No. 12-71

IN THE

Supreme Court of the United States

THE STATE OF ARIZONA, *et al.*,
Petitioner,
v.
THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals For the Ninth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL EDUCATION ASSOCIATION, ET AL., IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association (NEA); the Service Employees International Union (SEIU); and the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

NEA is a nationwide employee organization with more than three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA's governing policies "support[] voting . . . provisions that are accessible, simplified, accurate, reliable, and verifiable for all elections," and "oppose[] all actions that encourage or result in voter disenfranchisement." NEA Resolution H-3. In particular, NEA supports "uniform [voter] registration requirements without . . . restrictive identification requirements." *Id.*

SEIU is a labor organization which represents over two million men and women working in health care, property services, and public services throughout the United States. As reflected in its Mission Statement, SEIU is committed to building a civil society in which the voices of workers and their families are heard at every level of government in support of economic opportunity and social justice.

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[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia and Puerto Rico. AFSCME advocates for fairness in the workplace, excellence in public services, and prosperity and opportunity for all working families. As a manner of achieving its objectives, AFSCME's membership is committed, "[b]oth as union members and as citizens," to "employ[ing] all available legislative and political action," including the exercise of the right to vote."

These organizations help working families throughout the country, including in Arizona, participate in the political process. A key element in that effort is support of nationwide activities to register eligible voters through organized voter registration programs and to remove barriers to voters casting their ballots in federal, and state, elections. This voter registration work has been facilitated by the procedures set forth in the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq*., and will be directly harmed by efforts, such as those at issue in this case, to undermine the effectiveness of those procedures.

INTRODUCTION AND SUMMARY

Congress passed the NVRA in an effort to establish certain basic and uniformly offered voter registration procedures to be used in federal elections, in response to what it perceived as the national problem of low voter participation, thereby easing voter registration processes while also ensuring the integrity of federal

electoral processes. To accommodate these competing objectives, Congress struck a precise balance, reflected in the creation of a federal form that the states would be required to accept and use to register voters in federal elections. The statute also allowed states to develop equivalent state forms, meeting the same federal criteria, that could be used in addition to the federal form in fulfilling federal procedural obligations. Arizona's Proposition 200 (Prop. 200) instructs its election officials to reject this federal form, as well as any state form, unless it is accompanied by additional documentation of citizenship—a requirement that Congress clearly rejected in enacting the NVRA. It is therefore plain that Prop. 200 conflicts with the NVRA's fundamental objectives, disrupts the careful balance Congress intended, and is therefore preempted.

The particular balance that Congress struck between streamlining the voter registration process and protecting against fraud is clear from the text and structure of the NVRA. With each provision of the law, Congress considered and weighed the risks of fraud and burdens on registration that such a provision would entail. In particular, when mandating the contents of forms for mail and in-person registration, Congress determined that potential voters should be required to provide *only the information that is necessary* to the registration process, and that, for federal registration purposes, an attestation by the applicant under pains of perjury is all that is required to establish that a voter in fact meets the substantive eligibility requirements set out in the form.

The text and structure of the NVRA are clear

enough to demonstrate Congress's intent to preempt laws such as Prop. 200 that establish a balance of relevant factors that differs from that which Congress intended. But the most authoritative legislative history places that conclusion beyond all doubt. Here, a provision that would have expressly allowed states to adopt laws such as Prop. 200 was considered and explicitly rejected *because such laws were viewed as inconsistent with the NVRA's intended objectives.*

Finally, the actions of the administrative agencies charged with carrying out the NVRA's requirements fully confirm Congress's intent as to precisely the issue here, once again expressly rejecting state efforts to impose these added proof requirements as inconsistent with the federal plan.

While this case has been presented as involving federal actions that arguably intrude on state constitutional prerogatives, that is simply not the case. There is not even an arguable conflict between the preemptive scope of the NVRA and the constitutional right of states to fix the substantive qualifications for electors in federal legislative elections. The NVRA's requirements that states accept properly completed federal registration forms (and state forms that satisfy the NVRA's criteria) is a permissible procedural regulation of the manner of voter registration in federal elections, and thus at the core of Congress's express power to establish federal election procedures. The NVRA simply does not alter any substantive qualification standards for electors set by the states.

