No. 12-71

IN THE
Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,
Petitioners,

v.

THE INTERTRIBAL COUNCIL OF ARIZONA, INC. *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION AND 12 CIVIL RIGHTS LAWYERS IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union and 12 Civil Rights Lawyers

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INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson;

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The 12 Civil Rights Lawyers include Christian Adams, Clint Bolick, Sheldon T. Bradshaw, Michael Carvin, Roger Clegg, Chris Coates, Charles J. Cooper, Robert Driscoll, Luis Reyes, Brad Reynolds, Brad Schlozman, Hans von Spakovsky. They are all lawyers who formerly worked in the Civil Rights Division of the Justice Department with extensive experience in the enforcement of federal voting rights laws. They are filing in their personal capacities.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans to vote, and to have their vote validly counted, regardless of political correctness. This case is of interest to the 12 Civil Rights Lawyers because they are concerned to protect the integrity of the election process and the rights of American voters.

STATEMENT OF THE CASE

Congress enacted the National Voter Registration Act ("NVRA") in 1993 to increase voter registration. Pet. App. 1h-42h. Concerned over the "increase in non-citizens registering to vote and actually voting in elections", Arizona voters passed Proposition 200 in 2004, which required prospective voters to provide satisfactory evidence of citizenship to register to vote. A.R.S. Section 16-166(F); Pet. App. 42h-50h. Such evidence may include an Arizona drivers license, Arizona ID card, certificate of naturalization, other

naturalization document, tribal identification number, birth certificate, passport, or other documents. A.R.S. Section 16-166(F).

Several Plaintiffs sued the State to prevent implementation of Proposition 200, alleging, *inter alia*, that the Proposition involved an undue burden on registration preempted by the NVRA. In the case of mail in registrations, that statute requires the states to "accept and use the mail voter registration application form (the Federal Form) prescribed by [the U.S. Elections Assistance Commission (EAC)] for the registration of voters in elections for Federal Office."42 U.S.C. Section 1973gg-4(a)(1).

But the statute also mandates that the form accommodate state specified requirements like Arizona's proof of citizenship for registration. The statute says 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" 42 U.S.C. Section 1973gg-7(b)(1) (emphasis added), which would include proof of citizenship where the state requires citizenship for eligibility to register. Indeed, the federal statute explicitly references state required proof of citizenship, saying that the Federal Form "shall include statements that specify each eligibility requirement (*including citizenship*)...." *Id.* 1973gg-7(b)(2)(emphasis added).

Pursuant to these statutory mandates, the actual federal form devotes 17 of 25 total pages to state-specific instructions to comply with state-specified requirements. Pet. App. 60c-84c. The EAC's regulations regarding the Federal Form provide that

it include "state-specific" instructions as a mandatory "component" of the Federal Form. 11 C.F.R. Section 9428.3(b). The EAC regulations further provide that "[t]he state-specific instructions shall contain… information regarding the state's specific voter eligibility and registration requirements." 11 C.F.R. Section 9428.3(b). The EAC even requires state election officials to report and update it on the State's unique "voter registration and eligibility requirements" so that the EAC can update the "state specific" component of the Federal Form. 11 C.F.R. Section 9428.6.

The Department of Justice precleared Proposition 200 on January 24, 2005. (J.A. 193). That means that the Department found that the citizenship requirement "did 'not have the purpose [or] effect of denying or abridging the right to vote on account of race or color.'" *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006) (quoting 42 U.S.C. Section 1973(c)).

But when Arizona submitted its request to the EAC to include Arizona's evidence of citizenship requirement on the state specific instructions for the Federal Form, the then serving EAC Executive Director made a staff decision to refuse to include it, claiming that it was "preempted by Federal law." (J.A. at 181-182, 186). But that staff decision has never been approved by a vote of the EAC Commissioners. Nevertheless, the EAC never acted to include Arizona's citizenship requirement on the Federal Form, even though federal law provides that "any action" taken by the EAC "may be carried out only with the approval of at least three of its [four

Commissioners]." 42 U.S.C. Section 15328. The EAC's failure to include Arizona's citizenship requirement on the Federal Form is also in violation of the EAC's own regulations noted above, which require the EAC to include it on the Federal Form.

Yet, in accordance with the NVRA, Arizona continues to this day to make available, accept and use the Federal Form for voter registration. (J.A. 190 at 191). But the evidence of citizenship requirement remains in effect as well. If an application is received without the required evidence, the county recorder sends the applicant correspondence indicating the evidence required to show citizenship. (J.A. 251; Arizona Secretary of State's Procedures Manual, at 9-14).

