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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION 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 precedent 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 requires persons who are registering to vote to show evidence that they are eligible to vote?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and

[1] Pursuant to Supreme Court Rule 37.3, consents from all parties to the filing of this Amicus Curiae Brief accompany the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States.

Here, the Ninth Circuit ignored the fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope of Congress's power to regulate elections. MSLF believes that its focus on these issues will be useful to this Court in deciding the issues in this case.

SUMMARY OF ARGUMENT

At issue here is whether certain provisions of the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg-1973gg-10, preempt certain provisions of Arizona's voter registration identification law. Pursuant to the NVRA, a Federal Mail Voter Registration Form ("Federal Form") was developed. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA directs the States to "accept and use" the Federal form when registrations are submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2).

A State may, however, develop and use its own mail voter registration form that meets all of the criteria stated in 42 U.S.C. § 1973gg-7(b) for the registration of voters in elections for federal office. 42 U.S.C. § 1973gg-4(a)(2). The criteria in 42 U.S.C. § 1973gg-7(b) provides, *inter alia*, that a mail voter

registration form "may require . . . 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). Importantly, 42 U.S.C. § 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2). The Federal Form includes a statement specifying "each eligibility requirement (including citizenship)," 42 U.S.C. § 1973gg-7(b)(2)(A-B), and contains an "attestation that the applicant meets such requirement," signed "under penalty of perjury." 42 U.S.C. § 1973gg-7(b)(2)(C). Whether a State uses the Federal Form or its own form, the NVRA does not prevent a State from requiring more than this barebones minimum identifying information in order to assess the eligibility of an applicant for registration.

Arizona voters passed Proposition 200 in 2004. One provision of Proposition 200 required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. A.R.S. § 16-166(F). Proposition 200 also requires the county recorder to reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. *Id*.

Following the implementation of Proposition 200, Arizona has continued to "accept and use" both the Federal Form and Arizona's Form for voter registration purposes, although the State requires submission of

evidence of U.S. citizenship along with both the Federal Form and the State Form, whichever the applicant selects. State Petitioners' Br. at 20-21. In all respects, both the State and Federal Form incorporate the requirements of the NVRA. *Id*. The Arizona Secretary of State makes the Federal Form available to anyone who requests it. *Id*. In addition, that form is publicly available for downloading and printing. *Id*.

Thus, one of the issues below was whether Proposition 200, insofar as it requires more than an attestation under penalty of perjury to establish citizenship, or any other eligibility requirement, conflicts with the NVRA, and is, therefore, preempted. The Ninth Circuit erroneously held that Proposition 200's requirement that those seeking to register to vote confirm their citizenship status (A.R.S. § 16-166(F)) was preempted by the NVRA. *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc). The Ninth Circuit failed to apply traditional preemption jurisprudence and instead held that, when Congress seeks to regulate elections, any State law that does not operate harmoniously in a single procedural scheme is preempted by the federal law. *Id.* at 394. The Ninth Circuit determined that the NVRA did not allow States to add their own requirements to the Federal Form and, thus, Proposition 200's proof of citizenship requirement was preempted because it did not operate harmoniously with the NVRA. *Id.* at 401-03. Arizona sought, and this Court granted, certiorari to address the Ninth

Circuit's holding with respect to Arizona's proof of citizenship requirement. As demonstrated below, the Ninth Circuit failed to recognize that the Constitution gives Congress only a limited authority to regulate elections and, thus, erroneously created a new preemption test that ignores the principles of federalism.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ESTABLISHED A NEW PREEMPTION TEST THAT CONFLICTS WITH THE CONSTITUTION AND FUNDAMENTAL PRINCIPLES OF FEDERALISM.

The Ninth Circuit ignored the purposes of the Constitution's elections clauses, as well as the fundamental principles of federalism, when it determined that the NVRA, enacted pursuant to the Article I, Section 4, Clause 1 ("Congressional Elections Clause"), preempted Arizona's proof of citizenship requirements contained in Proposition 200 (A.R.S. § 16-166(F)). Instead, as demonstrated below, the Ninth Circuit incorrectly ruled that federalism concerns apply only to preemption of State law under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, not to preemption under the Congressional Elections Clause. Furthermore, the Court failed to address the other sections of the Constitution that relate to the regulations of federal elections. *See* U.S. Const. Art. II, § 1, cl. 2, 4; Art. I, § 2, cl. 1; and Amend. XVII, cl. 1.

The Ninth Circuit observed that preemption under the Supremacy Clause "must strive to maintain the delicate balance between the States and the Federal Government." *Gonzalez*, 677 F.3d at 392. However, the Ninth Circuit ruled that the right to regulate federal elections was not a right reserved to the States by the Tenth Amendment. *Gonzalez*, 677 F.3d at 392. According to the Ninth Circuit, only those sovereign rights that predated the Constitution could be reserved by the Tenth Amendment. *Id*.