ARGUMENT

I. PROP. 200'S DOCUMENTATION-OF-CITIZENSHIP REQUIREMENT IS PREEMPTED BECAUSE IT CONFLICTS WITH THE ACCOMODATION OF COMPETING INTERESTS THAT CONGRESS ESTABLISHED IN THE NVRA FOR THE REGULATION OF FEDERAL ELECTIONS

Resolving this case does not require the drawing of fine distinctions as to whether the standards for preemption under the Constitution's Elections Clause are more robust than those under the Supremacy Clause. Instead, Prop. 200's documentation-of-citizenship requirement as applied to registration in federal elections must fall under any standard of preemption because it interferes with the purposes and objectives of Congress clearly expressed in the NVRA.

It is evident from the NVRA's text, structure, and history—and confirmed by the actions of the agencies charged with administering the NVRA's requirements[2]—that Congress struck a balance of competing policies with regard to particular methods of voter registration for federal elections. That balance is, on the one hand, to enhance participation in federal elections by establishing streamlined procedures to increase the number of eligible citizens who regis-

[2] *See Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (recognizing that agencies possess a "unique understanding of the statutes they administer" and "an attendant ability to make informed determinations about how state requirements" may conflict with "the full purposes and objectives of Congress.") (citations and quotation marks omitted).

ter to vote while, on the other hand, to protect the integrity of the electoral process by imposing meaningful, but not burdensome, safeguards to confirm voters' eligibility.

Prop. 200 upsets this balance. It "'stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (emphasis added) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (State law is preempted when it is an "'obstacle' to the accomplishment" of "important . . . federal objectives.") (citation omitted). And, it is therefore preempted by Federal law.

A. The NVRA's Preemptive Scope is Evident from the Language and Structure of the Statute

In its consideration of what would become the NVRA, Congress recognized that a major cause of the low rate of participation in federal elections was the fact that only 61% of eligible voters were registered to vote, and that the low voting rate among immigrant, poor, and black citizens could be attributed, at least in part, to a "complicated maze of local laws and procedures" for registering to vote. H.R. Rep. No. 103-9, 103d Cong., 1st Sess., at 3 (1993); *See also* S. Rep. No. 103-6, 103d Cong., 1st Sess. at 2-3 (1993). The House Committee declared that it was the "unfinished business of registration reform" initiated by of the 1965 Voting Rights Act "to reduce these obstacles to voting *to the absolute minimum* while

maintaining the integrity of the electoral process." H.R. Rep. No. 103-9 at 3 (emphasis added).

When Congress enacted the NVRA, it found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a). To address that concern, Congress announced that its solution would be guided by the following goals:

> (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.

Id. § 1973gg(b).

Between these stated purposes, there is an inherent tension. With every procedural requirement placed on citizens to verify that they are legally eligible to vote, an obstacle is created that must be overcome even by those who are fully qualified, making it more difficult to register to vote. Inversely, a decrease in verification requirements may increase

the risk that an ineligible person could obtain a place on the registration rolls. Faced with this dynamic, Congress chose the fraud-prevention measures that in its judgment could best be integrated into the voter registration procedures it was creating while still permitting eligible citizens to exercise their right to vote in Federal elections without undue registration burdens. Put simply, Congress established the precise balance that it deemed appropriate for resolving this inherent tension while achieving its stated goals.

Congress also authorized an administrative agency to create a uniform national voter registration tool, the mail voter registration form at issue in this litigation, in consultation with the chief election officers of the states.[3] This form, adopted after a full rulemaking process,[4] embodies the balance stuck by Congress by requiring that the applicant attest "under penalty of perjury" that he or she meets the voter registration requirements, specifically including "citizenship," and that the form prominently notify the applicant of the serious consequences of falsely signing such attestation. Having so ensured the

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[3] As originally passed, the NVRA vested this authority in the Federal Elections Commission (FEC). *See* 42 U.S.C. § 1973gg–4(a)(1). The responsibility for promulgating implementing regulations and developing voter forms was later passed to the Election Assistance Commission (EAC) by the Help America Vote Act of 2002 (HAVA). 42 U.S.C. § 15532.

