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

Respondents.

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

BRIEF OF AMICUS CURIAE KRIS W. KOBACH, KANSAS SECRETARY OF STATE, IN SUPPORT OF PETITIONERS

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Kris W. Kobach, in his capacity as the Secretary of State of the State of Kansas respectfully submits this amicus curiae brief in support of the Petitioners.[1]

INTERESTS OF THE AMICUS CURIAE

Kris W. Kobach is the Secretary of State for the State of Kansas (hereinafter, referred to as the "Amicus"). Effective January 1, 2013, Kansas will require proof of citizenship from all new voter registration applicants.[2] In addition, like all states, Kansas is required by 42 U.S.C. § 1973gg-4(a)(1) to "accept and use" the Federal Mail Voter Registration Form (the "Federal Form"). As the Election Officer for the State of Kansas, the Amicus has an interest in ensuring that the Kansas proof of citizenship requirement is not preempted by federal law. The Amicus is directly involved in the acceptance and usage of the Federal Form, and believes it to be fully consistent with Kansas's proof of citizenship requirements.

[1] All parties have consented to the filing of this brief. Copies of communications providing consent are submitted herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] K.S.A. § 25-2309.

SUMMARY OF THE ARGUMENT

The decision of the Ninth Circuit Court of Appeals ("Ninth Circuit") below suffers from two fundamental problems. First, the decision ignores this Court's precedent that traditional preemption doctrines apply, even in the context of the Elections Clause. Second, the Ninth Circuit's decision directly conflicts with the principle that only Congress, not the executive branch, can preempt State laws. Third, contrary to the determination of the Ninth Circuit, the language of the National Voter Registration Act ("NVRA") actually expressly allows states to require proof of citizenship.

ARGUMENT

I. The Ninth Circuit Erred by Holding that Traditional Preemption Doctrines Do Not Apply to the Elections Clause.

This Court has a long history of applying traditional preemption doctrines, in the context of the Elections Clause. Despite this case law to the contrary, the Ninth Circuit deviated from this long history by holding that a different preemption analysis must be used in regard to the Elections Clause. The Ninth Circuit rejected this Court's language that the presumption against preemption applies to "all" preemption cases (regardless of whether the case arises under the Supremacy Clause or the Elections Clause). *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis

added) (*quoting Medtronic v. Lohr*, 518 U.S. 470, 485 (1996), and *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). Instead, the Ninth Circuit explained that states have no reserved authority over federal elections due to the fact that federal elections did not exist prior to the existence of the federal government. *Gonzalez v. Arizona* (*Gonzalez III*), 677 F.3d 383, 392 (9th Cir. 2012). The Ninth Circuit then concluded that due to the absence of reserved authority, courts need not follow the traditional preemption doctrines such as the presumption against preemption and the rule that the intent to pre-empt must be plainly stated. *Id.* The Ninth Circuit then created a new preemption standard specifically for Elections Clause issues. *Id.* By reaching this conclusion, the Ninth Circuit read the Elections Clause in a vacuum and ignored this Court's bedrock principle that sections of the Constitution must be read in conjunction with other sections as well as examined individually. *See, eg., M'Culloch v. Maryland*, 17 U.S. 316, 331 (1819). Therefore, the Elections Clause must be read in conjunction with the Supremacy Clause. Consequently, the Ninth Circuit's new standard is in direct conflict with the precedents of this Court.

"Because the States are independent sovereigns in our federal system, [this Court has] long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). Further, this Court has traditionally started its analysis in preemption cases, particularly those involving a field traditionally occupied by the

States, "with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (*quoting Medtronic*, 518 U.S. at 485, and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The administration of elections is plainly a field traditionally occupied by the state; indeed, the federal government has never directly administered any election.

This new standard created by the Ninth Circuit ignores the historic role occupied by the States in administering federal elections. Traditionally, states have led the way in election reforms and the federal government has given leeway to the States to do so. For example, individual states led election reform by enacting legislation over an 8-year period between 1888 and 1896 adopting the "Australian" secret ballot system. During this period 90 percent of the States accounting for 92 percent of the national electorate made these reforms. *Burson v. Freeman*, 504 U.S. 191, 204-205 (1992) (plurality opinion). Additionally, states have an interest in "orderly administration and accurate recordkeeping" of elections. *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008). Furthermore, this Court has repeatedly found that the Elections Clause grants the States "broad power" to administer federal elections. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *Cook v. Gralike*, 531 U.S. 510, 511 (2001); *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). Because

the States traditionally occupy the field of federal elections, it follows that courts should apply the traditional presumption against preemption principle in the context of the Elections Clause. Along these lines, when considering Elections Clause preemption, this Court has held preemption occurs only when there is a clear, express conflict between federal and state law. *See Ex Parte Seibold*, 100 U.S. 371, 386 (1879); *Smiley v. Holm*, 285 U.S. 355, 369 (1932). Such a clear, express conflict does not exist here nor does the Election Assistance Commission ("EAC") have the power to preempt state law without congressional authorization.

