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., ET AL.
Respondents.

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

BRIEF OF ALABAMA, GEORGIA, KANSAS, MICHIGAN, OKLAHOMA, AND TEXAS AS AMICI CURIAE SUPPORTING PETITIONERS

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.
Ala. Solicitor General
Andrew L. Brasher*
Dep. Ala. Solicitor General
OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

*Counsel of Record
Counsel for Amicus Curiae

December 14, 2012

(additional counsel listed on inside cover)

ADDITIONAL COUNSEL

Samuel S. Olens
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334-1300

Derek Schmidt
Attorney General of Kansas
120 S.W. 10th Ave.
2nd Fl
Topeka, KS 66612-1597

Bill Schuette
Attorney General of Michigan
P. O. Box 30212
Lansing, MI 48909

E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105-4894

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

QUESTION 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 authority 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 requests persons who are registering to vote to show evidence that they are eligible to vote?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE AND INTRODUCTION 1

STATEMENT 3

A. The Controversial Enactment of the NVRA 3

B. Mechanics of the NVRA 5

C. Proposition 200 7

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. The serious consequences of preemption in the election context support the traditional presumption against it. 12

A. All election-related preemption compels States to change how they conduct federal, state, and local elections. 13

B. The federalism stakes of preemption are particularly high in this case. 17

II. Principles of constitutional avoidance compel a narrow reading of the NVRA. 22

A. States have argued that the NVRA is not a lawful exercise of Congress's power under the Elections Clause. 23

B. States have argued that the NVRA is unconstitutional under the Tenth Amendment. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Alaska Dep't of Envtl. Conservation v. EPA,
540 U.S. 461 (2004).....18

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008).....12

Arizona v. United States,
132 S. Ct. 2492 (2012).....18

Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar,
1995 WL 532120 (N.D. Ill. 1995).....16

Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar,
56 F.3d 791 (7th Cir. 1995) 5, 26

Ass'n of Cmty. Orgs. for Reform Now v. Miller,
129 F.3d 833 (6th Cir. 1997);.....5, 26, 27

Clark v. Martinez,
543 U.S. 371 (2005).....23

Condon v. Reno,
913 F. Supp. 946 (D.S.C. 1995) 5

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008).....3, 28

Eu v. S.F. Cnty. Democratic Cent. Comm.,
489 U.S. 214 (1989).....1

Gonzalez v. Arizona,
485 F.3d 1041 (9th Cir. 2007) 8, 20

Gonzalez v. Arizona,
624 F.3d 1162 (9th Cir. 2010) 9, 19, 20

Gonzalez v. Arizona,
677 F.3d 383 (9th Cir. 2012) ..... passim

Haskins v. Davis,
253 F. Supp. 642 (E.D. Va. 1966).....15

Lopez v. Monterey Cnty.,
525 U.S. 266 (1999).....17

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996).....12

Miller v. Johnson,
515 U.S. 900 (1995).....17

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012).....27

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932).....28

New York v. United States,
505 U.S. 144 (1992).....13

Operation Push v. Allain, 674 F. Supp.
1245, 1269 (N.D. Miss. 1987), *aff'd sub nom. Operation Push v. Mabus*,
932 F.2d 400 (5th Cir. 1991) 15

Oregon v. Mitchell,
400 U.S. 112 (1970).....24

Orr v. Edgar,
670 N.E.2d 1243 (Ill. App. Ct. 1996).....16, 17

Printz v. United States, 521 U.S. 898
(1997).....13

Purcell v. Gonzalez,
549 U.S. 1 (2006).....1

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000).....21

Shelby Cnty., Ala. v. Holder,
811 F. Supp. 2d 424 (D.D.C. 2011).....16

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986).....24

United States v. Gradwell,
243 U.S. 476 (1917).....3

Voting Rights Coal. v. Wilson,
60 F.3d 1411 (9th Cir. 1995), *cert. denied*, *Wilson v. Voting Rights Coal.*,
116 S. Ct. 815 (1996).....5, 23, 27