[4] *See* Advanced Notice of Proposed Rulemaking 58 Fed. Reg. 51,132 (Sept. 30, 1993); Notice of Proposed Rulemaking, 59 Fed. Reg. 11,211 (Mar. 10, 1994); Final Rules, 59 Fed. Reg. 32,311 (June 23, 1994).

reliability of applicant representations, the form requires the applicant to provide "only" the information that is "necessary" to the registration process.

Congress also understood that it was regulating against a background of varied state voter registration laws that applied to both state and federal elections within each state. Accordingly, in enacting a limited federal voter registration scheme, Congress did not upset all state prerogatives in this area. Instead it left states free to use their own voter registration methods in contexts apart from the federally required procedures. But Congress unambiguously required, in the additional procedures which it was mandating for the registration of voters in federal elections, that the states "accept and use" both the federal form and the state's equivalent form.[5]

In particular, the NVRA required states to furnish three specific methods of registration in addition to any methods the state already provides: (i) by application at the same time as applying for a driver's license; (ii) by mail application; and (iii) by application in person at designated voter registration agencies 42 U.S.C. § 1973gg-2(a)(1)-(3). Two of the methods rely on the state making "available" and "accepting and using" both the federal mail voter registration form and a state's own form "that meets all

[5] Of course, states choosing to develop their own mail-registration forms in compliance with the NVRA's requirements cannot do so to the exclusion of the federal form. A state may use its own NVRA-compliant forms only "[i]n addition to accepting and using" the federal form. 42 U.S.C. § 1973gg-4(a)(2).

of the criteria" of the NVRA.[6] *Id.* § 1973gg-4(a)(1)-(2), (b)

Arizona does not "accept" the federal form or any state form that would satisfy the NVRA's criteria; rather it "rejects" those forms in accordance with the unmistakable command of its election law. *See* Ariz. Rev. Stat. § 16-152(A)(23) ("[T]he Registrar shall reject the application if no evidence of citizenship is attached."). Simply put, Arizona has mandated a very different accommodation of the competing interests than that chosen by Congress, and Arizona has further commanded that its accommodation should control. A clearer case for federal preemption could not be made under any standard. Even a brief review of these required federal methods and the contexts in which they operate, reveals the starkness of the conflict between this state command and the federal plan.

When it was considering the NVRA, Congress recognized that twenty-seven states and the District of Columbia have some form of mail-in registration while

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[6] The third registration method the NVRA mandates—which is not directly involved in this case—is an application made in conjunction with obtaining or renewing a driver's license. 42 U.S.C. § 1973gg-2(a)(1). Congress imposed specific requirements on the states' use of forms for this purpose. To ensure that states did not make the process long and frustratingly redundant for the registrant, Congress mandated that the form "may not require any information that duplicates information required in the driver's license portion of the form." *Id.* § 1973gg-3(c)(2)(A). Congress also included protections against registration by non-citizens or otherwise ineligible individuals by requiring applicants to attest "under penalty of perjury" that they satisfied a federally mandated statement of the voting eligibility criteria of the particular state. *Id.* § 1973gg-3(c)(2)(C)(ii).

the other states required in-person registration, mostly at limited locations. *See* S. Rep. No. 103-6 at 12. In crafting a federal mail in registration form that must be used and accepted in every state, Congress struck a deliberate balance between ease-of-registration and preventing the registration of those ineligible to vote. To accomplish that balance, the NVRA places strict requirements on the two routes by which states can register voters by mail for participation in federal election.

First, the NVRA mandates that each state "shall accept and use" a federal mail-registration form prescribed by the EAC.[7] 42 U.S.C. § 1973gg-4(a)(1). In developing the federal form, the EAC was required to adhere to a strict set of statutory criteria that describe the contents and requirements of the form. *See id.* § 1973gg-7(a)(2), (b).