II. Only Congress Can Preempt

As explained above, it is clear that traditional preemption doctrines apply in this case. With that being true, it also must follow that the traditional principle that only Congress, not the executive branch, can preempt state law also applies. As stated in the Petitioner's Brief, the EAC's Arizona decision was basically at the whim of an employee of the EAC after the board issued a split decision. It should be noted that now because the EAC currently has no commissioners, the Commission does not "reject" the inclusion of a state's proof of citizenship requirement language. Rather, the EAC "cannot take action" on a request to amend the state instructions. Consequently, the Ninth Circuit's interpretation of NVRA essentially gives a "pocket veto" to an agency which believes it "cannot take action" to either approve or

reject instructions because it lacks commissioners. Federal preemption of state law requires direct and clear congressional action and not the mere absence of a federal agency's ability to act. The Ninth Circuit ignored this traditional principle, as well as the established precedent of this Court, and if allowed to stand will allow an executive branch agency to arguably preempt state law by the agency's inability to take action. Such cavalier treatment of state law must not be allowed.

The principle that only Congress may preempt state law is deeply rooted in both the Constitution and the case law of both this Court and inferior Article III Courts. The Supremacy Clause of Article VI of the Constitution gives preemptive power to only the

> Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Consequently, unilateral preemption by an executive agency cannot occur. Only the "unmistakabl[e]" words of Congress can displace the states. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). "It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise

valid state laws. . . ." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Further and significantly, the Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 131 (2d Cir. 2007) (reversed in part on other grounds, *Cuomo v. Clearing House Ass'n, L.L.C.,* 557 U.S. 519 (2009)). "Congress has the exclusive power to make laws necessary and proper to carry out the powers vested by the United States Constitution in the federal government." *In re NSA Telecoms. Records Litig.*, 633 F. Supp. 2d 892, 908 (N.D. Cal. 2007) (*citing Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). While it is true that an executive action can have a preemptive effect, this can only occur if the executive action occurs within the four corners of a congressional act that clearly authorizes the action. That is not the case here.

In reaching its decision, the Ninth Circuit placed emphasis on the decision of the Election Assistance Commission ("EAC") to reject Arizona's request that the Federal Form be modified to require documentary proof of citizenship in order to register. *See Gonzalez III*, 677 F.3d at 400. In so doing, the Ninth Circuit stated that Congress had "entrusted" the EAC with the authority to determine the contents of the Federal Form, and that regardless of state law Arizona was required to accept and use the form without imposing additional requirements. *Id.* Despite this declaration from the Ninth Circuit, it is far from clear that Congress has granted the EAC the authority to deny the

States the right to impose additional requirements before accepting the information on the Federal Form.

NVRA requires the EAC, in consultation with the States, to develop a federal mail voter registration form ("Federal Form"). 42 U.S.C. § 1973gg-7(a). Further, the NVRA requires that the States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). A great deal of confusion exists in regards to the meaning of the phrase "accept and use." This confusion can be seen in the history of this case. First, the district court denied a motion for preliminary injunction which would have stopped implementation of the Arizona citizenship requirement. *See Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1046 (9th Cir. 2007). Later, on appeal, the Ninth Circuit upheld the district court's denial, holding that Arizona's proof of citizenship requirement was not preempted by the NVRA. *Id.* at 1049-1051. Following this ruling of the Ninth Circuit and the district court's subsequent summary judgment on the NVRA claim, the decision was appealed to a second panel of the Ninth Circuit Court of Appeals. *See Gonzalez v. Arizona* (*Gonzalez II*), 624 F.3d 1162 (9th Cir. 2010). On this appeal, a divided three-judge panel reversed the earlier ruling and held that the NVRA did prohibit Arizona from imposing additional requirements on the Federal Form. *Id.* at 1185-1191. The judges of the Ninth Circuit then voted to rehear the case en banc, and issued the decision being appealed here. *See Gonzalez III*, 677 F.3d at 390. Although the divided en banc Ninth Circuit found the NVRA to preempt the

Arizona registration requirement, there was still disagreement amongst the panel of the meaning of the phrase "accept and use." In his concurring opinion, Chief Judge Kozinski stated that the issue is "difficult and perplexing" and explained that due to the vague language from Congress, the phrase "accept and use" could be construed to either allow a state to add additional requirements to the Federal Form or to prevent states from adding additional requirements to the Federal Form. *Id.* at 439-440 (Kozinski, Chief J., concurring). When applying traditional preemption doctrines, this vagueness prevents preemption, especially preemption by the executive branch.

III. The NVRA Does Not Preempt State Law Because it Allows States to Require Proof of Citizenship According to its Express Language

Having established that the States traditionally occupy the election field, the relevant questions are: 1) whether Congress has preempted the States and 2) whether Congress has expressly granted authority to the EAC to preempt. The answer to both of these questions is no.