As a result, the Ninth Circuit concluded that, because Arizona's authority to regulate such elections "arises from the Constitution itself," not from any right of retained sovereignty preserved by the Tenth Amendment, a court "need not be concerned with preserving the 'delicate balance' between competing sovereigns" in determining preemption under the Congressional Elections Clause. *Id*. Based upon this erroneous conclusion, the Ninth Circuit ruled that the Congressional Elections Clause is a "standalone preemption provision" and "establishes its own balance [between the State and federal government]. . . ." *Id*. Nothing could be less true or more destructive of liberty.

The Constitution requires a different outcome. The Constitution grants broad authority to the States to regulate elections, and limits Congressional control of elections, even federal elections. Therefore, the Ninth Circuit incorrectly created a new preemption test that was too deferential to Congress.

A. Federalism Is Fundamental To The Liberty Of The People.

The principles of federalism embodied in the Constitution are fundamental to the government created by the Framers. The federal system resulted from a "compromise between those who saw the need for a strong central government and those who were wedded to the independent sovereignty of the states." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3 (1988).

It is axiomatic that federalism is integral to the protection of liberty:

> In the compound republic of America, the power surrendered by the people, is *first divided between two distinct governments*, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a *double security arises to the rights of the people*. The different governments will controul [sic] each other; at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 291 (Madison) (Clinton Rossiter ed. 1999) (all emphasis added).[2] Indeed, the

[2] All citations to the Federalist Papers in this brief are from the same edition.

importance of the federal system to liberty was extolled by Hamilton as well:

> Power being almost always the rival of power; the General Government will at all times stand ready to *check the usurpations of the state governments; and those will have the same disposition towards the General Government*. . . . It may safely be received as an axiom in our political system that the *state government will in all possible contingencies afford complete security against invasions of the public liberty by the national authority*. Projects of usurpation cannot be masked.

THE FEDERALIST No. 28, at 149 (Hamilton) (all emphasis added).

Madison also explained that the federal system of dual sovereignty steered a safe passage between the perils of a large republic and the dangers of a small one. In large republics, Madison expounded that "the [federal] representative[s] [are] too little acquainted with . . . local circumstances and lesser interests." THE FEDERALIST No. 10, at 50 (Madison). In small republics, on the other hand, representatives may become "unduly attached to these [local interests], and too little fit to comprehend and pursue great and national objects." *Id*. Madison concluded that the federal system created by the Framers "form[ed] a happy combination in this respect" and promoted wise legislation at both the national and local level; "the great and aggregate interests being referred to the

national, the local and particular[,] to the state legislatures." *Id*.

In order to preserve this system, most powers were reserved to the States, and only enumerated powers in the federal government:

> The powers delegated by the proposed Constitution to the Federal Government, are *few and defined*. Those which are to remain in the State Governments are *numerous and indefinite*. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The *powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State*.

THE FEDERALIST No. 45, at 260-61 (Madison) (all emphasis added).

Thus, Madison explained that the State governments are an essential part of the federal system created by the Constitution:

> The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his

> appointment, and will, perhaps, in most cases, of themselves determine it.

THE FEDERALIST No. 45, at 259 (Madison).

In this federal system, the States may regulate what concerns the liberties of the people. Regulation of the integrity of electoral systems, as demonstrated below, is essential to ensuring the liberties of the people and is thus a compelling interest of every State. As a result, the Constitution grants broad authority to the States to regulate elections, and limits Congress's ability to regulate elections. Congress can only regulate elections under extraordinary circumstances. As a result, the principles of federalism require the federal government to make its intent to limit the ability of the State to regulate elections manifestly clear.

Today, the federal government, with its army of administrative agencies and vast financial resources, continues to push the limits of its Constitutional authority. Given these realities, State governments provide an increasingly important institutional check on potential abuses of federal power:

> [O]ur federal system provides a salutary check on governmental power. . . . [O]ur ancestors "were suspicious of every form of all-powerful central authority. *To curb this evil, they both allocated governmental power between state and national authorities*, and divided the national power among three branches of government. Unless we zealously protect these distinctions, *we risk upsetting*

> *the balance of power that buttresses our basic liberties*. In analyzing this brake on governmental power . . . the *diffusion of power between federal and state authority takes on added significance as the size of the federal bureaucracy continues to grow*."

F.E.R.C. v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting in part) (internal quotations omitted) (all emphasis added). Accordingly, whenever there is a conflict between State and federal law, the principles of federalism should be applied to preserve the delicate balance between the two sovereign interests, which preserves the liberty of the people. THE FEDERALIST No. 51, at 291 (Madison).

B. The Constitution Grants The States Broad Authority To Regulate Federal Elections And Authorizes Congress To Regulate Federal Elections Only In Limited Circumstances.