Wash. State Grange v. Wash. State Republican Party,
552 U.S. 442 (2008).....2

Welker v. Clarke,
239 F.3d 596 (3d Cir. 2001) 15

Wyeth v. Levine,
555 U.S. 555 (2009).....18

Young v. Fordice,
520 U.S. 273 (1997).....16

Zadvydas v. Davis,
533 U.S. 678 (2001).....23

Statutes

42 U.S.C. § 15321 6

42 U.S.C. § 15323 18
42 U.S.C. § 15532 6
42 U.S.C. § 1973gg ..... passim
Ala. Code § 31-13-28.....1, 20
Ariz. Rev. Stat. § 16-166 1
Fla. Stat. § 97.041 21
Ga. Stat. Ann. § 21-2-216.....1, 20
Kan. Stat. Ann. § 25-2309.....1, 20
La. Rev. Stat. Ann. § 18:104 21
Tenn. Code Ann. § 2-2-141.....20
Wis. Stat. Ann. § 6.33.....21

Constitutional Provisions

U.S. Const. amend. XIX.....23
U.S. Const. amend. XVII.....24
U.S. Const. amend. XXVI.....25
U.S. Const. art. I.....1, 24
U.S. Const. art. II 24

Other Authorities

Cases Raising Claims Under the National Voter Registration Act, U.S. Dept. of Justice, http://www.justice.gov/crt/about/vot/litigation/caselist.php#nvra_cases (last visited Dec. 7, 2012).....5

Certification, In the Matter of Arizona Request for Accommodation, Before the Election Assistance Commission (July 31, 2006) 8

Commissioners, U.S. Election Assistance Commission, http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Dec. 10, 2012) 18

Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1193-94 (2012) 25

Letter from Julie L. Flynn, Deputy Secretary of State to Election Assistance Commission (Aug. 1, 2012) 6

Letter from Thomas Wilkins to Arizona Secretary of State (Mar. 6, 2006) 8

Letter from Tom Schedler, Secretary of State, to Election Assistance Commission (July 16, 2012) 21

National Mail Voter Registration Form, State Instructions 6, 7

Position Statement of Commissioner Ray Martinez III (July 10, 2006) 9

President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), 1 PUB. PAPERS 1072 (1992) 4, 22

Richard S. Greene, *Congressional Power over the Elective Franchise: The Unconstitutional Phrases of* Oregon v. Mitchell, 52 B.U. L. Rev. 505 (1972) 25

Statement of EAC Chairman Paul DeGregorio Regarding the EAC's Tally Vote of July 6, 2006 9

The Federalist No. 52 (James Madison) (J. Cooke ed., 1961) 24

The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107–252, 116 Stat. 1666 5

INTEREST OF AMICI CURIAE AND INTRODUCTION

The *amici curiae* are States that have the constitutionally recognized authority to regulate the registration and qualification of voters. *See, e.g.*, U.S. Const. art. I, §§ 2 & 4. That power is inherent in the nature of sovereignty, and it pre-existed the establishment of the federal government. Several of the *amici* have invoked this authority to enact legislation that is materially identical to the state law at issue here. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(*l*) (2011). Others stand to have their own state laws negated by the Election Assistance Commission, a federal commission with the ministerial duty to prepare voter registration forms.

States' control over elections will be diminished in law and in practice if the Ninth Circuit's misapplication of the National Voter Registration Act is not reversed. Arizona's Proposition 200 is a voter-approved referendum that "sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 8 (2006) (per curiam). The States, of course, "indisputably" have a "compelling interest in preserving the integrity of [their] election process[es]." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Proposition 200 furthers that purpose by directing election officials to "reject any application for [voter] registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(f) (2004).

Proposition 200 works hand in glove with the NVRA. Congress adopted the NVRA for several reasons: to "increase the number of eligible citizens who register to vote," "to protect the integrity of the electoral process," and to "enhance[] the participation of eligible citizens as voters in elections." 42 U.S.C. § 1973gg(b). Given these purposes, it is passing strange that the NVRA and Proposition 200 could be in conflict; Proposition 200 is itself designed to protect the electoral process for the benefit of eligible citizens. The lower courts' decision is particularly ironic because its bottom line—that Arizona cannot enforce a law enacted by a popular referendum—nullifies the actual votes cast by Arizonans in the name of making it easier for Arizonans to register to vote.

The *amici* States disagree with the Ninth Circuit's conclusion that courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns" in the area of elections. *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012) (en banc). Instead, in the States' experience, there are few areas in which preserving the "delicate balance" between State and federal interests is more important. "The States possess a 'broad power'" to regulate federal elections, "which power is matched by state control over the election process for state offices." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Although the effectiveness of Arizona's law "may well be debatable," there is "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*

v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008).

