

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.,
and JESUS M. GONZALEZ, ET AL.,
Respondents.

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

STATE PETITIONERS' REPLY BRIEF

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STATE PETITIONERS' REPLY BRIEF

Respondents have essentially abandoned the Ninth Circuit's new legal test for preemption in Elections Clause cases. The Ninth Circuit held that, in Elections Clause cases, the court "need *not* be concerned with preserving a 'delicate balance' between competing sovereigns." Pet. App. 16c (emphasis added). Instead, the court held that the state law would be preempted if it did not "operate harmoniously in a single procedural scheme" with a federal law that addresses the same subject. *Id.* at 20c. Respondents now acknowledge there must be a conflict between the federal and state law. Brief of Gonzalez Respondents (Gonzalez Br.) 48 (claiming that Arizona now concedes that there must be a conflict); Brief of the Inter Tribal Council Respondents (ITCA Br.) 33 (arguing that the only question under the Elections Clause is whether the state and federal statutes conflict with one another). State Petitioners indeed acknowledged there must be a conflict, stating that under this Court's controlling Elections Clause cases there has to be an actual conflict for preemption to apply, and even then, only "so far as the conflict extends" and "no farther." *Foster v. Love*, 522 U.S. 67, 69 (1997) (first quote); *Ex Parte Siebold*, 100 U.S. 371, 386 (1879) (second quote).

Respondents and Amicus United States persist, however, in arguing that the court of appeals correctly held that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns." Pet. App. 16c. *See* ITCA Br. 32-34; Brief of Amicus United States (U.S. Br.) 26-27. They therefore maintain that in assessing whether a federal election law preempts a

state law, courts should not strive to reconcile the two laws even where the laws are susceptible of such a construction. *Id.* That approach to Elections Clause preemption conflicts with this Court’s Elections Clause cases and with bedrock federalism principles.

In any case, Arizona’s Proposition 200 and the National Voter Registration Act (NVRA) are not in “conflict.” In *Siebold*, this Court explained that a conflict exists only if both the federal and state laws “cannot be performed.” 100 U.S. at 386. Under that standard, a federal election law “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.

Compliance with both Proposition 200 and the NVRA is not a physical impossibility. Arizona has been “accept[ing] and us[ing]” the Federal Form and also applying its evidence-of-citizenship requirement for some seven years. To “accept and use” a document does not preclude requiring additional information. State Petitioners’ Brief gave so many examples (a clerk who accepts and uses a credit card but asks for I.D., an airline that accepts and uses e-tickets but asks for I.D., an employer that accepts and uses an employment form but asks for additional information, etc.) that Respondent ITCA complained that “what the words ‘accept and use’ might mean in the abstract [read plain language] is not what is at issue in these cases.” ITCA Br. 36.

But adding context, as ITCA suggests, strengthens Arizona’s case. If Congress intended to prohibit additional information, it would not have authorized

States to acquire information “as is necessary to enable appropriate state election officials to assess the eligibility of the applicant” as it did in 42 U.S.C. § 1973gg-7(b)(2).

Furthermore, Congress included 42 U.S.C. § 1973gg-7(b)(3), which prohibited authentication, but did not prohibit additional information to assess the eligibility of the applicant. Under the contextual rule of *expressio unius est exclusio alterius*, Congress was making a deliberate choice not to exclude States asking for additional information.

This Court also has found conflict preemption “where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Arizona law does not stand as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The Ninth Circuit erroneously implied that Congress’s single controlling purpose and objective was the goal of “streamlining the registration process.” Pet. App. 36c. Actually, Congress’s purposes and objectives are set forth in 42 U.S.C. § 1973gg(b) as: (1) increasing the number of “eligible citizens” to register; (2) enhancing the participation of “eligible citizens”; (3) protecting the “integrity” of the process; and (4) ensuring “accurate and current” voter rules. (Emphasis added.)

The key question then becomes analyzing Arizona’s requirements in light of the necessity to balance Congress’s purposes and objectives, on the one hand, to increase participation, and, on the other hand, to

protect the integrity of the system and be sure that only “*eligible*” citizens vote.