In the courts below, the District Court ruled for Arizona, finding that the burdens on potential registrants of showing citizenship were not excessive, that voter fraud in Arizona was a significant problem, and that the citizenship evidence requirement did not conflict with the NVRA. (Pet. App. 3e, 8c; J.A. 288-94, 95). But the Ninth Circuit reversed, concluding that the NVRA preempts Proposition 200 in regard to federal elections, even though Arizona does comply with the NVRA and uses the Federal Form for voter registration. The Supreme Court granted the Writ of Certiorari on October 15.

SUMMARY OF ARGUMENT

The Constitution explicitly provides for the power of the states in setting the qualifications for voting in

federal as well as state elections. Article I, Section 2, Clause 1; Article II, Section 1, Clause 2; 17th Amendment. See Article I, Section 4, Clause 1.

Consistently with these Constitutional provisions, this Court in *Ex Parte Siebold*, 100 U.S. 371, 384-85 (1879) recognized that the Election Clause provided "concurrent authority of the two sovereigns, State and National, over the same subject matter." This Court consequently ruled in *Siebold* that a state election law is preempted when it conflicts with federal law, and then only "so far as the conflict extends" and "no farther."

The Court explained that such a conflict exists only "if both" the federal and state laws at issue "cannot be performed."

Under these precedents, Arizona's evidence of citizenship requirement to register to vote is clearly not preempted under the NVRA. There is no conflict between the evidence of citizenship requirement of Proposition 200 and the NVRA. Arizona has been complying, and continues to comply, with both to this very day. Arizona continues to accept and use the Federal Form under the NVRA, and to enforce its own evidence of citizenship requirement, at the same time and in the same place. So complying with both is not a physical impossibility.

Moreover, the states have long occupied the field of Election Law, as expressly authorized in the Constitution itself. Rather than a clear and manifest purpose of Congress in the NVRA to supercede the

state role in this field, the NVRA expressly provides for that state role.

Moreover, Arizona's evidence of citizenship requirement carries out rather than frustrates the accomplishment of the full purposes and objectives of Congress. Among those purposes and objectives was protecting the integrity of the electoral process.

In any event, the Voter Qualifications Clauses of the Constitution, found in Article I, Section 2, Clause 1, the 17th Amendment, and Article II, Section 1, Clause 2, expressly provide that voter qualifications for federal elections *shall* be the same as the qualifications the states have set for state offices. The federal government does not even have jurisdiction to change or preempt the state voter qualifications, and these Constitutional provisions leave no scope for the federal government to change or preempt the qualifications for federal offices. So the NVRA cannot preempt Arizona's Proposition 200 in any event.

The Ninth Circuit below erred because it failed to follow the long established precedents on preemption, or the Constitution's language itself. The Ninth Circuit's own fabricated standard for this case flatly contradicts this Court's applicable precedents and the language of the Constitution itself.

Moreover, the applicable Constitutional provisions grant to the states the power to define the qualifications to vote in federal elections. So if the NVRA is read as preempting Arizona's proof of

citizenship requirement, the NVRA is unconstitutional as violating these Constitutional provisions.

Under the canon of constitutional avoidance, courts should interpret laws to avoid conflicts with the Constitution if possible. This is another reason why the NVRA should be read as not preempting Arizona's Proposition 200, requiring satisfactory evidence of citizenship to register to vote.

ARGUMENT

I. UNDER THE CONSTITUTION, AND LONG ESTABLISHED PRECEDENTS, THE NVRA DOES NOT PREEMPT THE EVIDENCE OF CITIZENSHIP REQUIREMENT ESTABLISHED BY PROPOSITION 200.

The Constitution explicitly provides for the power of the states in setting the qualifications for voting in federal as well as state elections. Article I, Section 2, Clause 1 of the Constitution states,

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

This language explicitly states that the qualifications for voting for Representatives in each state *shall* be the same as the state has chosen for electing the

members of the most numerous branch of its own legislature. The Federal government does not even have any authority to change or preempt those requirements.

Similarly, the 17th Amendment states,

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years.... The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language explicitly states that the qualifications for voting for Senators in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The Federal government does not have any authority to change or preempt those requirements either.

Even in regard to Presidential elections, Article II, Section 1, Clause 2 of the Constitution states,

> "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled to in the Congress...."

This provision gives the power to the states as well to determine the qualifications for voting in Presidential elections, as the states have the

Constitutional authority to determine the "manner" of choosing the Presidential Electoral College Electors for each state. That would include the qualifications of voters voting for President in each state, and thereby determining who the Presidential Electors from each state will be. Limiting the vote for President to U.S. citizens would be part of the manner the state has set to choose its Presidential Electors for the Electoral College.

Even the Constitution's Elections Clause, which deals only with the time, place and manner of elections, and not the qualifications of voters, gives the primary role to the states, providing:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

U.S. Const. art. I, Section 4, cl. 1.

