to register to vote.

Preemption Analysis for Federal-State Conflict

Our Constitution establishes a federalist structure of dual state-federal sovereignty. *Tafflin v. Levitt,* 493 U.S. 455, 458-59 (1990). Under the Supremacy Clause, of course, 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. But 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). Thus, state governments retain their roles under the Constitution as separate sovereigns.

Accordingly, under this Court's preemption analysis, 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)).

STATEMENT OF FACTS

Neither the legislative facts nor the adjudicative facts are materially in dispute. This litigation is therefore appropriate for summary judgment.

In 1993, Congress enacted the 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 ("EAC") 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 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. 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.

The registration of non-citizens under the NVRA is a significant problem. Pet. at 8; Arizona Br. at 15-16. For example, in 2005, jury commissions in two

counties alone identified approximately 200 non-citizens registered to vote. Arizona Br. at 16. While polemical opponents of states' ballot-integrity efforts complain that such efforts seek to solve a problem that does not exist, the problem is real here.[3]

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 in Arizona, *see* Arizona Br. at 16, 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: *Ex parte Siebold,* 100 U.S. 371, 393 (1880), and *U.S. v. Bathgate,* 246 U.S. 220, 225 (1918). *See* Section I.C *infra.* Moreover, whatever formality this Court attributes to EAC's actions interpreting the NVRA, this Court should not defer to that interpretation because the interpretation fails to apply the presumption against preemption, which renders the interpretation unreliable. *See* Section I.B *infra.* Instead, applying traditional preemption

[3] In *Purcell,* 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.

analysis under the Supremacy Clause requires reversal because there is no actual conflict and the NVRA can be interpreted to allow Proposition 200. *See* Section I.D *infra.* Finally, although this Court could rely on the doctrine of constitutional avoidance simply to reject Plaintiffs' interpretation of the NVRA, this Court should reject the argument that the purely procedural powers of Congress under the Elections Clause displace the substantive powers of the states under the Elector-Qualifications Clause. *See* Section II, *infra.*

ARGUMENT

I. THE NVRA WOULD NOT PREEMPT ARIZONA, ASSUMING *ARGUENDO* THAT CONGRESS HAD THE AUTHORITY TO DO SO

As explained in Section II, *infra,* Congress lacks the authority to preempt Proposition 200. As Arizona notes (Arizona Br. at 46-47), however, this Court may not need to reach that issue if, under the doctrine of constitutional avoidance, this Court determines that the NVRA would not preempt Proposition 200, even assuming that Congress had the authority to do so. In any event, 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.

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

Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. If preemption analysis becomes "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" that analysis will "undercut 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 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.

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 particularly misplaced here. While any applicable provisions of the Constitution plainly could limit the states' power to set elector qualifications, this Court has never applied *elevated* preferences to the other potential limits:

> [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); *see also Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 50-53 (1959).

Amicus Eagle Forum respectfully submits that the Supremacy Clause – not the Elections Clause – could provide the constitutional basis on which Plaintiffs here seek to rely to void Proposition 200. In other words, Plaintiffs ask whether Proposition 200 conflicts with the NVRA, not whether it conflicts with the Elections Clause. Significantly, the NVRA predated Proposition 200 by ten years and does not – and temporally could not – purport to "make or alter" Proposition 200. *See* U.S. CONST. art. I, §4, cl. 2. Because the Supremacy Clause provides the basis for Plaintiffs' federal claims, that Clause should dictate the standard of preemption analysis. *See* Section I.D, *infra* (applying this Court's traditional preemption doctrines to Proposition 200 and the NVRA).

B. This Court Should Not Defer to the Executive Branch's Administrative Construction of the NVRA

As Arizona explains, the federal administrative construction on which the Ninth Circuit relied falls

short of the traditional basis for agency action to have the force of law. Arizona Br. at 45-46. At the outset, it does not matter what Congress and federal agencies believe about the Constitution: the "power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Thus, whether the EAC action would qualify for *Chevron* deference or only the lesser *Skidmore* deference[4] is entirely beside the point. With *Chevron,* this Court can decide the issue using traditional tools of statutory construction, which obviates deference to agency constructions altogether. With *Skidmore,* the agency's views lack the power to persuade for the same reason.