Two factual determinations would be key in deciding whether Proposition 200 was an obstacle to “the full purposes and objectives of Congress.” The first would be whether Proposition 200 imposed an unreasonable burden on increased voter participation. If there was *no* excessive burden, as this Court found in *Crawford v. Marion County*, 553 U.S. 181 (2008), then Proposition 200 does not stand as an obstacle to Congress’s purposes. Second, is whether there was a genuine problem of voter fraud that justified Proposition 200’s measures that furthered the “purposes and objectives” of protecting the integrity of the process and ensuring that only “eligible” citizens register.

The district court found that the burden on voter participation was not excessive: “Of approximately 20,000 voters ultimately unable to register to vote due to Proposition 200’s proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to gain it.” JA 291-92. Plaintiffs were able to produce only “one person . . . who [was] 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. *Id.* at 294.¹ For example, in 2005, in two Arizona counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner that they were not U.S. citizens. *Id.* at 267. Additionally, election officials testified that some voter registration organizations submitted "garbage" voter registration forms and had misled noncitizens into registering to vote. *Id.*

The issue is crucial because the district court's findings show that in balancing Congress's purposes and objectives, Proposition 200 serves an important purpose in protecting the integrity of elections, without any significant burden on the purpose of increasing participation by eligible citizens. It follows that the state law is not an obstacle to the accomplishment and execution of Congress's full purposes and objectives. It is therefore respectfully submitted that the NVRA does not preempt Proposition 200.

ARGUMENT

I. Ordinary Conflict Preemption Principles Apply to Elections Clause Legislation.

Respondents maintain that in assessing whether a federal election law preempts a state law, courts should

¹ In *Crawford*, this Court noted that "flagrant examples" of voter fraud throughout the country "had been documented throughout this Nation's history by respected historians and journalists." 553 U.S. at 195-96. The Amicus Brief of The American Unity Legal Defense Fund provides substantial evidence of voter fraud throughout the country.

not strive to reconcile the two laws even where the laws are susceptible of such a construction. *E.g.*, ITCA Br. 32-34. That approach to Elections Clause preemption conflicts with this Court’s Elections Clause cases and with bedrock federalism principles.

In *Siebold*, an election case, the Court recognized that the Elections Clause provides “concurrent authority of the two sovereignties, State and National, over the same subject-matter,” analogized Congress’s Elections Clause authority with its Commerce Clause authority over interstate commerce, 100 U.S. at 384-85, and noted that it must presume that, in exercising its power under the Elections Clause, “Congress has done so in a judicious manner; *that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations* [or] with the duties of State officers.” *Id.* at 393 (emphasis added). Contrary to the Ninth Circuit’s holding, this Court has therefore recognized that courts must respect the delicate balance between the two sovereignties in the Elections Clause context.

In arguing to the contrary, Respondents and the United States emphasize that the States’ Article I, § 4 power is delegated, not reserved. Gonzales Br. 51. n.24; ITCA Br. 30-32; U.S. Br. 26. The conclusion they seek to draw—that courts in Elections Clause cases should not strive to harmonize federal and state law—is incorrect. The Court “endeavor[s] to guard as far as possible against any unnecessary interference with State laws and regulations,” *Siebold*, 100 U.S. at 393, because “respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt’” state law.

Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009) (internal citation omitted). States have regulated elections within their borders, including for federal office, since the Nation’s founding. That the source of that power (as it pertains to federal elections) is the Constitution itself does not change that foundational fact.

Respondents and the United States also argue that this Court should not “endeavor[] to guard as far as possible against any unnecessary interference with State laws and regulations” because federal Elections Clause enactments are “inherently federal in character.” Gonzales Br. 51 n.24; ITCA Br. 30-31; U.S. Br. 26. That argument ignores the first half of Article I, § 4, which expressly empowers states legislatures to “prescribe[]” the “Times, Places, and Manners of holding Elections for Senators and Representatives.” Election laws, including those governing the election of federal officers, are not “inherently federal in character” any more than regulation of interstate commerce within a given state.

Where Congress acts pursuant to its delegated authority, whether under the Elections Clause, the Commerce Clause, or otherwise, courts should exercise caution before finding state law thereby preempted under the Supremacy Clause. In another context, this Court rejected an argument “that the authority of Congress over federal election practices is of such a wholly different nature from the other grants of authority to Congress that it may be employed in such a manner as to offend” separation-of-power principles. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). The rationale applies with equal force here: the Elections Clause authority of Congress is not “of such

a wholly different nature” than other concurrent grants of authority that courts “need not be concerned with preserving a ‘delicate balance’ between competing sovereigns.”