Consistently with these Constitutional provisions, this Court in *Ex Parte Siebold*, 100 U.S. 371, 384-85 (1879) recognized that the Election Clause provided "concurrent authority of the two sovereigns, State and National, over the same subject matter." This Court consequently ruled in *Siebold* that a state election law is preempted when it conflicts with federal law, and then only "so far as the conflict extends" *id.* at 384, and "no farther" *id.* at 386.

The Court explained that such a conflict exists only "if both" the federal and state laws at issue "cannot be performed." *Id.* 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.

The *Siebold* Court added that when interpreting a conflicting federal law under the Election Clause, courts "are bound to presume that Congress 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.

This Court applied these principles more recently in *Foster v. Love*, 522 U.S. 67 (1997). At issue in that case was the Louisiana open primary system that allowed conclusive Congressional elections in October while federal law required a uniform Election Day in November for such elections. This Court held that "When Louisiana's statute is applied to select from among Congressional candidates in October, it conflicts with federal law and to that extent is void." *Id.* at 74.

This Court further explained in *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) that

> "[I]n all preemption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [the Court] start[s] with the assumption that the historic police powers of the States were not to be

> superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

The Court added in *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) that conflict preemption

> "includes cases where compliance with both federal and state regulations is a physical impossibility and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Under these precedents, Arizona's evidence of citizenship requirement to register to vote is clearly not preempted under the NVRA. There is no conflict between the evidence of citizenship requirement of Proposition 200 and the NVRA. Arizona has been complying, and continues to comply, with both to this very day. Arizona continues to accept and use the Federal Form under the NVRA, and to enforce its own evidence of citizenship requirement, at the same time and in the same place, as discussed above. So complying with both is not a physical impossibility. This is unlike in *Foster,* where the same election obviously could not be held in October and also in November.

Moreover, the states have long occupied the field of Election Law, as expressly authorized in the Constitution itself. Rather than a clear and manifest purpose of Congress in the NVRA to supercede the state role in this field, the NVRA expressly provides for that state role, with 17 of the Federal Form's 25

pages involving state rather than federal requirements, as expressly required by the NVRA.

Indeed, the NVRA expressly contemplates a state evidence of citizenship requirement for voter registration. As discussed above, the NVRA provides that the Federal Form may require "such identifying information…as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. Section 1973gg-7(b)(1). Moreover, the NVRA explicitly states that the Federal Form "shall include statements that specify each eligibility requirement (*including citizenship*). *Id.* 1973gg-7(b)(2)(emphasis added).

In addition, the EAC's own regulations expressly contemplate the state role in the administration of the NVRA and setting the qualifications of voters. 11 C.F.R. Section 9428.3(b) explicitly provides that the Federal Form include "state-specific" instructions as a mandatory "component." 11 C.F.R. Section 9428.3(b) further provides that "[t]he state-specific instructions shall contain…information regarding the state's specific voter eligibility and registration requirements."

Moreover, Arizona's evidence of citizenship requirement carries out rather than frustrates the accomplishment of the full purposes and objectives of Congress. Among those purposes and objectives was protecting the integrity of the electoral process, 42 U.S.C. Section 1973gg(b), which includes ensuring that only eligible voters are registered. 42 U.S.C. Section 1973gg-6(a)(1)(administrators of federal elections must "ensure that any *eligible* applicant is registered

to vote in an election" (emphasis added)). The Arizona evidence of citizenship requirement established by Proposition 200 advances this integrity where only U.S. citizens are eligible to vote, as in Arizona.

This integrity purpose is further evidenced by the NVRA requirement that election administrators conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. 42 U.S.C. Section 1973gg-6(a)(4). *See also Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010)(Under the NVRA, "eligibility is the definitive criterion for registration and list maintenance obligations" and consequently, "States must strive to add eligible voters and to remove ineligible ones.").

Also among the purposes and objectives was to avoid a national NVRA that would displace the role of state officials in voter registration. FEC Guide to Implementing the NVRA ("This bill should not be interpreted in any way to supplant [the] authority [of state officials to] make determinations as to applicants eligibility." House Report, Section 5 at 8).

In addition, federal law makes it a felony for a non-citizen to vote in U.S. elections. 18 U.S.C. 611, 1015(f). So Arizona's Proposition 200 furthers this federal requirement and its purpose as well.

Finally, in any event, the Voter Qualifications Clauses of the Constitution, found in Article I, Section 2, Clause 1, the 17th Amendment, and Article

II, Section 1, Clause 2, expressly provide that voter qualifications for federal elections *shall* be the same as the qualifications the states have set for state offices. The federal government does not even have jurisdiction to change or preempt the state voter qualifications, and these Constitutional provisions leave no scope for the federal government to change or preempt the qualifications for federal offices. So the NVRA cannot preempt Arizona's Proposition 200 in any event.