The erroneous judgment below could have been avoided if the Ninth Circuit had properly applied traditional preemption doctrines. The NVRA should be construed consistent with these principles and in a manner that minimizes well-recognized constitutional concerns. This approach would maintain the proper state-federal balance and protect the States' good-faith efforts to conduct free and fair elections.

STATEMENT

A. The Controversial Enactment of the NVRA

States have traditionally regulated the registration of voters and administration of elections with minimal interference by federal law. As this Court explained in *United States v. Gradwell*, 243 U.S. 476 (1917), with the notable exception of 24 years during Reconstruction, "it has been [Congress's] policy to leave such regulations almost entirely to the States, whose representatives Congressmen are." *Id.* at 482. "It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude toward such elections, and repealed all of [the Reconstruction-era] laws with the exception of a few sections not relevant here." *Id.* at 483-84. It was approximately 100 years from the

repeal of those laws before Congress again entered the field of election administration.

In 1992, Congress passed what became the National Voter Registration Act (NVRA), but it was vetoed by President George H. W. Bush. In his veto statement, the President explained that the Act would intrude on "an area of traditional State authority" by imposing "constitutionally questionable Federal regulation." *See* President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), in 1 PUB. PAPERS 1072 (1992).[1] The President further explained that it is "critical" for States to have authority "to tailor voter registration procedures to unique local circumstances." *Id.* The NVRA could "forc[e] them to implement federally mandated and nationally standardized voter registration procedures," which could "restrict severely" their ability to protect the integrity of their own state elections. *Id.* This restriction would "deny the States their historic freedom to govern their own electoral processes" and "contravene the important principles of federalism on which our country was founded." *Id.* President Bush thus determined that Congress's power to enact the bill was "suspect" and presented a "serious constitutional question." *Id.*

The next year, Congress again passed the NVRA, and newly inaugurated President Clinton signed it into law. *See* 42 U.S.C. § 1973gg. Several States—

---

[1] *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=4533&year=1992&month=7.

including California, Illinois, Michigan, Mississippi, Pennsylvania, New York, South Carolina, Vermont, and Virginia—refused to implement the NVRA on the grounds of its asserted unconstitutionality. These disputes never reached this Court on the merits.[2]

B. Mechanics of the NVRA

Of particular import to this case, the NVRA prescribes three methods for registering voters for federal elections. 42 U.S.C. § 1973gg–2(a). These methods are: (1) "by application made simultaneously with an application for a motor vehicle driver's license," (2) "by mail application," and (3) "by application in person." *Id*. States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law." *Id.*

Congress established the Election Assistance Commission ("EAC") to develop and promulgate a federal form for use in registering voters by mail.[3]

---

[2] *See, e.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995), *cert. denied*, *Wilson v. Voting Rights Coal.*, 116 S. Ct. 815 (1996); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794-96 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946, 964-67 (D.S.C. 1995). *See generally* Cases Raising Claims Under the National Voter Registration Act, U.S. Dept. of Justice, http://www.justice.gov/crt/about/vot/litigation/caselist.php#nvra_cases (last visited Dec. 7, 2012).

[3] The responsibilities of the EAC were formerly held by the Federal Election Commission. The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107–252, 116 Stat. 1666, created the

See 42 U.S.C. § 15321 *et seq*. (establishing the EAC). The NVRA directs the EAC to develop the federal form "in consultation with the chief election officers of the States." *Id*. § 1973gg–7(a)(2). The form must "enable the appropriate State election official to assess the eligibility of the applicant." *Id*. § 1973gg–7(b)(1). One of the express eligibility criteria that must be included on the form is a question about United States citizenship. *Id*. § 1973gg–7(b)(2).

When a State passes a voting law that changes its processing requirements, it can ask the EAC to include that requirement in the state-specific instructions the EAC provides with the federal form. *See id*. § 1973gg–7(a). For example, as of August 7, 2012, Maine had a request pending to change the registration deadline on the form to comply with a change in Maine law. *See* Letter from Julie L. Flynn, Deputy Secretary of State, to Election Assistance Commission (Aug. 1, 2012) (on file with the Alabama Attorney General's Office). In accordance with the NVRA's command that the form "specif[y] each eligibility requirement," 42 U.S.C. § 1973gg–7, the EAC has generally made the requested changes without controversy. *See* National Mail Voter Registration Form, State Instructions.[4]

The state-specific instructions provided with the federal form almost always require that the registrant provide specific identifying information on

---

EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532.