II. There Is No Conflict Between the NVRA and Proposition 200.

A. The Term “Accept and Use” the Federal Form Does Not Conflict with Proposition 200’s Requirement.

Perhaps the most telling sentence in Respondents’ briefs is the following: “What the words ‘accept and use’ might mean in the abstract is not what is at issue in these cases.” ITCA Br. 36. With all the examples in State Petitioners’ brief of the ordinary meaning of “accept and use” that allow requiring additional information, it is no wonder that Respondents do not want the words “accept and use” to be interpreted according to their plain meaning, or as they put it, “in the abstract.”

Adding context in the statute strengthens this interpretation of “accept and use.” If Congress had intended to prohibit States from requesting other information necessary to enable officials to assess the eligibility of the applicant, it would not have expressly authorized the States to do just that in the state forms. But Congress did expressly authorize that. *See* 42 U.S.C. § 1973gg-4(a)(2); *id.* -7(b).

Respondents totally misunderstand the significance of 42 U.S.C. § 1973gg-4(a)(2) and -7(b). Respondents argued that § 1973gg-4(a)(2) and -7(b) are irrelevant

because the Federal Form must be provided in addition to the state form. That is not the point. The significance of § 1973gg-4(a)(2) and -7(b) is that they provide overall context, as to Congress's understanding of the term "accept and use." It makes no sense to infer a prohibition for additional information (there is no express prohibition) where Congress explicitly authorized that information on the state form and was silent as to whether or not it could be included in the Federal Form.

This becomes especially compelling when one considers that Congress knew how to prohibit information on the Federal Form and the state form. The NVRA expressly prohibits notarization, or other forms of authentication. 42 U.S.C. § 1973gg-7(b)(3). Statutory language that explicitly prohibits one thing indicates that there is no other implicit prohibition. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011).

B. The Election Assistance Commission Director's Failure to Include Arizona's Evidence-of-Citizenship Requirement Has No Preemptive Force.

The U.S. Elections Assistance Commission (EAC) (or rather its executive director) refused to include in the Federal Form an Arizona-specific instruction explaining that Arizona residents must provide evidence of citizenship to register. Respondents contend this denial has preemptive effect. This is incorrect.

First, the NVRA expressly empowers *state* election officials “to assess the eligibility of the applicant.” 42 U.S.C. § 1973gg-7(b)(1). That would be a hollow power if it meant nothing more than eyeballing a form to see if all the required boxes showed eligibility on its face—whether accurately or not.

The United States insists that this result is required by 42 U.S.C. § 1973gg-6(a)(1)(B), which provides that “each State shall . . . ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days . . . before the election.” U.S. Br. 14. That argument reads far too much into the provision.

The focus of the subsection is on the deadlines for the timely submission of registration forms, not defining the word “use” in the phrase “accept and use” that appears in a different subsection of the law. *Cf. Kloeckner v. Solis*, 133 S. Ct. 596, 605-06 (2012) (criticizing the United States’ contention that substantive statutory term should be construed based on language in separate provision that sets filing deadlines). Moreover, § 1973gg-6(a)(1)(B) directs state officials to register timely submitted registrations only with respect to “any *eligible* applicant” who submits a “*valid* voter registration form.” (Emphasis added). The provision does not specify who determines whether an applicant is eligible or a voter registration form is valid. But § 1973gg-7(b)(1) directs *state* officials to assess eligibility.

If the United States were correct that States must register any applicant who has mailed “a timely,

completed Federal Form” (U.S. Br. 15), it would mean that States would be barred from refusing to register an applicant even when the State possesses concrete proof that the applicant is not a citizen. As that cannot be right, ITCA admits that a State would not “be forced to register a person even if it had ‘absolute documented proof’ extrinsic to the Federal Form, that an applicant was not a citizen.” ITCA Br. 39 n.39. Their concession confirms that the NVRA does *not* prohibit States from verifying applicants’ eligibility—even applicants who completed and timely submitted the Federal Form, showing eligibility on its face. In short, even according to the ITCA, a State can “accept and use” the Federal Form by receiving the form and employing it as a tool, but not the exclusive tool, to verify voter eligibility. That is precisely what Arizona does under Proposition 200.