The Ninth Circuit below erred because it failed to follow these long established precedents, or the Constitution's language itself. Even though Voter Qualifications Clauses of the Constitution grant the states unquestioned power over voter qualifications, and even the Election Clause expressly mandates a central state role in Election law, the Ninth Circuit ruled that state voter qualification and election laws have weaker standing than under the Supremacy Clause. The Ninth Circuit below said that the "Elections Clause operates quite differently from the Supremacy Clause" (Pet. App. 15c), explaining that "courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns," (Pet. App. 16).

The Ninth Circuit fabricated its own preemption standard under these Constitutional Clauses, holding that a state law is preempted if it does not "operate harmoniously in a single procedural scheme" with a federal law that "addresses the same subject." Pet. App. 20c). But this standard does not give any recognition to the unilateral power the Constitution's

Voter Qualification Clauses grant to the states, or to the *two* sovereigns, federal *and* state, granted jurisdiction over the same subject matter in the Elections Clause. It bows even more to the federal government than the law under the Supremacy Clause, where the federal government is supreme.

This fabricated Ninth Circuit standard flatly contradicts this Court's precedents concerning these Constitutional Clauses discussed above. Moreover, it also contradicts the language of the Constitution itself, with state control in federal elections for Congress in Article I, Section 2, Clause 1 and in the 17th Amendment, and in Presidential elections in Article II, Section 1, Clause 2, and dual sovereignty in the Elections Clause, as discussed above. The Ninth Circuit needs to be reversed and reminded yet again that concerning its rulings, this Court's precedents are Supreme.

Under those precedents, Arizona's Proposition 200 is not preempted by the NVRA, as discussed above. Arizona is following both the NVRA and Proposition 200, and so there is no conflict, and no preemption under the applicable law, as discussed above.

II. IF THE NVRA IS READ AS PREEMPTING ARIZONA'S PROPOSITION 200, THEN IT IS THE NVRA THAT IS UNCONSTITUTIONAL.

As discussed above, the applicable Constitutional provisions grant to the states the power to define

the qualifications to vote in federal elections. Article I, Section 2, Clause 1 states "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Again, this language explicitly states that the qualifications for voting for Representatives in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The federal government has no authority to preempt a state's voter qualifications for its own legislature. So it is the states that determine voter qualifications for federal elections to the House of Representatives under the Constitution.

Similarly, the 17th Amendment states,

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years.... The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

This language again explicitly states that the qualifications for voting for Senators in each state *shall* be the same as the state has chosen for electing the members of the most numerous branch of its own legislature. The Federal government does not have any authority to change or preempt those requirements either.

Moreover, even in regard to Presidential elections, Article II, Section 1, Clause 2 of the Constitution states,

> "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled to in the Congress...."

Again, this provision gives the power to the states as well to determine the qualifications for voting in Presidential elections, as discussed above.

As James Madison explained, under these Constitutional provisions, the qualifications for voters in federal elections are those "which may be established by the State itself" and are not even subject to the "occasional regulation of the Congress." *The Federalist No. 52*, at 354 (James Madison) (J. Cooke ed. 1961). Alexander Hamilton added, "[P]rescribing qualifications" for voters in federal elections "forms no part of the power…conferred upon the national government" by the Elections Clause, which is "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60* at 408-409 (Alexander Hamilton) (emphasis in original).

This Court has consequently recognized that "the Constitution indeed makes voters' qualifications rest on state law even in federal elections." *Gray v. Sanders*, 372 U.S. 368, 379 (1963). *See also Lassiter v. Northampton Bd. of Elections*, 360 U.S. 45 (1959);

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995); *ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (upholding Congress's power under the Elections Clause to enact the NVRA, but indicating that if the State could show that the NVRA made "it impossible for the state to enforce its voter qualifications…we might have a different case.")(Posner, J.).

So if the NVRA is read as preempting Arizona's proof of citizenship requirement, the NVRA is unconstitutional as violating the above Constitutional provisions granting the states the power to set their own voter qualification requirements.

Under the canon of constitutional avoidance, courts should interpret laws to avoid conflicts with the Constitution if possible. *Clark v. Martinez*, 543 U.S. 371 (2005). As this Court said in *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001),

> "It is a cardinal principle of statutory interpretation…that when an Act of Congress raises a serious doubt as to its constitutionality, this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

This is another reason why the NVRA should be read as not preempting Arizona's Proposition 200, requiring satisfactory evidence of citizenship to register to vote.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the Ninth Circuit's decision below.

Respectfully submitted,

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae American Civil Rights Union and 12 Civil Rights Lawyers