Two sections of the Constitution relate to Congress's authority to regulate federal elections: the Congressional Elections Clause and Article II, Section 1, Clause 4 of the Constitution. Three clauses relate to the power of the States to regulate federal elections: Article I, Section 2, Clause 1; Clause 1 of the Seventeenth Amendment; and Article II, Section 1, Clause 2 (collectively "Voter Qualification Clauses"). All five of these sections reflect Congress's limited authority to regulate federal elections. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995)

("Hamilton expressly distinguished the broad power to set qualifications from the limited authority under the Elections Clause."). As a result, the Ninth Circuit erred when it determined that courts should apply a preemption standard more deferential to Congress when Congress seeks to regulate federal elections. *See Gonzalez*, 677 F.3d at 393-94 (holding that Congress has a plenary authority to supplant State election regulations and that State regulations are preempted if "the two statutes do not operate harmoniously in a single procedural scheme").

The Congressional Elections Clause authorizes Congress to regulate the elections of its own members, but only in extraordinary circumstances. U.S. Const., Art. I, § 4, cl. 1; *see* THE FEDERALIST No. 59, at 330-31 (Hamilton) (emphasis added). The Congressional Elections Clause provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const., Art. I, § 4, cl. 1. Hamilton described the Congressional Elections Clause as "that provision of the Constitution which authorizes the national legislature to regulate, *in the last resort*, the elections of its own members." THE FEDERALIST No. 59, at 329 (Hamilton) (emphasis added).

The Ninth Circuit failed to consider the very limited purpose and scope of the Congressional Elections Clause, *i.e.*, leaving to the States the regulation of

congressional elections and reserving to the federal government only such power as might be necessary to protect its existence from abusive election regulations. U.S. Const., Art. I, § 4, cl. 1. Indeed, the "[Constitutional Convention] submitted the regulation of elections for the Federal Government in the first instance to the *local administrations*; which in ordinary cases, and when no improper views prevail, may be *both more convenient and more satisfactory*[.]" THE FEDERALIST No. 59, at 330-31 (Hamilton) (emphasis added).

But the federal government also "*reserved* . . . a right to interpose, whenever *extraordinary circumstances* might render that interposition necessary to its own safety." *Id*. at 331 (emphasis added). Thus, the power to regulate congressional elections remained with the States, with only a residual power granted to the federal government for extraordinary circumstances. States were not entrusted with plenary control over congressional elections only because "every government ought to contain in itself the means of its own preservation." *Id*. at 330.

The fear was that "state Legislatures, by forbearing the appointment of Senators, may destroy the national Government." *Id*. at 332. Consequently, as a last resort in extraordinary circumstances, the Congressional Elections Clause allows the federal government to invade the States' inherent authority over elections in order to alter or amend State election laws that threaten the federal government's very existence. *Millsaps v. Thompson*, 259 F.3d 535, 539

(6th Cir. 2001) (citing *U.S. Term Limits,* 514 U.S. at 808-09 ("[T]he Framers sought to curb the potential for abuses by the States and to give the nascent national government the power to preserve itself.")). That is, without a reserved federal override, "the Framers feared that the existence of the federal government would depend upon the willingness of the States to hold federal elections." *Id*.

As demonstrated above, the original intent of the Framers was that the Congressional Elections Clause preserve the States' sovereignty to regulate elections. Congress would intrude on that sovereignty only minimally, and only then as a last resort in extraordinary circumstances. Thus, the Framers drafted the Congressional Elections Clause with an eye to maintaining the delicate balance between State and federal sovereignty. THE FEDERALIST No. 59 (Hamilton).

The limited power of the federal government to regulate elections is reflected in other parts of the Constitution, as well. *See* U.S. Const. Art. II, § 1, cl. 2, 4; Art. I, § 2, cl. 1; and U.S. Const. Amend. XVII, cl. 1. In order to fully understand how much authority Congress has to regulate elections, one must look to the Article II, Section 1, Clause 4 and the Voter Qualifications Clauses of the Constitution. Article II, Section 1, Clause 4 of the Constitution provides that Congress may "determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." As with the Congressional Elections Clause, Article II, Section 1, Clause 4

limits the power of Congress to regulate elections, and instead gives most of the control to the States.

Importantly, this provision does not grant Congress the power to regulate the "manner" of choosing presidential electors, as it does with congressional elections. As a result, Congress's power to regulate presidential elections is less than its power to regulate congressional elections. The manner of choosing presidential electors is left entirely to the States, and a State can choose not to grant the right to vote for presidential electors to its citizens. *See Bush v. Gore,* 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."). As this Court stated in *McPherson v. Blacker*, 146 U.S. 1, 35 (1892):

> In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States; but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that

> congressional and federal influence might be excluded.