Second, the upshot of the foregoing argument is that the NVRA does not override state methods of verifying eligibility so long as they are reasonable and are not on balance contrary to the purposes and objectives of Congress. This is confirmed by the EAC’s regulations and practice with respect to other States.

Contrary to Respondents’ assertions (*e.g.*, ITCA Br. 44), the Federal Election Commission (FEC) recognized that it lacked “rulemaking authority” to revise “specific state voter eligibility requirements.” 59 Fed. Reg. 32,311, 32,311 (June 23, 1994). Also, the FEC concluded that the state-specific instructions “*shall contain* the following information for each state[:] . . . the *state’s specific voter eligibility and registration requirements.*” 11 C.F.R. § 9428.3 (emphasis added). Similarly, even though a voter identification number

was not, in the FEC's view, "necessary for determining the eligibility of an applicant," applicants would have to refer to the specific state instructions in order to determine what number may be required by that State. 59 Fed. Reg. at 32,313-14. The FEC did not understand the NVRA to preclude state requirements for registration or suggest that it had veto-like power over state eligibility and registration requirements.

And the EAC's own practice with the Federal Form confirms this approach. The EAC includes Louisiana's requirement that if a person lacks a qualifying identification number, "the applicant shall attach one of the following items to his application: (a) a copy of a current and valid photo identification; or (b) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of applicant."² The EAC also includes Hawaii's registration requirement that an applicant provide a full Social Security Number. The instructions specifically state that "[f]ailure to furnish this information will prevent acceptance of this application."³

The Federal Form itself also undermines Respondents' argument that Proposition 200 interferes with the "postcard" nature of the form. Gonzalez Br. 42. First, the EAC informs applicants that they should "**[b]e sure [to] mail [the Federal Form] in an**

² Form Instructions at 9, http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (last visited February 11, 2013).

³ Form Instructions *supra* n.2 at 7.

envelope with the proper amount of postage.”⁴

Second, the Form instructions inform applicants that if they are interested in voting by mail for the first time in a federal election, they may enclose copies of identifying documents *with the Form*, as they are also required to by Louisiana under certain circumstances.⁵

In the end, therefore, Respondents’ and the United States’ arguments depend entirely on the EAC’s then-director’s legal conclusion that Proposition 200 conflicts with the NVRA. *See* ITCA Br. 46; U.S. Br. 20. But his statements are entitled to no weight in this context. *See Wyeth*, 555 U.S. at 576 (noting that the Court “ha[s] not deferred” to an agency’s conclusion that a state law is preempted). And his conclusion is manifestly at odds with the statutory and regulatory framework of the NVRA and the EAC’s rules.

It would be an odd rule, indeed, for preemption to arise from an agency official’s mistaken conclusion that a federal statute prohibits application of a state law. In fact, under 42 U.S.C § 15328, “any action” taken by the EAC in furtherance of its statutory authority “may be carried out only with the approval of at least three of its members.” Even the EAC itself, acting by a vote of three of its four members, could not preempt a state law because its powers are limited by 42 U.S.C. § 15329, and unlike other agencies (*e.g.*, 47 U.S.C.

⁴ Election Assistance Commission, Register to Vote, http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited February 11, 2013).

⁵ Form Instructions *supra* n.2 at 1, 9.

§ 253(d) and 49 U.S.C. § 5125(d)), Congress did not grant the EAC the authority to preempt state law.

C. Proposition 200’s Evidence-of-Citizenship Requirement Is Not an Obstacle to the NVRA’s Purposes and Intended Effects.

1. The legislative history does not support respondents’ position.

Respondents and the United States claim to have found evidence that supports their misreading of the NVRA in the legislative history, referring to the rejection of an amendment concerning documentary evidence of citizenship in conference committee. *E.g.*, ITCA Br. 41; U.S. Br. 28-30. But even the United States concedes: “Senator Ford, the bill’s sponsor, objected to the amendment on the ground that, in his view, it was ‘redundant’ since *there is nothing in the bill now that would preclude the State’s requiring presentation of documentary evidence of citizenship.*” U.S. Br. at 30 n.6 (quoting 139 Cong. Rec. 5099) (emphasis added). The United States argues that “there is no indication that other members of Congress shared his interpretation.” *Id.* But there is also no indication that they didn’t. The legislative history is ambiguous. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (noting that “*on the whole*” legislative history “was more likely to confuse than clarify” the meaning of a statute).