Second, "[i]n addition to accepting and using" the federal form, a state may develop and use its own mail-registration form. *Id.* § 1973gg-4(a)(2). The state's form, however, must meet the same statutory criteria required for the federal form developed by the EAC. *Id.* §§ 1973gg-4(a)(2), 1973gg-7(a)(2).

The NVRA'S criteria for both the federal form and any form developed by a state reflect a considered effort simultaneously to prevent the forms from being unduly burdensome while providing reliable safeguards against fraudulent registration. Congress expressly limited the information that could be required by these forms to "*only* such identifying . . . and other information . . . as is *necessary* to enable the appropriate State election official to assess the eligibil-

[7] *See* note 3, *supra*.

ity of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1) (emphases added).[8]

Congress also included specific requirements for the verification of voter eligibility that embody its minimalist "only . . . as is necessary" proof of eligibility standard. In particular, the NVRA requires that mail-registration forms must include:

- a statement that "specifies each eligibility requirement (*including citizenship*)";
- a statement of the "penalties provided by law for submission of a false voter registration application";
- an "attestation that the applicant meets each such requirement"; and
- a requirement for the "signature of the applicant, under penalty of perjury."

Id. § 1973gg-7(b)(2)(A)-(C), (4)(i) (emphasis added); *id.* § 1973gg–6(a)(5)(A)-(B).

Congress's balanced approach is also apparent in the NVRA's in-person registration provisions. These provisions require states to designate as "voter registration agencies" all offices that provide public assistance, and all offices that provide state-funded programs and serv-

[8] This "only . . . as is necessary" standard is consistent with the policy of the bill that the initial House Report articulated: "to reduce . . . obstacles to voting *to the absolute minimum* while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9 at 3 (emphasis added). S*ee also id.* at 19 (discussing the same "only . . . as is necessary" language).

ices to persons with disabilities. *Id.* § 1973gg-5(a)(2). States are also given flexibility to choose additional public buildings and offices that would function as voter registration agencies. *Id.* § 1973gg-5(a)(3).

These voter registration agencies must supply each applicant for assistance or services with a written form notifying the applicant of his or her option to register to vote. *Id.* § 1973gg-5(a)(6)(B). In addition, the agency must furnish the applicant with either the federal mail-registration form or "the office's own form *if it is equivalent to the [federal] form.*" *Id.* § 1973gg-5(a)(6)(A)(ii) (emphasis added). Accordingly, the forms made available at voter registration agencies must embody the same balancing of competing interests that Congress struck in establishing the contours of federal and state mail-registration forms.

Congress's decision to mandate a sworn declaration upon penalty of perjury (to be made in the face of clear statements as to the penalties for false declarations) as the sole form of proof permitted or required to support a claim of citizenship is a paradigmatic example of the balance Congress struck in the statute. On the one hand, the affirmation upon penalty of perjury is a substantial method of assuring citizenship claims are valid—it is a form of proof accepted and used throughout the federal system to verify the most important claims, and carries with it serious penalties for false statements. On the other hand, a sworn declaration does not require the declarant who is making a truthful declaration to submit any additional materials, perform searches for documentary evidence, or otherwise take on additional burdens of verification or authentication.

The whole thrust of Congress's enactment is to provide for a simplified and non-burdensome system. The absence of any statutory requirement to submit additional documentation—or of any explicit allowance for a state to require the submission of additional documentation—can only be seen as a deliberate choice on the part of Congress.[9]

In every preemption case, "[t]he purpose of Congress is the ultimate touchstone" that guides this Court in determining a statute's preemptive effect. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (cita-

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[9] To call this balance an "honor system," as Arizona does here (Br. of Pet. Arizona at 43), is to ignore that the penalties for perjury can be severe indeed and that requiring declarations under such penalties is a legitimate, longstanding, and widely accepted method of ensuring the trustworthiness of evidentiary statements. *See* 28 U.S.C. § 1746; *see also* 18 U.S.C. § 1621 (providing for prosecution of perjury under federal law); Ariz. Rev. Stat. § 13-2702 *et seq.* (providing for criminal prosecution of perjury and related offenses under Arizona law).