See also Igartua de la Rosa v. United States, 113 F. Supp. 2d 228, 239 (D. P.R. 2000), *rev'd on other grounds,* 229 F.3d 80 (1st Cir. 2000) (Noting that "Congress' power over Presidential elections is limited . . . the citizenry of the United States gave very little power to the federal government in dictating the mechanism by which Presidential elections may be held.").

Finally, the Voter Qualifications Clauses reinforce the broad authority of the States to regulate federal elections. Article I, Section 2, Clause 1 and Clause 1 of the Seventeenth Amendment provide that the voters for Representatives and Senators "in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." U.S. Const. Art. I, § 2, cl. 1; U.S. Const. Amend. XVII, cl. 1. Article II, Section 1, Clause 2 provides that "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 in the Congress." These two provisions expressly give the States the power to set the qualifications of voters for congressional elections because States have the exclusive authority over setting the qualifications of voters for State elections. *See* THE FEDERALIST No. 60, at 339 (Hamilton) (Stating that Congress's authority is "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."). As a result, "the States, under Article 1, Section 2 of the Constitution and the Seventeenth Amendment, are free to establish voting qualifications," if those qualifications "do not transgress the United States Constitution." *United States v. Louisiana*, 225 F. Supp. 353, 358 (E.D. La. 1963), *aff'd,* 380 U.S. 145 (1965).[3]

Article II, Section 1 also allows States to establish Constitutional voting qualifications for presidential elections because the States decide the manner of choosing presidential electors. *See McPherson v. Blacker*, 146 U.S. at 35. Requiring potential voters to prove U.S. citizenship while registering to vote is a constitutional voting qualification that Arizona is

[3] Proposition 200 did not add an additional requirement for voting in federal elections that does not also apply to voting in state elections. *See* A.R.S. § 16-166(F). Thus, because Arizona's proof of citizen requirements apply equally to both kinds of elections, it does not violate either Article I, Section 2, Clause 1 or the Seventeenth Amendment. *Compare with Forssenius v. Harman*, 235 F. Supp. 66, 70 (E.D. Va. 1964), *aff'd*, 380 U.S. 528 (1965) (Three-judge panel of the district court holding that a state statute requiring filing of a certificate of continuing residence six months before voting in a federal general election was unconstitutional because "[t]he extra obligation offends the Federal Constitution by tasking the voter in an election for President, Vice President and Congress beyond what is asked of the elector in the choice of members of the House of Delegates." (citing Art. I, § 2 and U.S. Const. Amend. XVII).

empowered to establish. As a result, Arizona was acting within its broad authority to regulate elections when it passed Proposition 200.

The common principle among the sections of the Constitution relating to the regulation of elections is that the Federal Government may only regulate federal elections in extraordinary circumstances. This Court has recognized that principle, and has held that the power to regulate federal elections comes from a need for institutional protection. *See Burroughs v. United States*, 290 U.S. 534 (1934). In *Burroughs*, two defendants charged with violations of the Federal Corrupt Practices Act of February 28, 1925 challenged the Act as unconstitutional under Article II, Section 1 of the Constitution. This Court ruled the statute constitutional based on the "power of self-protection," that Congress possesses, which is "essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption." *Burroughs*, 290 U.S. at 545. This is consistent with Hamilton's view that it is sometimes necessary for Congress to regulate federal elections, but only when governmental institutions are threatened. *See* THE FEDERALIST No. 59 (Hamilton) (emphasis added); *see also Buckley v. Valeo*, 424 U.S. 1, 236 (Burger, C.J., dissenting) (noting that *Burroughs* upheld election regulations intended to eliminate "the appearance and reality of corrupting influences" because they constitute "[s]erious dangers to the very processes of government.").

The Constitution grants broad authority to the States to regulate elections, and allows Congress to intervene only when necessary to preserve the federal government. The Ninth Circuit took the opposite stance, however, and held that "the states' authority to regulate federal elections extends only so far as Congress declines to intervene." *Gonzalez*, 677 F.3d at 410. As demonstrated above, the Ninth Circuit's decision is not supported by the Constitution nor this Court's precedent and should be reversed.

C. The Ninth Circuit's New Test To Analyze Preemption Under The Congressional Elections Clause Usurps The States' Role In Regulating Elections.

The Ninth Circuit failed to recognize the federalism principles inherent in the Congressional Elections Clause; Article II, Section 1, Clause 2; and the Voters Qualifications Clauses, and the limited purpose and scope of those provisions. As a result, the Ninth Circuit arbitrarily created its own new preemption test that accords substantial deference to the federal government and rides roughshod over the sovereign interests of the States, in derogation of principles of federalism. The Ninth Circuit's so-called "harmonious operation" test for Elections Clause preemption asks:

> If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and

> viewing the federal act as if it were a subsequent enactment by the same legislature. If the two statutes do not *operate harmoniously in a single procedural scheme* for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

Gonzalez, 677 F.3d at 394 (internal citations omitted) (emphasis added).