[4] *available at* http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited Dec. 13, 2012).

the form. For example, to register in California, "you must provide your California driver's license or California identification card number." *Id.* "Michigan law requires that the same address be used for voter registration and driver license purposes." *Id.* Seven States require a registrant to supply his full Social Security Number. *Id.* Twenty-two States require registrants to indicate a "Choice of Party" in order to participate in the State's primary or caucus. *Id.* Registrants must also review their States' specific voter-registration qualifications and "swear/affirm that: I am a United States citizen, I meet the eligibility requirements of my state and subscribe to any oath required." *Id.* at Voter Registration Application ¶ 9. The form contemplates and has always included state-specific eligibility criteria.

C. Proposition 200

Arizonans voted to approve Proposition 200 by popular referendum. After its passage, the Attorney General of Arizona requested preclearance of the law from the Department of Justice ("DOJ") under Section Five of the Voting Rights Act. And the Secretary of State of Arizona requested that the EAC modify Arizona's state-specific instructions to require registrants to provide proof of citizenship with the federal form. DOJ precleared the law, *see* Pet. Br. 17, but the EAC took the extraordinary step of rejecting Arizona's request to include the law in the state-

specific instructions, *see* Letter from Thomas Wilkins to Arizona Secretary of State (Mar. 6, 2006).[5]

Arizona nevertheless enforced Proposition 200, and several private plaintiffs sued the State to invalidate the law on preemption and other grounds. The trial court below denied a temporary restraining order and concluded that the NVRA did *not* preempt Proposition 200. The Ninth Circuit affirmed the trial court's decision on the issue of preemption. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (*Gonzalez I*).

Arizona returned to the EAC, which held a new vote on Arizona's request to add Proposition 200 to its state-specific instructions on the federal form. *See* Certification, In the Matter of Arizona Request for Accommodation, Before the Election Assistance Commission (July 31, 2006).[6] That vote was a 2-2 tie, and resulted in another denial. *Id.* The EAC Chairman and Vice Chairman both published explanations for voting, respectively, to approve and reject the request. Chairman Paul DeGregorio supported the change by arguing that "leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a

---

[5] *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf (last visited Dec. 13, 2012).

[6] *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF (last visited Dec. 13, 2012).

ballot." Statement of EAC Chairman Paul DeGregorio Regarding the EAC's Tally Vote of July 6, 2006, at 2.[7] He also opined that "[f]urther clarification of the federal government's role in developing the National Registration Form is needed to prevent future confusion." *Id*. On the other hand, Vice Chairman Ray Martinez voted against adding to the instructions because "reversing [the EAC's] current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III (July 10, 2006), at 3.[8]

The issue of preemption continued to be litigated on the merits and eventually reached the Ninth Circuit again. *See Gonzalez v. Arizona*, 624 F.3d 1162, 1207 (9th Cir. 2010) (*Gonzalez II*). The *en banc* Ninth Circuit held in a divided opinion that the NVRA preempts Proposition 200 as applied in the federal form. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (*Gonzalez III*).

---

[7] *available at* http://www.eac.gov/assets/1/Page/Chairman%20Paul%20DeGregorio%20Regarding%20Arizona%20and%20the%20Federal%20Voter%20Registration%20Form%20August%208%202006.pdf (last visited Dec. 13, 2012).

[8] *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf (last visited Dec. 13, 2012).

SUMMARY OF ARGUMENT

I. Traditional preemption doctrines—such as the presumption against preemption and plain-statement rule—are a practical shorthand for Congressional intent, and they serve that useful function here just as well as they do in other contexts.

In the elections context, preemption is fraught with serious consequences for the state-federal relationship because Congress can commandeer the States' officers to conduct federal elections according to federal law. Moreover, although Congress does not have the power to regulate state and local elections, federal preemption has that practical effect. At a minimum, States are forced to choose between (1) the expense of conducting elections for state and local officers separate from elections for federal officers or (2) adopting federal standards as their own. Often, however, States do not even have that choice. Instead, as in the cases of Mississippi and Illinois, lower courts (perhaps erroneously) prevent States from separately registering voters for state elections. Congress should be presumed not to intend such effects.