Moreover, in addition to ensuring through the penalties of perjury that all mail-registration forms were truthfully completed, Congress allowed states an additional means of ensuring that voters are in fact eligible. Recognizing that the greater threat to electoral integrity was the fraudulent casting of a ballot, and that the history of some states may lead them to be particularly concerned by this threat, Congress empowered the states to require voters to vote in person if they were registering for the first time in a particular jurisdiction. 42 U.S.C. § 1973gg-4(c). For practical purposes, this requirement provides states with a major safeguard to ensure that they can prevent anyone from voting without personally appearing before a state official. Thus, the mail registration method balances these competing purposes to make registration easy and simultaneously take steps to prevent fraud.

tion and quotation marks omitted). Any determination of that intent must be "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). As this Court has explained:

> [T]he entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Id. (citation and quotation marks omitted). In light of the purpose, structure, and text of the NVRA, it is apparent that any proof of citizenship beyond the required attestation cannot be required, either as a predicate to accepting the federal form or as a requirement on any state form that must comply with the NVRA's requirements.[10]

When Congress enacts a detailed scheme that is plainly designed to accommodate and balance competing policy interests, state laws that alter the scheme and shift the balance in the name of strength-

[10] Congress made a small change to the requirements for mail-registration forms when it enacted HAVA such that mail registration forms must now also include a check-box stating, "Are you a citizen of the United States of America?" 42 U.S.C. § 15483(b)(4)(A)(i).

ening one policy goal while undermining another are plainly preempted. Here Congress has adopted "detailed provisions" which implement conflicting policy goals and demonstrate that "Congress's calibrated . . . policy is a deliberate effort to steer a middle path" between competing statutory goals. *Id.* at 377-78 (citation and quotation marks omitted). *See also Boggs v. Boggs*, 520 U.S. 833, 844 (1997) (concluding that "States are not free to change [the] structure and balance" of policy objective codified in federal law governing employee benefit plans); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (holding that a state may not "second-guess" how Congress's regulation of patents "strike[s] [a] balance in a particular circumstance"). In other words, where the "text, structure, and history" of the federal enactment reveal a "deliberate choice" by Congress to strike a "careful balance" of competing policy goals, a state may not seek to legislate a different balance—including one that "attempts to achieve one of the same goals as federal law" through a different method of enforcement. *Arizona v. United States*, 132 S. Ct. 2492, 2504-05 (2012). As this Court has recognized, a "'[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Id.* at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

The NVRA requires that the state *must* "ensure that [an] eligible applicant is registered to vote in an election" so long as he or she timely submits a "valid voter registration form" that complies with the requirements of the NVRA, whether by mail or through a voter registration agency.

42 U.S.C. § 1973gg-6(a)(1)(B)-(C). Neither method requires additional proof of citizenship. Nothing in the NVRA can be construed to permit Arizona to ignore these provisions and thereby frustrate the execution of the full purposes and objectives of Congress in enacting the NVRA. Prop. 200's documentation-of-citizenship requirement is therefore preempted.

B. Legislative History Confirms Congress's Intent as to the NVRA's Preemptive Scope

These conclusions regarding Congress's plan—and the incompatibility of additional documentation-of-citizenship requirements to that plan—are unmistakably demonstrated by the authoritative and directly relevant legislative history of this enactment. Congress not only adopted the NVRA with a clear understanding that it would preclude states from imposing documentation-of-citizenship requirements for specified forms of voter registration in federal elections, it explicitly considered and rejected a provision that would grant states precisely that latitude.

When the Senate considered the bill that would eventually become the NVRA, it passed an amendment to the House-passed bill to include a section entitled "Rule of Construction" that stated, "Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." H.R. 2, 103rd Cong. § 13 (as amended and passed by Senate, Mar. 17, 1993).