As demonstrated above, however, the Constitution's elections clauses reinforce the principles of federalism and limit the authority of Congress to regulate federal elections. The Ninth Circuit should not have created a new preemption test that was deferential to the federal government just because this case involves the regulations of elections. In fact, the Constitution gives authority to regulate elections to the States, and Congress can only step in when there are "[s]erious dangers to the very processes of government." *Buckley*, 424 U.S. at 236 (Burger, C.J., dissenting); *see also* THE FEDERALIST No. 59, at 329-31 (Hamilton). The Ninth Circuit's "harmonious operation" test goes in the exact opposite direction that the Constitution requires.

The Ninth Circuit cited to several of this Court's previous cases to support its conclusion that "states are obligated to conform to and carry out whatever [election] procedures Congress requires." *Gonzalez*, 677 F.3d at 391. These cases, however, do not stand for that proposition. Instead, these cases reflect the limited authority the Constitution grants to Congress to regulate elections.

The Ninth Circuit cited to *Ex parte Siebold*, 100 U.S. 371 (1879). In *Siebold*, the plaintiffs were found guilty of violating federal statutes that made it an offense to interfere with election supervisors. *Id.* at 377-79. This Court upheld the statutes and stated that "[t]he due and fair election of these representatives is of vital importance to the United States." *Id.* at 388. The statutes, this Court explained:

> [R]elate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, *may be necessary to the stability of our frame of government.*

Ex parte Siebold, 100 U.S. at 382 (emphasis added). This Court recognized that Congress properly exercised its authority to regulate elections because the statutes were necessary to protect the federal government. This Court also recognized the importance of the State governments to the federal system, and stated that "[t]he true interest of the people of this country requires that both the national and State governments should be allowed . . . to exercise all the

powers which respectively belong to them according to a fair and practical construction of the Constitution." *Id.* at 394.

The Ninth Circuit also selectively quoted from *Colegrove v. Green*, 328 U.S. 549, 554 (1946), for the proposition that "power over federal election procedures is ultimately committed to the exclusive control of Congress." *Gonzalez*, 677 F.3d at 391 (internal quotation omitted). Contrary to the Ninth Circuit's belief, this Court, in *Colegrove*, did not state that Congress had the exclusive control over federal elections. Instead, this Court simply stated, in dictum, that "the Constitution has conferred upon Congress exclusive authority *to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility.*" *Colegrove*, 328 U.S. at 554 (emphasis added). Consistent with the framers intent, this Court once again recognized that the Congressional Elections Clause gives Congress the authority to regulate elections only when necessary to protect itself. *Id.* This Court was not presented with an actual statute, however, and, thus, did not have to decide if Congress properly exercised its power under the Congressional Elections Clause. The issue presented in the case was whether it was appropriate for the judiciary to hear a case regarding the alleged unfairness of Illinois's congressional districts. This Court upheld the district court's dismissal of the

complaint because the issue presented was a political question.[4] *Colegrove*, 328 U.S. at 552.

The third case the Ninth Circuit relied on is *Foster v. Love,* 522 U.S. 67 (1997). At issue in *Foster* was the conflict between Louisiana's "open primary" statute, which allowed for Senators and Representatives to be determined before federal election day, and a Congressional statute setting the date for the biennial election for federal office. *Id.* at 38-69. This Court recognized that:

> Congress was concerned both with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of federal officers in Presidential election years.

Foster, 522 U.S. at 73. Because Congress was concerned that an individual state could disrupt the federal system, and unduly influence the election of its members, this Court recognized that Congress properly exercised its power authorized by the Congressional Elections Clause.[5]

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[4] Furthermore, this Court only discussed Congressional regulation of elections to the House of Representatives, and did not discuss Congressional regulation of other federal elections.

[5] This Court recognized that Congress passed three different laws setting the date for the biennial federal election because there are three different clauses in the Constitution

(Continued on following page)

These three cases reinforce the principle that Congress has only limited authority over regulating elections. In *Colegrove*, the Court stated that Congress was in charge of ensuring that its members were elected consistent with the Constitution. In *Siebold*, and *Foster*, the Court upheld statutes that were passed to ensure the preservation and stability of the federal government. All three situations represent extraordinary circumstances where Congress legislated (or could legislate) for the limited purpose of ensuring its own preservation. Contrary to the Ninth Circuit's holding, this Court's precedent reinforces Congress's limited role in regulating federal elections. Therefore, the Ninth Circuit erred when it created its "harmonious operation" test that usurped the States' role in regulating elections.[6]

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governing congressional regulation of elections. *Foster*, 522 U.S. at 69-70. The three statutes were: 2 U.S.C. § 7 (setting the first Tuesday after the first Monday of November as the date to choose Representatives), 2 U.S.C. § 1 (setting the same rule for electing Senators under the Seventeenth Amendment) and 3 U.S.C. § 1 (doing the same for selecting Presidential electors). *Id*.