The federalism stakes are particularly high in this case. The lower court's rule grants the power to preempt state election laws to a federal agency. That agency is uniquely unsuited to that task. It currently has no commissioners and the NVRA provides it no statutory mandate or guidance. Several state laws risk preemption if the lower court's rule is adopted by this Court.

II. Serious doubts about the constitutionality of the NVRA also compel this Court to give it a narrow reading.

Several States have argued previously that Congress did not have the power to enact the NVRA because it effectively controls voter qualifications. Although the Elections Clause gives Congress power over the time, place, and manner of federal elections, the Qualifications Clause ensures that the federal electorate is the same as the electorate for the highest chamber of each States' legislature. This Court's leading precedent in this area did not command a majority and provides little guidance.

Several States have also argued that the NVRA violates the Tenth Amendment because it controls how States conduct elections for state and local offices. The States' lawsuits on this subject left this question unresolved. The lower courts generally conceded that certain applications of the NVRA might unconstitutionally intrude on state sovereignty.

This Court has never passed on the merits of the concerns identified in the States' previous lawsuits. These live constitutional issues support a rule that gives the NVRA a limited preemptive application.

ARGUMENT

I. The serious consequences of preemption in the election context support the traditional presumption against it.

It makes pragmatic sense to apply the traditional presumption against preemption and plain-statement rule when interpreting election-related legislation. This Court invokes these rules because they help the Court ascertain the "purpose of Congress" that "is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citation and internal quotation marks omitted). Even where Congress plainly intends to preempt *some* state law, this Court has held that Congress can be presumed not to intend the broadest possible preemption. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008) (presumption against preemption applies to express preemption clause). Against this backdrop, the Ninth Circuit's refusal to apply traditional preemption doctrines to this case makes no sense; these doctrines are no less useful in discerning the intent of Congress in an election-related case than in a case arising under the Supremacy Clause.

In fact, the pragmatic reasons for the presumption against preemption and plain-statement rule are *especially* compelling in the elections context and the circumstances of this case. Precisely because the Elections Clause may permit Congress to "'conscript state agencies to carry out' federal mandates," the Court should be "concerned

with preserving a 'delicate balance' between [the States and the Federal Government]." *Gonzalez III*, 677 F.3d at 391-92. In this case, preemption means that several States will have to change their own laws to comply with federal law and likely change the way they register voters for state and local elections as well. Going forward, States will have to ask permission from a federal commission to register voters according to their own laws. In short, this is precisely the kind of case in which the presumption against preemption and plain-statement rule are important; Congress should not lightly be presumed to have intended these jarring effects.

A. All election-related preemption compels States to change how they conduct federal, state, and local elections.

Election-related preemption is a much more serious breach of the state-federal balance than police-power preemption. Preemption of state police powers displaces state regulation, but it does not compel States to change how they administer their own programs. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Preemption in the election context has much more serious effects.

1. Election-related preemption commandeers States to change their election practices. Although Congress clearly lacks the power to compel States to run the elections for their own officers in any particular manner, the practical effect of all federal election-related legislation is just that. The reality is that, for every election-related law that Congress

enacts, the States have to modify their own election statutes and practices. They have to do this in one of two ways.

One possibility is for a State to change its practices to enforce federal law as to federal elections, and state law as to state elections. Under the Ninth Circuit's decision, for example, Arizona could create separate state-federal registration regimes to enforce both state and federal law. "[A]n Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials." *Gonzalez III*, 677 F.3d at 449 (Rawlinson, J., concurring in part and dissenting in part). This system of "dual registration" would require Arizona to "track whether . . . residents are registered to vote for federal elections, state elections, or both" and to distinguish between these classes of voters on Election Day. *Id.* Given the concurrence of state and federal elections, moving to a two-tiered election system would itself involve changes in state law and practice, such as preparing separate state and federal ballots and developing election-day procedures to identify federal-only voters.

The only other option is for a State to change (or disregard) its own laws and use federal law for federal, state, and local elections. As the first President Bush's veto message predicted, this is the "choice" that 48 of the 50 States were effectively forced to make immediately after President Clinton signed the NVRA. "[M]aintaining two sets of registration rolls would impose massive administrative and economic burdens" on the States.