Immediately before the final passage of the NVRA, the Conference Committee of the House and Senate

met to reconcile the Senate version of the bill with the House version, which did not contain any provision analogous to the Senate's amendment. The Committee considered the inclusion of this provision, but it ultimately determined that the Senate's amendment upset the balance struck by the NVRA and undermined the purpose of the law:

> The conferees agree with the House bill and do not include this provision from the Senate amendment. *It is not necessary or consistent with the purposes of this Act.* Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well. . . . *These concerns lead the conferees to conclude that this section should be deleted.*

H.R. Conf. Rep. No. 103-66, 103d Cong., 1st Sess., at 23-24 (1993) (emphases added). This Joint Explanatory Statement of the Conference Committee was then distributed to members to inform them of "the effect which the amendments or propositions contained in such report will have upon the measure to which those amendments or propositions relate." Standing Rules of the Senate, 103rd Congress, Rule XXVIII, ¶ 6.

Despite the agreement of the Conference Committee, a number of House members who were in favor of the Senate Amendment sought to add it back in to the text of the final bill. Congressman Livingston introduced a motion to recommit the bill

with instructions that the Conference Committee reinstate the Senate amendment. This motion failed the house by a vote of 170-253, and the bill then passed both houses without the Senate amendment. *See* 139 Cong. Rec. 9231-32, 9636, 9640-41.

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation and quotation marks omitted). Congress's "rejection of the very language that would have achieved the result [Arizona] urges here weighs heavily against [Arizona's] interpretation." *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006).

While legislative history can sometimes be an unreliable guide to the meaning of a statute's disputed provisions, that is not the case here. As Chief Judge Kozinski noted in his concurrence in the Ninth Circuit's rehearing en banc: "the history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists." *Gonzalez v. Arizona*, 677 F.3d 383, 441 (2012) (concurring opinion). Further, these were the final actions prior to the enacting vote of both houses, and the members had the Conference Committee's report of these actions before them prior to voting. These actions relate to exactly the interpretive and textual question at hand, and they reflect the explicit and considered Congressional judgment that what Arizona seeks is incompatible with the federal scheme.

Moreover, unlike the history that was objected to in *Hamdan*, this history cannot be characterized as

contradicting the plain meaning of the statutory language. *See Hamdan* 548 U.S. at 665-68 (Scalia, J. dissenting joined by Thomas and Alito, JJ.). To the contrary, it powerfully reinforces the most natural reading of the statutory text and the evident legislative purpose derived from the words of the statute. The understanding of the law articulated by the Conference Committee therefore confirms the interpretation of the NVRA that follows naturally from its purposes, structure, and text.

C. Congress's Preemptive Intent is Further Confirmed by the Actions of the FEC and EAC Implementing Key NVRA Requirements

The proper understanding of the NVRA's preemptive scope is also confirmed by the actions of the FEC and EAC, the administrative agencies charged with interpreting the statutory requirements for federal and state mail-registration forms under 42 U.S.C. § 1973gg-7(a).[11] Following the NVRA's statutory instructions, the FEC developed the federal form to include only those items that "are necessary to assess the eligibility of the applicant or to administer voter registration or other parts of the election process." 59 Fed. Reg. 32,311, 32,313 (Jun. 23, 1994) (originally codified at 11 C.F.R. pt. 8, now codified at 11 C.F.R. pt. 9428). After consultation with state election officials and input from the public, the FEC rejected items that did not meet this "necessary threshold." *Id.* at 32,316. In particular, while the FEC noted there were several items considered for inclusion that could be useful

[11] *See* note 3, *supra*.

for assessing eligibility, such as "place of birth" or "information regarding naturalization," they noted that these were not "necessary" and could lead to "unequal scrutiny." *Id.* The FEC concluded that:

> The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words "For U.S. Citizens Only" will appear in prominent type on the front cover of the national mail voter registration form. For these reasons, the final rules do not include this additional requirement.

Id.