[6] Petitioners do not directly challenge the constitutionality of the NVRA under Congress's limited power to regulate elections. However, as Petitioners correctly point out, this issue will need to be addressed if this Court were to rule that Proposition 200 is preempted by the NVRA. State Petitioners' Br. at 46-56.

II. PROPOSITION 200 IS NOT PREEMPTED BY THE NVRA.

A When Congress Properly Exercises Its Limited Authority To Regulate Elections, A State Law Is Only Preempted When It Irreconcilably Conflicts With The Federal Legislation.

The Ninth Circuit misconstrued this Court's previous decisions to create a new self-styled "harmonious operation" test that is too deferential to Congress. As demonstrated above, the Constitution limits when Congress may regulate elections. When Congress does properly exercise its limited power to regulate elections, this Court has held that the exercise of that power must conflict with State law, and that both laws cannot be executed at the same time, for preemption to occur. For example, in *Siebold*, this Court held that "[w]hen [Congress] exercise[s] [its power under the Congressional Elections Clause], the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them." 100 U.S. at 384 (emphasis added). That is, Congress may pre-empt State laws, but only "so far as the two are *inconsistent, and no farther*." *Id*. at 386 (emphasis added). *Siebold* cautioned that when Congress exercises its Congressional Elections Clause power, "we are bound to *presume that 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*. . . ." *Id*. at 393 (all emphasis added). *Siebold* recognized and

applied principles of federalism and preserved the delicate balance of power between the States and the federal government, precisely what the Ninth Circuit specifically rejected.

Likewise, in *Foster*, this Court recognized that Congress's authority to regulate the time, place, and manner of federal elections is "paramount to those made by the State legislature." 522 U.S. at 69. But this Court then ruled that State laws "cease[ ] to be operative" only "if [the federal law] *conflict[s]* [with State law]," and only "*so far as the conflict extends*." *Id*. (emphasis added). Thus, *Foster*, like *Siebold*, applied principles of federalism to preserve the delicate balance between State and federal power.

Moreover, in *Foster*, this Court very liberally construed "election," a key term in that case, in order to avoid a conflict. This Court refused to "pars[e] the term 'election' . . . down to the definitional bone." *Id*. at 72. Instead, this Court held that "election" meant the "combined actions of voters and officials meant to make a final selection of an officeholder," so long as, "if an election takes place, it may not be consummated prior to federal election day." *Id*. at 71-72. Unlike the approach of the Ninth Circuit, this Court's deliberate effort to construe a statute to avoid finding a conflict between State and federal law, if possible, acknowledges the important role of federalism in the interpretation of the Elections Clause.

This Court's approach in *Siebold* and *Foster* is the same as the approach taken in preemption cases

not involving the regulation of elections. Under the Supremacy Clause, federal law may be held to pre-empt State law where any of the three forms of pre-emption doctrine may be properly applied: express preemption, field preemption, and implied conflict preemption. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985).

When acting within constitutional limits, Congress is empowered to pre-empt State law by so stating in express terms. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). In the absence of express pre-emptive language, Congress's intent to pre-empt all State law in a particular area may be inferred. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). This Court has recognized two types of implied preemption:

> [F]ield pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id. at 98 (internal quotations and citations omitted). As demonstrated above, this Court applied the implied conflict preemption test in *Siebold* and *Foster. See Gonzalez*, 677 F.3d at 451-52 (Rawlinson, J., dissenting) (citing *Siebold* for the proposition that "The

laws of the state are preempted if, and only if, both cannot be executed at the same time," and noting that *Foster* "addressed an actual conflict between a state law and a federal law.").

Instead of following the lead of this Court's past decisions – by looking for a direct conflict between the NVRA and Proposition 200, and determining the extent of any such conflict – the Ninth Circuit created its own "harmonious operation" test in which such a conflict between State and federal law plays no part. Astonishingly, the Ninth Circuit opined that it had reached its novel test by "reading *Siebold* and *Foster* together." *Gonzalez*, 677 F.3d at 394. The Ninth Circuit, in fact, ignored *Siebold*, *Foster*, and this Court's other preemption jurisprudence and proceeded without considering Congressional intent or whether a conflict existed between the NVRA and Proposition 200.

Other circuits have correctly recognized that this Court has never applied a different preemption standard to election legislation and non-election legislation. For example, in *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985), the Seventh Circuit was confronted with whether the "Contested Elections Act," a federal ballot-counting provision, preempted State ballot-counting laws under the Elections Clause. Utilizing well-established Supremacy Clause analysis, the Seventh Circuit first ruled that none of the laws in question "so pervades the field that all competing principles of state law must yield." *Id*. at 1085. The Seventh Circuit then ruled that "a federal law

preempts state law only when the two inevitably conflict or the law contains an explicit preemption clause," and, therefore, held that "the Contested Elections Act neither conflicts with nor expressly preempts state rules." *Id*. (citing to the Supremacy Clause preemption cases of *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977)). Thus, *McIntyre* properly applied the principles of federalism, as set out in Supremacy Clause preemption jurisprudence.