Furthermore, legislative history is only helpful if it explains something that is in the law, not something that is not in the law. If the point to be made is not

anchored in the actual text of the statute, this Court has held that it is entitled to no weight. *Shannon v. United States*, 512 U.S. 573, 583 (1994). Here, Respondents attempt to find meaning from a failed amendment.

And even if this committee report had been about something in the law and had been unambiguous, the committee reports support both sides of the issue. The House Report stated that “[t]he Committee is particularly interested in ensuring that election officials continue to make determinations as to applicants’ eligibility, such as citizenship, as are made under current law and practice” and specified that “[a]pplications should be sent to the appropriate election official for the applicant’s address in accordance with *the regulations and laws of each State.*” H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993), *reprinted at* 1993 U.S.C.C.A.N. 105, 112 (emphasis added). Furthermore, the House Report specifically stated that “States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill.” *Id.* at 113.

2. Respondents misrepresent the record as to crucial points.

Respondents also inaccurately attempt to counter Arizona’s argument that Proposition 200 is not burdensome by including misleading record citations. Respondents’ argument fails.

In the opening brief, State Petitioners pointed out that approximately ninety percent of voting age Arizonans have driver’s licenses and could satisfy

evidence of citizenship by writing their driver's license number on a postcard registration form. Br. 19-20. In addition, naturalized citizens could write down their naturalization number. *Id.* That left very few who could provide evidence from any one of a number of documents listed. *Id.* This was important because in *Crawford*, this Court held, in the context of voter identification, that where there was a minimum burden on most voters, and a somewhat greater burden on a few, who had to get a photo taken and obtain the identification, this would not invalidate the law. 553 U.S. at 197-98. This Court stated that "burdens of that sort, arising from life's vagaries, are neither so serious *nor so frequent*, as to raise questions about the validity of the law. *Id.* at 197 (emphasis added). This Court also stated: "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198.

Respondent Gonzalez attempts to demolish this by stating that only voters under the age of 30 can use their driver's license, because the license had to be issued after 1996. Gonzalez Br. 19. The assertion is misleading as driver's licenses must be updated every twelve years. Ariz. Rev. Stat. (A.R.S.) § 28-3173. In addition, people who registered at the time of Proposition 200 were grandfathered, and naturalized citizens whose license record has an "F" (indicating that they obtained the license previously, when they were not citizens) can either write down their naturalization number or update their records.

Respondents also assert as facts selections from the district court trial on counts ranging from Equal Protection to a Voting Rights Act violation, without acknowledging that the district court found against them on those facts. (Gonzalez Br. at 18-25; ITCA Br. at 16).

The district court made the following factual findings:

[E]ven if everyone prevented from registering by Proposition 200 as allowed to register, the percentage of the electorate that was Latino would only increase by 0.1%, and the difference in Latino turnout in the 2006 general election for Secretary of State would have been even less, 0.06% . . . Dr. Zax credibly testified that these differences were not nearly large enough to be statistically significant. This is especially true in light of the fact that the Passel-Word List, while a good estimate, is merely an estimator of Latino descent. Thus, when one considers the uncertainty as to the actual number of Latinos, minute differences of less than one-tenth of one percent are subsumed by the uncertainty associated with the original identification of who is and is not Latino.

Thus, examining the facts as a whole, Proposition 200 does not have a statistically significant disparate impact on Latino voters. . .”.

JA 307-08 (internal citations omitted).

Both Respondents claim that Proposition 200 “resulted in the rejection of 31,550 registration applications.” ITCA Br. 16 n.17, Gonzalez Br. 18. If they were non-citizens, that is entirely in keeping with NVRA’s “integrity” purposes. The burden of proof was on Respondents. The district court found against Respondents on this crucial fact. The district court found:

Of approximately 20,000 voters ultimately unable to register to vote due to Proposition 200’s proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it. See Crawford, 128 S. Ct. 1620. . . . They have only produced one person . . . who is unable to register to vote due to Proposition 200’s proof of citizenship requirement. Nor have they demonstrated that the persons rejected are in fact eligible to register to vote.