Since the EAC has taken over responsibility for the federal form after the passage of HAVA it has not amended these regulations, in effect adopting the FEC's understanding and implementation of the NVRA.[12] Moreover, when Arizona's Secretary of State asked the EAC to apply Prop. 200's documentation-of-citizenship requirement to the Federal Form, the EAC's Executive Director replied that Prop. 200 was "preempted by Federal law" and that Arizona "may not mandate additional registration procedures that condition the acceptance of the Federal Form." EAC Letter to Ariz. Sec'y of State dated March 6, 2006 at

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[12] The FEC and EAC entered into a joint rulemaking to transfer the NVRA regulations from the FEC to EAC. *See* 74 Fed. Reg. 37,520 (July 29, 2009).

3.[13] The EAC further explained that "[n]o state may condition acceptance of the Federal Form upon receipt of additional proof." *Id.*

The regulatory actions of the FEC and EAC underscore that Arizona's law is in irreconcilable conflict with the NVRA. These actions reflect the agency's clear understanding of Congress's objectives and the incompatibility of Arizona's policy with those objectives, as reflected in the legislative history quoted above. *See Wyeth*, 555 U.S. at 577 (recognizing that agencies possess "unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *Hines*, 312 U.S. at 67); *Geier*, 529 U.S. at 883 ("The agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements.") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)).

D. Prop. 200 Upsets the Careful Balance Congress Struck in the NVRA

As all of the foregoing demonstrates, Prop. 200's challenged provision is inconsistent with Congress's "deliberate choice" to strike a "careful balance" of competing policy goals. *Arizona*, 132 S. Ct. at 2504-

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[13] Available at http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf

05. And, it is no defense to argue as the State does here, *see* Br. of Pet. Ariz. at 41-44, that Prop. 200's disputed provisions are consistent with one of the NVRA's statutory goals—protecting electoral integrity.

Avoiding preemption is not that simple. "[I]t is not enough to say that the ultimate goal of both federal and state law" is the same. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Here the prevention of election fraud is one of several competing goals, and Congress's method of advancing this goal was carefully tailored to accommodate the other important purposes of the federal law. In this situation it is especially apparent that a "state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id.*; *see also Crosby*, 530 U.S. at 379 ("The fact of a common end hardly neutralizes conflicting means."). The "[c]onflict in technique" occasioned by Prop. 200's documentation-of-citizenship requirements is so "disruptive to the system Congress enacted" as to amount to a "conflict in overt policy.'" *Arizona*, 132 S. Ct. at 2505 (citation and quotation marks omitted).

Regardless of whether Prop. 200 is analyzed according to the well-established demands of the Supremacy Clause, or by some heightened standard under the Election Clause, Congress's full purpose and intent must prevail. "The correct instruction to draw from the text, structure, and history" of the NVRA is that Congress decided it would be inappropriate to require additional proof of citizenship for registration for federal elections done by mail or through election registration agencies; "[i]t follows

that a state law to the contrary is an obstacle to the regulatory system Congress chose." *Id.*

II. THE NVRA DOES NOT TRENCH ON THE STATE'S CONSTITUTIONAL AUTHORITY TO ESTABLISH THE QUALIFICATIONS FOR ELECTORS

Arizona argues—for the first time before this Court—that the NVRA's preemptive scope must be narrowly construed to avoid difficult constitutional questions that arise due to a perceived conflict between the NVRA's registration requirements and the right of states under Article I, Section 2 and the Seventeenth Amendment to fix the qualifications for electors voting for Representatives and for Senators. *See* Br. of Pet. Ariz. at 46-53. Several of the state's supporting *amici* go even farther, arguing that a finding of preemption would in fact render the NVRA unconstitutional. *See* Br. *Amicus Curiae* of Ctr. for Constitutional Jurisprudence at 3-10; Br. *Amicus Curiae* of the Am. Civil Rights Union at 16-19; Br. *Amicus Curiae* of Landmark Legal Found. at 5-10.