In *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001), the Sixth Circuit was asked to determine whether Tennessee's early voting system conflicted with federal statutes establishing certain days as federal election days. The Sixth Circuit noted that "under the Elections Clause, 'the states are given[ ] and in fact exercise wide discretion in the formulation of a system for choice by the people of representatives in Congress.'" *Id*. at 538 (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941) (alteration in original). Indeed, these "comprehensive words embrace authority [of the States] to provide a complete code for congressional elections." *Id*. at 539. This broad language empowers States "to enact numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce

the fundamental right involved," which include "prevention of fraud and corrupt practices."[7] *Id*.

The Sixth Circuit then analyzed the Elections Clause preemption allegation by utilizing Supremacy Clause precedent. First, the Sixth Circuit ruled that "'[whether federal law preempts state law turns principally on congressional intent.'" *Id*. at 538 (quoting *Northwest Cen. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989)). In doing so, the Sixth Circuit started 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.'"[8] *Id*. (quoting *Rice*, 331 U.S. at 230).

The Sixth Circuit went on to note that a federal law preempts State law "when the two *actually conflict*" which occurs when "'compliance with both federal and state regulations is a physical impossibility,'" or

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[7] This ruling follows the original intent of the Framers that the Elections Clause conferred on the federal government only a limited residuary power to be utilized only as a last resort in extraordinary circumstances. *See* THE FEDERALIST No. 59 (Hamilton). It also reinforces the concept that control of elections, particularly the prevention of fraud and corrupt practices, has always been a power retained by the States to protect the liberty of their people and the fundamental right to vote in a representative democracy and to have one's vote count without illegal dilution. *See* THE FEDERALIST No. 45 (Madison).

[8] This once again reinforces the proposition that maintaining integrity by rooting out fraud and corruption in elections is a traditional power of the States, whether those elections are local, State, or federal.

when a State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting for the first proposition *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and for the second, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). In holding that there was no Congressional Elections Clause preemption, the Sixth Circuit observed that "all courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes." *Id*. at 545. Thus, *Millsaps* properly upholds and applies principles of federalism.

The Fifth Circuit, without mentioning the Supremacy Clause, utilized much of the same analysis as *McIntyre* and *Millsaps* in analyzing Elections Clause preemption: "[A] state's discretion and flexibility in establishing the time, place and manner of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the subject." *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 775 (5th Cir. 2000) (emphasis added).

To similar effect is *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). There, the United States contended that Missouri failed to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of [death or change in residency]," pursuant to the NVRA. *Id*. at 846. Missouri

defended, arguing that "although Congress has authority to disrupt the federal/state balance of authority over elections, in order to do so, Congress "must make its intention to do so unmistakably clear in the language of the statute." *Id*. at 850 n.2 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460-61 (1991)). The United States responded by offering the argument accepted by the *Gonzalez* court, that "the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states" and is, therefore, not subject to principles of federalism. *Id*. The Eighth Circuit, however, rejected the United States' argument:

> We . . . recognize regulation of federal elections could not have been technically reserved to the states by the Tenth Amendment, when such federal elections did not exist before the Constitution was established. . . . [A]lthough the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states . . . which existed before the Constitution was established, the text of the Elections Clause may arguably describe the *usual constitutional balance between the States and the Federal Government*. . . . If Congress intends to alter [that balance], it must make its intention to do so unmistakably clear in the language of the statute.

Id. (internal citations and quotations omitted) (emphasis added).

The Eighth Circuit did not ultimately decide this issue because it determined that the plain language of the statute did require Missouri to conduct a program to purge voters who had died or changed addresses: "[W]e need not decide whether the plain statement rule applies in the context of the Elections Clause [because] the NVRA utilizes the mandatory 'shall' followed by an active verb, requiring the states to 'conduct a general program.'" *Id*. Thus, there is "no ambiguity in Congress's intent[.]" *Id*. *Missouri* does, however, taken together with *Siebold*, *Foster*, *McIntyre*, *Millsaps*, and *Bomer*, illustrate that the Ninth Circuit stands alone in its reasoning and its abandonment of fundamental principles of federalism.

As demonstrated above, this Court, and several circuits, have applied the same preemption test to all federal legislation, and have never been more deferential to Congress just because it passed legislation regulating elections. It is clear from this Court's precedent, and how that precedent has been applied in every circuit that has addressed the issue other than the Ninth Circuit, that a State election regulation must irreconcilably conflict with federal law in order to be preempted. Because the Constitution restricts the power of Congress to regulate elections this Court should continue to recognize that Congress may only regulate elections in extraordinary circumstances. Thus, this Court should reverse the Ninth Circuit's decision in this case and make clear that the same preemption doctrine to all congressional legislation.