JA 291-92.⁶

Likewise, Respondents did not produce evidence that Proposition 200 substantially burdened voter registration groups’ First Amendment rights. JA 303. Indeed, voter registration witnesses testified that the measure did not have “a huge impact” (JA 275) and testified anecdotally to a handful of persons who did not have evidence “on their person” when registering

⁶ Ten thousand of those initially rejected did register. *Id.*

(JA 274, 279) or could not testify to knowledge of any person who lacked such evidence (JA 277). Additionally, there was a lack of documentary evidence that Proposition 200 increased voter registration costs. JA 274. Furthermore, the district court found there was no excessive burden on naturalized citizens or Arizonans at large. JA 291, 294.

The court also found that Arizona's voter fraud concerns and its interest in voter confidence were real: "Although an evidentiary showing of fraud is not required to find a government's interest in preventing voter fraud to be important . . . the Defendants demonstrated instances of voter fraud in Arizona." JA 294. The district court found from the evidence that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots . . . [a]s such, Plaintiffs' challenge must fail." JA 296.

Likewise, the court concluded that Plaintiffs' Equal Protection claim based on alleged discrimination against naturalized citizens failed. JA 301. The court also rejected their Section 2 of the Voting Rights Act claim, finding the following facts: "Plaintiffs have not adduced any evidence that the observed difference in voter registration and voting rates of Latinos is substantially explained by race, as opposed to factors independent of race." JA 315.

Because there is no conflict between the NVRA and Proposition 200, the court of appeals erred in holding that the NVRA preempts Proposition 200's evidence-of-citizenship requirement.

III. The Canon of Constitutional Avoidance Favors Arizona’s Interpretation of the NVRA.

A. The Constitutional Issue Presented.

The Arizona Legislature has determined that any person who has not supplied evidence of citizenship is not qualified to vote in the election of the most numerous House of its Legislature. *See* A.R.S. § 16-121(A). The Constitution expressly assigns to the States the power to define and enforce the qualifications to vote in federal elections. U.S. Const. art. I, § 2, cl. 1; art. II, § 1, cl. 2; amendment XVII. It follows that Congress lacks the power to change that qualification.

Respondents argue that Congress derives its power from Article I, Section 4, which allows Congress to regulate the time, place, and manner of federal elections. But this Court has examined the constitutional history and determined that manner refers to “*how* these electors shall elect—whether by ballot, or by vote, or by any other way.” *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 833 (1995). This is an issue of “qualification,” not “manner.” The “power of a State to pass laws [on voter qualifications] means little if the State cannot enforce” such laws. *Calderon v. Thomas*, 523 U.S. 538, 556 (1998) (quoting *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)).

B. The Canon Applies Here Because Arizona’s Interpretation of the NVRA, Which We Believe to Be Correct, Is, at a Minimum, Plausible.

Under the canon of avoidance, when a statute is susceptible to “two plausible statutory constructions,” one of which “would raise a multitude of constitutional problems, the other should prevail.” *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). As Judge Kozinski, observed below, the NVRA is at least “readily susceptible” to the interpretation advanced by Arizona that avoids a conflict with Proposition 200. Pet. App. 89c (Kozinski, J., concurring).

This Court need not resolve the constitutional problems raised: “One of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark*, 543 U.S. at 381-82.

C. Interpreting the NVRA to Preempt Proposition 200 Raises Serious Doubts as to the Constitutionality of the NVRA.

1. Congress lacks the power to preclude Arizona from enforcing its qualification of citizenship.

Respondents and the United States agree that citizenship is a qualification but argue that Congress's power to regulate the "Manner of Holding the Election" allows it to preclude Arizona from enforcing that qualification. Gonzalez Br. 62; ITCA Br. 48-49; U.S. Br. 32-33. They argue, in effect, that Congress can require Arizona to trust applicants' claims of citizenship, in a kind of honor system that assumes that people who are willing to vote fraudulently would not be willing to sign falsely, and preclude Arizona from verifying such claims.