As a threshold matter, this argument has been forfeited because it was not raised at any earlier stage in the case. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (declining to address "new substantive arguments" that a party did not raise below); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (same with regard to new arguments raised by an amicus). At any rate, the argument is without merit. The NVRA's requirements that states "accept and use" a properly completed mail-

registration form is a permissible *procedural* regulation of the manner of voter registration; it does not alter the *substantive* qualification standards for electors set by the states.

The authority to enact regulations of times, places, and manner of elections under the Elections Clause is a "'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). It is, in this Court's words, an "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

The NVRA's integrated scheme for registration in federal elections fits comfortably within this broad power. *See id.* (including, as areas within this comprehensive federal authority, "registration" and "prevention of fraud" procedures). As detailed above, the NVRA mandates certain forms of registration in order to reach those qualified electors who might otherwise be unable or unlikely to register. It also facilitates those registration procedures through the use of either a single, simplified federal form or a state form that satisfies the federal

form's requirements that can be widely disseminated in state offices and by voter registration groups. Those forms require only the information that is "necessary" to enable an assessment of the applicant's eligibility (*i.e.*, qualifications) to vote, which are confirmed by an attestation that must be made on pains of perjury, in the face of a clear explanation of the gravity of and consequences attending to such an attestation. 42 U.S.C. § 1973gg-7(b). In other words, the NVRA's scheme is concerned entirely with procedural matters that involve *when*, *where*, and *how* voters may register for federal elections.

The history of the Elections Clause reflects that the Founders believed it was essential for the ultimate authority to regulate the manner of federal elections to reside with the federal government. As Hamilton explained, "Nothing can be more evident, than that an exclusive power in the state legislatures to regulate elections for the national government would leave the existence of the Union entirely at their mercy." THE FEDERALIST NO. 59, at 363 (Clinton Rossiter ed., 1961). Ultimate federal authority to regulate the manner of federal elections was therefore viewed as an expression of the basic precept that "every government ought to contain in itself the means of its own preservation." *Id.* at 362.

In contrast, the Constitution's grant of authority to states to fix the "qualifications" of electors deals solely with the question of *who* may lawfully vote. That is, voter "qualifications" set by the state have always been understood—including at the time enactment of Article I, Section 2 and the subsequent

ratification of the Seventeenth Amendment[14]—as being limited to substantive restrictions, unrelated to election procedures, describing the classes of people entitled to vote.

Given this settled understanding of the distinction between regulations affecting the "manner" of elections and those setting the "qualifications" of electors, as well as the Constitutional interests that underlie that distinction, there is no serious argument that the NVRA trenches on Arizona's right to fix the qualifications of electors. Arizona currently sets voting qualifications by restricting suffrage in all state elections to those who are (1) citizens of the United States, (2) at least 18 years of age, (3) residents of Arizona for at least twenty-nine days, (4) have not been convicted of a felony, and (5) have not been determined mentally incapacitated. Ariz. Rev. Stat. §16-101. These categorical distinctions as to *who* may vote are typical "qualifications" as that term is commonly understood and are similar to the qualifications set by many states.

The NVRA, of course, does nothing to alter or disturb these substantive standards for identifying the

[14] In both the Eighteen and Nineteenth Centuries, voter qualification depended on many of the same substantive restrictions that are common today (such as age, residency, and mental fitness), as well as many restrictions that have since been invalidated (such as sex, race, religion, and holding of property). *See generally* Cortlandt F. Bishop, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 51-90 (1893); Albert McKinley, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 473-81 (1905).

characteristics of eligible voters in Arizona. Rather, the federal law provides only the procedural mechanisms for *when*, *where*, and *how* such voters must be registered. More importantly, the federal law provides adequate safeguards to verify the prospective voter's eligibility—first, by requiring the individual to attest under penalty of perjury to each criteria for voter eligibility and, second, by allowing states to require new voters to vote in person where documentary proof of eligibility can be required.

Because the NVRA does not interfere—or even arguably interfere—with Arizona's ability to establish substantive categories of who can vote, the federal law is a proper exercise of Congress's authority under the Elections Clause that must be upheld in the face of Prop. 200's conflicting requirements.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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