B. Proposition 200 Does Not Conflict With The NVRA.

There are "two cornerstones of . . . pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("ways in which federal law may pre-empt state law . . . turn on congressional intent"). The second cornerstone of pre-emption analysis is that "in *all* preemption cases" there is a presumption "that the *historic police powers* of the States were not to be superseded by [federal law] unless [this result] was the *clear and manifest purpose* of Congress." *Wyeth,* 555 U.S. at 565 (quoting *Lohr,* 518 U.S. at 485) (quoting *Rice*, 331 U.S. at 230 (emphasis added)).

Importantly, there is a "presumption against pre-emption [that] is *rooted in the concept of federalism*." *Geier v. American Honda Motor Comp., Inc.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (emphasis added). This presumption serves to place preemption in the hands of Congress rather than the Judiciary:

> The signal virtues of this presumption are its placement of power of preemption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance . . . and its

> requirement that Congress speak clearly when exercising that power.

Id. (internal quotations omitted).

The NVRA provides that "[i]n addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(2). The NVRA does not prohibit requiring proof of citizenship documentation to be submitted with the mail voter registration form. The NVRA only requires that the mail voter registration form

> may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

Importantly, the NVRA only expressly prohibits "notarization or other formal authentication" on registration forms. 42 U.S.C. § 1973gg-7(b)(3). Therefore, the NVRA allows some States to require "such identifying information . . . as is necessary to assess . . . the eligibility of the applicant. . . ." 42 U.S.C. § 1973gg-7(b)(1); *see Kucana v. Holder,* 558 U.S. 233, 130 S.Ct. 827, 838 (2010) ("Where Congress includes particular

language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and citation omitted)); *see also Gonzalez,* 677 F.3d at 447 (Rawlinson, J., dissenting). Proposition 200 requires what Arizona determines was necessary identifying information to assess the eligibility of those attempting to register to vote. This requirement does not conflict with the requirements of the NVRA.

Furthermore, the Ninth Circuit also ignored the text and purpose of the NVRA, coupled with the complementary Help America Vote Act ("HAVA"), 43 U.S.C. §§ 15301-15545, both of which reinforce the sovereignty of the States to regulate the integrity of the electoral process. The Ninth Circuit held that the NVRA's goal was to "streamline the registration process . . . " and "make it easier to register to vote." *Gonzalez*, 677 F.3d at 400-01 (internal citations and quotations omitted). But the Ninth Circuit failed to mention the equally important NVRA goal of maintaining the integrity and accuracy of the voting registration system. Congress's stated purposes in enacting the NVRA were fourfold:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

> (3) to *protect the integrity of the electoral process*; and
>
> (4) to *ensure that accurate and current voter registration rolls* are maintained.

42 U.S.C. § 1973gg(b) (emphasis added).

HAVA complements this NVRA provision. HAVA requires that States keep computerized lists of registrants, that those lists be "*maintained on a regular basis*," specifies how the maintenance shall be performed, and mandates that the States' election systems "shall include provisions to ensure that voter registration records in the State are *accurate and updated regularly*," including "[a] system of file maintenance that makes a *reasonable effort to remove registrants who are ineligible* to vote from the official list of eligible voters." 42 U.S.C. § 15483(a)(2), (a)(4) (emphasis added).

The NVRA and HAVA together make it quite clear that maintaining an accurate, up-to-date list of voters by regularly purging those who have changed addresses or are ineligible to vote is critical. Thus, Arizona's efforts to register only eligible voters and to purge those who are not is consistent with and does not conflict with the same goal enunciated in the NVRA and HAVA. But the Ninth Circuit, in the same way that it ignored fundamental principles of federalism, also failed to consider or address these important features of the NVRA and HAVA.

Finally, the Ninth Circuit gave no credence to Arizona's compelling interest in protecting the integrity of voting for legislators in State, local, and Federal elections. As this Court has often observed:

> "A State *indisputably has a compelling interest in preserving the integrity of its election process*." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). *Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy*. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (all emphasis added).

Arizona is no less concerned with national elections for legislators to represent the interests of Arizona and its people than with State and local elections. Indeed, given the vast expansion of federal power into every aspect of life, Arizona must be especially careful in assuring that those elected to the Senate and the House are elected fairly, and without fraud, by voters who are eligible to vote.

As demonstrated above, Proposition 200 is not preempted by the NVRA. Arizona's proof of citizenship requirements do not conflict with the requirements set forth in the NVRA. In fact, the NVRA allows States to require identifying information that will assist in determining the eligibility of the applicant. Therefore, the Ninth Circuit incorrectly determined that Proposition 200's proof of citizenship requirements were preempted by the NVRA.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's decision to correct the grave errors made by that court and to reemphasize the importance of federalism to individual liberty.

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Respectfully submitted,

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