"In *all* pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest

purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (emphasis added) (*quoting Medtronic*, 518 U.S. at 485 (1996), and *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). As explained above, the Ninth Circuit concluded that NVRA's vague language was sufficient to preempt state law.

In the words of the Chief Judge of the Ninth Circuit "Congress used tantalizingly vague language, which would make it very useful to fall back on a rule of construction, such as the Clear Statement Rule or the Presumption Against Preemption." *Gonzalez III*, 677 F.3d at 439-440 (Kozinski, Chief J., concurring). This is undoubtedly true, and the only reason the Ninth Circuit did not follow the words of the Chief Judge is because the Ninth Circuit chose to ignore traditional preemption doctrines and the precedents of this Court. Had the Ninth Circuit applied the presumption against preemption, there is little doubt that the Ninth Circuit would have had to rule in favor of Arizona and against preemption. As previously explained, the phrase "accept and use" can be interpreted in two ways. One way, allowing States to accept and use the Federal Form while also requiring additional documentation, would not preempt State law. The other interpretation would preclude the States from requiring anything other than the Federal Form itself, thus preempting State law. Because the presumption against preemption applies, it must be presumed that Congress did not intend this vague

language to preempt State law. Additionally, as it must be presumed that this vague language does not preempt State law and does not prohibit the States from requiring that additional information be submitted with the federal form, the EAC also does not possess the authority to do so. Only Congress, not the Executive branch may preempt State law. *See North Dakota v. United States*, 495 U.S. 423, 442 (1990). In the vague language of the NVRA, Congress did not expressly grant the EAC the authority to preempt State law. Thus, the EAC has no authority to preempt a State statute requiring additional documentation be submitted with the Federal Form.

However, in reaching this conclusion, the Ninth Circuit failed to adequately explain why the plain language of the NVRA did not expressly allow states the option of requiring proof of citizenship. Under NVRA, the Federal Form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to *assess* the eligibility of the applicant. . . ." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). The key phrases in this section are "may require identifying information" and "assess."

Based on this language, NVRA allows states to require "indentifying information" regarding the eligibility of voter registration applicants. Based on this language, the NVRA cannot be read as the Ninth Circuit held, because they held that "identifying information" regarding citizenship is limited to a box for the applicant to check if the applicant is a citizen

of the United States. However, checking a box plainly does not constitute providing "identifying information." A checked box does not allow the possibility of requiring any information from the applicant. The applicant provides nothing that "identifies" him or her in any way. In contrast, the documents that establish citizenship, *eg.*, a passport or birth certificate, do constitute "identification" documents. The Ninth Circuit's reading renders this statutory language superfluous.

Furthermore, the word "assess" similarly cannot be squared with the Ninth Circuit's interpretation. To assess something requires action on the part of the one doing the assessing. In addition, an assessment assumes a spectrum of possible outcomes. Black's Law Dictionary defines "assessment" as the "[d]etermination of the rate or amount of something, such as a tax or damages." Black's Law Dictionary 111 (7th ed. 1999). The American Heritage Dictionary defines "assess" as "[t]o evaluate; appraise". The American Heritage Dictionary of The English Language: New College Edition 79 (1979). For State election officials to assess the eligibility of an applicant would require that there be something to assess. For an assessment to occur, something more than a mere checked box is needed to evaluate and make a determination of eligibility. One essential eligibility requirement is United States citizenship. The check box leaves no room for assessment because it is either checked or not checked. A determination that nothing beyond checking a box may be required to determine

an applicant's citizenship would result in the word "assess," as used in the statute, being surplusage.

It is a long-standing and fundamental principle of statutory interpretation that courts must not interpret statutes in a fashion that renders them redundant or duplicative – mere "surplusage." Words in a statute "cannot be regarded as mere surplusage." *Potter v. United States*, 155 U.S. 438, 446 (1894). "Since all the words used by the legislature have meaning, courts must avoid reading a statute so as to render any superfluous." *Alioto v. Hoiles*, 341 Fed. Appx. 433, 439 (10th Cir. 2009). The rule against surplusage is "a cardinal rule of statutory construction." *United States v. Hasan*, 526 F.3d 653, 666 (10th Cir. Okla. 2008). "We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress." *Beisler v. Commissioner*, 814 F.2d 1304, 1307 (9th Cir. 1987); *United States v. Noone,* 913 F.2d 20, 25 n.5 (1st Cir. 1990) (rejecting a statutory reading would render 18 U.S.C. § 3161(h)(1)(F) "mere surplusage"). To read the statute in question in a way that prevents the requirements of additional eligibility requirements would be to render the words "require identifying information" and "assess" superfluous.

CONCLUSION

For all of the above reasons, the Kansas Secretary of State respectfully requests this Court to reverse the decision of the Ninth Circuit.

Respectfully submitted,

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