That cannot be right, because "[t]he power of a State to pass laws means little if the State cannot enforce them." *Calderon*, 523 U.S. at 556 (quoting *McCleskey*, 499 U.S. at 491). Arizona has the unquestioned constitutional prerogative to make citizenship a qualification for voting, and that prerogative "cannot be manipulated out of existence" by Congress's preclusion of Arizona's attempt to enforce that qualification. *U.S. Term Limits*, 514 U.S. at 831 (internal quotation marks omitted). "[C]onstitutional rights would be of little value if they could be indirectly denied." *Id.* at 829 (internal quotation marks omitted).

2. This is an issue of “qualification” not “manner” because “manner” refers to voting, which occurs after the qualification process is completed.

Congress’s power “over the manner [of holding the Election] only enables [Congress] to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way.” *U.S. Term Limits*, 514 U.S. at 833 (quoting 4 *Elliot’s Debates* 71 (Steele statement at North Carolina ratifying convention)). That is to say, in regulating the “Manner of holding the Election,” Congress can regulate “the combined actions of voters and officials *meant to make a final selection of an officeholder,*” including “requirements as to procedure and safeguards” related to the selection process. *Foster*, 522 U.S. at 71 & n.2 (emphasis added and quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Amicus Brief of the Center for Constitutional Jurisprudence presents historical evidence that the power to regulate “manner” was to prevent dissolution of the federal government by a State’s not holding elections; that it was the power to prescribe the circumstances under which the elections shall be “holden,” “not the qualifications of the electors, nor those of the elected”; that it extended only to the “when, where, and how” of elections; that it referred to mechanical matters such as paper ballot rather than voice vote and to the ability to choose by majority versus plurality vote requirement; and that it involves the power to compel representatives by district and to deal with gerrymandering. These all deal with the

mechanics of the actual election, rather than the qualifications of the electors prior to the election. *Id.* at 4-7.⁷

Merely registering to vote in Arizona, by contrast, does not involve any act involved in the “final selection of an officerholder.” *Foster*, 522 U.S. at 71. Instead, under Arizona law, registration is itself a *qualification* to vote; persons otherwise eligible to vote in Arizona by virtue of age, citizenship, and residency are not qualified electors unless they are also properly registered. See A.R.S. § 16-121(A) (defining “qualified elector” as “[a] person who is qualified to register to vote pursuant to § 16-101 and who is properly registered to vote shall, if he is at least eighteen years of age on or before the date of the election, be deemed a qualified elector for any purpose for which such qualification is required by law”) (emphasis added).

⁷ This Court has stated on three occasions that Congress’s Elections Clause power extends to regulating voter registration. See *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (citing *Smiley*); *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (citing *Smiley*). Those statements—made in passing and without the benefit of full briefing on the question—are dicta, and do “not establish law and would not qualify as binding precedent.” *Camreta v. Greene*, 131 S. Ct. 2020, 2045 (2011). These cases do not discuss “qualifications.” Similarly, this Court’s decision in *Siebold* did not address, much less uphold, Congress’s power to regulate voter registration. In *Siebold*, this Court upheld as a valid exercise of Congress’s power a federal statute allowing federal supervisors of election to monitor voting in congressional elections for fraud. See *id.* at 379-82. Although the same statute authorized federal officers to similarly monitor voting registration, that issue was not before the Court in *Siebold*.

Under A.R.S. § 16-121(A), when otherwise eligible persons register to vote, they become qualified electors, but do not take any act “meant to make the final selection of an officeholder”—that is participate in the “holding of the Election” that the Elections Clause empowers Congress to regulate under *Foster*—unless and until they actually vote.

Where a statute is susceptible of “two plausible constructions,” one of which “would raise a multitude of constitutional problems, the other should prevail,” *Clark*, 543 U.S. at 380-81. State Petitioner’s interpretation is, at a minimum, “plausible.” Respondents’ interpretation raises a serious constitutional problem.

It is therefore respectfully submitted that, both on the merits and under the canon of avoidance, State Petitioner’s interpretation “should prevail.”

CONCLUSION

For the foregoing reasons, the State Petitioners requests that the Court reverse the Ninth Circuit's decision and remand for proceedings consistent with its Opinion.

Respectfully submitted,

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