If the Court applies the Supremacy Clause's familiar standards, then this Court must reject preemption if the federal statute supports a no-preemption interpretation under the presumption against preemption combined with *Chevron* prong one. *Chevron,* 467 U.S. at 842-43. It does not matter what EAC believes, regardless of how formally that agency expresses its view. If traditional tools of

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[4] Under the former, courts owe deference to an agency's plausible construction of an interstitial gap in a statute under that agency's administration (*Chevron* prong two), unless the Court can interpret the statute's requirements using tools of traditional statutory construction (*Chevron* prong one). *Chevron U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 842-44, 865-66 (1984). Under the latter, courts defer to agency interpretation based on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

statutory construction – *e.g.,* the presumption against preemption – resolve the matter, deference has no part to play.

In a 2007 dissent joined by the Chief Justice and Justice Scalia and not disputed by the majority, Justice Stevens called into question the entire enterprise of administrative preemption when it conflicts with the presumption against preemption. *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law, which is more preemptive than federal law generally. *Watters,* 550 U.S at 12 (majority). At the least, the presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns.[5]

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

As indicated in the prior sections, this Court's general preemption jurisprudence should have guided the Ninth Circuit to a different conclusion,

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[5] The courts of appeal have adopted a similar approach. *See, e.g., National Ass'n of State Utility Consumer Advocates v. F.C.C.,* 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review … under *Chevron,* this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.,* 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt,* 194 F.3d 176, 182-83 (1st Cir. 1999).

assuming *arguendo* that this Court 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*. Both of those decisions argue for rejecting the Ninth Circuit's unprecedented creation of a heightened test for preemption in this area of traditional state concern.

In both *Siebold* and *Bathgate,* this Court 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.

D. Under this Court's Traditional Preemption Analysis, Arizona Must Prevail

Where a state's laws actually conflict with an act of Congress properly issued under the Elections Clause, the state law is preempted. *McPherson v. Blacker,* 146 U.S. 1, 40-41 (1892) ("[i]n this respect it is in conflict with the act of congress, and must necessarily give way"). As Chief Judge Kozinski explained, however, the NVRA's application here is susceptible to both Arizona's and 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). By its express terms, the NVRA allows an interpretation that supports Arizona here.

Under the traditional preemption analysis, "[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). Indeed, because voter qualifications are an area of traditional state concern and regulation, U.S. CONST. art. I, §2, cl. 2, the presumption against preemption applies even more strongly here. *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,* 518 U.S. at 485. All inferences support Arizona.

Of course, *if* the Elections Clause applies to limit the Elector-Qualifications Clause, *but see* Section II, *infra,* Congress would retain the power to correct any perceived error that would result from this Court's deference to the states. If federalism requires deference to the states as distinct sovereigns – as it would under traditional preemption doctrines – then Arizona must prevail.

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

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. *Compare* U.S. CONST. art. I, §2, cl. 2 *with id.* art. I, §4, cl. 2. 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 v. Mitchell,* 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part). If the Court finds that the NVRA preempts Proposition 200, then the Court must ask whether Congress had the authority to enact the NVRA in the first place.

Significantly, *Oregon* does not resolve the issue. In *Oregon*, 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 to lower the voting age from 21 to 18. While the lead decision for a single justice found authority under the Elections Clause, *Oregon,* 400 U.S. at 119 ("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") (opinion of Black, J.), that view did not command the votes of a majority of justices. *See id.* at 400 U.S. at 229-281 (relying on Equal Protection Clause) (joint opinion of Brennan, White, and Marshall, J.J.); *id.* at 135-44 (relying on Equal Protection Clause and rejecting Elections Clause) (opinion of Douglas, J.); *id.* at 210 (rejecting congressional authority under the Elections Clause) (Harlan, J., concurring in part and dissenting in part). Five justices rejected the Elections-Clause rationale, and three were silent on it.