Welker v. Clarke, 239 F.3d 596, 599 (3d Cir. 2001). For that reason, "most states [have] elected to adopt . . . a single, unified registration system and electorate." *Id.* Here, Arizona's election officials will be under intense economic pressure to adopt, in practice, the federal form for state and local elections, despite the fact that Arizona's voters directly enacted Proposition 200.

2. Notwithstanding the above, the States often have no choice about whether to use preemptive federal election law for administering elections for their own officers. Even though the Elections Clause gives Congress the authority to control only *federal* elections, lower courts often hold (perhaps erroneously) that other federal laws prevent States from registering voters for their own state-level elections separately from elections for federal officers. *See, e.g.*, *Haskins v. Davis*, 253 F. Supp. 642 (E.D. Va. 1966) (per curiam) (invalidating under the Equal Protection Clause a system that treated federal voters differently from those registered for state elections). The stories of Mississippi and Illinois are instructive.

Mississippi has twice tried to use separate two-tiered election systems and has twice been stymied by federal law. Mississippi registered voters separately for municipal elections until 1987. In that year, a federal court found that the separate registration system was confusing and burdensome, and violated Section Two of the Voting Rights Act. *See Operation Push v. Allain*, 674 F. Supp. 1245, 1269 (N.D. Miss. 1987), *aff'd sub nom*. *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, after Congress enacted the NVRA, Mississippi tried

to use a different system of registration for federal elections than it did for state elections—in other words, the same kind of system Arizona would need to adopt in order to enforce Proposition 200. But DOJ refused to preclear the change to a two-tiered system under Section Five of the Voting Rights Act. *See Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424, 481 (D.D.C. 2011) (recounting this history). Mississippi fought that decision all the way to this Court, which held that DOJ had the right to prevent Mississippi from "changing" to a dual registration system even though the change was prompted by the NVRA. *See Young v. Fordice*, 520 U.S. 273 (1997) (requiring preclearance before a change from a single registration system to dual registration). Like Mississippi, Arizona is covered by Section Five. In light of the lower court's holding, if Arizona wants to give effect to the voter-approved Proposition 200, it would have to return to DOJ for permission to change to dual registration, even though DOJ already precleared Proposition 200 in 2005.

Illinois likewise decided to implement the NVRA through a dual registration system, instead of using the NVRA's rules to register voters for state and local elections. *See Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 1995 WL 532120, at *1 (N.D. Ill. 1995) (unpublished). That effort was also short-lived. The Illinois courts held that, "without a defensible distinction between the two electorates, the disparity violates equal protection under the federal constitution" and Illinois constitution. *Orr v. Edgar*, 670 N.E.2d 1243, 1253 (Ill. App. Ct. 1996). The court recognized that complying with the NVRA was a "compelling interest" but held that, by altering

its practices for federal elections only, Illinois did not "employ[] the least restrictive means available in order to comply with NVRA." *Id.* The court enjoined Illinois to "permit[] NVRA registrants to vote in state and local elections," even though those NVRA registrants were not properly registered under Illinois state law. *Id.* at 1254. Precedents like these mean that the States may lose control over their own elections because of federal preemption, even if the States are willing to spend the money to run a dual system.

B. The federalism stakes of preemption are particularly high in this case.

If this Court affirms the Ninth Circuit, the result will have especially grave consequences for the state-federal balance in election administration. The NVRA "authorizes federal intrusion into sensitive areas of state and local policymaking, impos[ing] substantial 'federalism costs'" in the mine run of cases. *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (discussing Section Five of the Voting Rights Act). The Ninth Circuit's reading of the NVRA in this case invalidates numerous state-specific registration requirements and gives the EAC unbridled legal authority over state election practices.

1. As Petitioners' brief explains, the Ninth Circuit's decision erroneously gives the EAC "ultimate authority" over state election practices. Pet. Br. 43. The EAC is composed of an equal number of *four* members, no more than two of which can be of the same political party. 42 U.S.C.

§ 15323(a) & (b)(2). To make significant changes, the EAC needs an affirmative vote of three of these four members, which is why Arizona's application to add Proposition 200 to its state-specific instructions was denied by a 2-2 tie. And, to make matters worse, there are currently *no* Commissioners serving on the EAC; all four positions are vacant. *See* Commissioners, U.S. Election Assistance Commission.[9] These limitations make the EAC a uniquely ineffective body to be tasked with deciding which state laws are preempted and which ones can be enforced.