Writing for himself on the Elections-Clause issue, 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 § 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 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*) (opinion of Black, J.). 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." *Id.* at 122 (*quoting Smiley,* 285 U.S. at 366). While both *Classic* and *Smiley* discuss congressional authority generally, neither decision actually addresses the issue of

whether congressional authority under Article I, Section 4 overrides the states' elector-qualification authority under Article I, Section 2. As such, their application here is *dicta. See also Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 171 (1874) ("not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted").

Contrary to Justice Black's *Oregon* opinion and the *dicta* in *Classic* and *Smiley,* both the legislative history and this Court's holdings suggest that the power of Congress under the Elections Clause does not trump the states' power under the Elector-Qualifications Clause. 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,* 400 U.S. at 210 (*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, which sharpens the issues presented here into a case or controversy, one that neither *Classic* nor *Smiley* presented on the precise questions presented here.

An early draft of the Constitution gave the states authority over voter qualifications, "subject to the proviso that these qualifications might 'at any Time

be altered and superseded by the Legislature of the United States.'" *Oregon,* 400 U.S. at 289 (*quoting* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 153) (Harlan, J., concurring in part and dissenting in part). The Committee on Detail struck that proviso and replaced it with the proviso tying voter qualifications to the most numerous branch of the state legislature. *Id.* (*citing* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164). A subsequent attempt to restore congressional oversight of voter qualifications was rejected as well. *Id.* at 290 (*citing* 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 201). "Few principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). For that reason alone, this Court should recognize that the Elections Clause does not provide Congress the authority to overrule the states' voter qualifications.

The post-convention ratification debates confirm that conclusion. Madison argued that, because "the right of suffrage is very justly regarded as a fundamental article of republican government," the issue of voter qualifications should not be subject to legislative control of the Congress or the states:

> It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason

> just mentioned. To have submitted it to the legislative discretion of the States, would have been improper for the same reason[.] … The provision made by the convention appears, therefore, to be the best that lay within their option.

THE FEDERALIST NO. 52, at 323 (C. Rossiter ed. 1961) (Madison). Rather than force all states into a single solution or under the control of Congress, the genius of the Elector-Qualifications Clause is that it submits each state to the criteria by which that state already has bound itself for its own state-law purposes.

Hamilton was equally clear that power over voter qualifications was "no part of the power to be conferred upon the national government":

> But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times,* the *places,* the *manner* of elections. The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.

THE FEDERALIST NO. 60, at 369 (C. Rossiter ed. 1961) (Hamilton) (emphasis in original). Consistent with the Elections Clause's plain language, this Court has recognized that Hamilton's remarks reflect the

clause's focus on *procedural* issues. *U.S. Term Limits v. Thornton,* 806 U.S. 779, 833-34 (1995).[6]

In contrast to this clear history, Plaintiffs rely on the NVRA to allow the registration of ineligible non-citizen voters. This Court cannot reconcile the Elections Clause's purely procedural focus with the substantive ends that Plaintiffs seek to attribute to the NVRA. Whether by invalidating the NVRA as applied here or by relying on the doctrine of constitutional avoidance to reject Plaintiffs' interpretation, this Court should reverse the Ninth Circuit's unprecedented intrusion into states' powers under the Elector-Qualification Clause.

CONCLUSION

For the foregoing reasons and those argued by Arizona, the Court should reverse the Ninth Circuit.

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[6] The ratification debates also confirmed that the plain language of the Elections Clause limited that clause to process: "The power over the manner of elections does not include that of saying who shall vote: – the Constitution expressly says that the qualifications which entitle a man to vote for a state representative. It is, then, clearly and indubitably fixed and determined *who* shall be the electors; and the power over the manner only enables them to determine *how* these electors shall elect – whether by ballot, or by vote, or by any other way. Is it not a maxim of universal jurisprudence, of reason and common sense, that an instrument or deed of writing shall be so construed as to give validity to all parts of it, if it can be done without involving any absurdity? By construing it in the plain, obvious way I have mentioned, all parts will be valid.") 4 Debates on the Adoption of the Federal Constitution, at 71 (J. Elliot ed. 1863) (Steele statement at North Carolina ratifying convention) (emphasis in original).

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Respectfully submitted,

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