Especially in light of these features, the Ninth Circuit's enlargement of the EAC's power flouts well-founded principles of federalism and separation of powers. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely vested in "a single agency official." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Instead, this Court has "rightly reject[ed]" the notion that a state law is preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. 2492, 2524 (2012) (Alito, J., concurring in part and dissenting in part); *see also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (no judicial deference to administrative agencies on questions of preemption). This tradition is no doubt why the EAC has regularly added state-specific instructions to the federal form,

---

[9] *available at* http://www.eac.gov/about_the_eac/commissioners.aspx (last visited Dec. 10, 2012).

without controversy and as a mere ministerial task. *See Gonzalez II*, 624 F.3d at 1207 (Kozinski, J., dissenting) (noting that a variety of state-specific requirements have been incorporated into the federal form).

This kind of anomaly—putting an unmanned ministerial commission in charge of election-law preemption—would be justifiable only if it were compelled by an express textual command. But the text of the NVRA does not purport to grant the EAC discretion to reject *any* state law or guide the exercise of that theoretical discretion. *Cf.* Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote of July 6, 2006, at 2 (asking for clarification). Instead, the NVRA *requires* the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2), and in such a way as to "enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg–7(b)(1). Moreover, when Congress wanted to preclude States from requiring certain registration information, it expressly barred them from doing so. *See, e.g.*, *id.* § 1973gg–7(b)(3) (prohibiting the States from requiring notarization). Thus, "the plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg–7(b)." *Gonzalez III*, 677 F.3d at 445 (Rawlinson, J., concurring in part and dissenting in part). Only by rejecting the usual rules of statutory interpretation was the Ninth Circuit able to find a delegation of preemptive authority to the EAC.

2. The statutory preemption at issue here also threatens to upend legislation in several States. As Judge Kozinski has noted, the Ninth Circuit's "reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona." *Gonzalez II*, 624 F.3d 1162 at 1207 (Kozinski, J., dissenting).

In the years since the Ninth Circuit initially *upheld* Arizona's proof-of-citizenship requirement as *not* preempted by the NVRA, *see Gonzalez I*, 485 F.3d at 1050, state legislatures across the country have considered and enacted similar measures. Four States in three different federal circuits—Georgia, Alabama, Kansas, and Tennessee—have already enacted laws that are materially identical to Proposition 200. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(*l*) (2011); Tenn. Code Ann. § 2-2-141(a) (2011).[10] These laws all require proof of citizenship as part of the registration process. And they all provide, like Proposition 200, that the proof-of-citizenship requirement can be satisfied by providing a driver's license number or a photocopy of one of several enumerated documents. *See* Ga. Stat. Ann. § 21-2-216(g)(2); Ala. Code § 31-13-28(k)-(*l*); Kan. Stat. Ann. § 25-2309(*l*)(1)-(13); Tenn. Code Ann. § 2-2-141(b).

---

[10] Georgia's, Alabama's, and Kansas's statutes are almost verbatim replicas of Arizona's law. Tennessee's law is phrased in terms of *removing* the registrant from the voting list instead of *denying* the application. Georgia's law was approved by DOJ under Section Five of the Voting Rights Act in 2011.

Other States also have enacted laws that require applicants to provide proof of their eligibility. For example, as of August 7, 2012, Louisiana has requested that the EAC change its state-specific instructions to require applicants without a driver's license number to submit either a copy of a different photo ID or another document that proves the applicant's name and address. *See* Letter from Tom Schedler, Secretary of State, to Election Assistance Commission (July 16, 2012); *see also* La. Rev. Stat. Ann. § 18:104(A)(16) (2009). Similarly, both Florida and Wisconsin require registrants to affirm that they are not previously convicted felons, *see* Fla. Stat. § 97.041(2)(b) (2008); Wis. Stat. Ann. § 6.33(1) (2011), but the EAC has previously rejected Florida's request to include its felon-voting certification on the federal form. *See* Position Statement of Commissioner Ray Martinez III (July 10, 2006), at 4. Given that the EAC currently has *no* commissioners, it seems unlikely that the EAC will be able to act timely on States' pending requests for changes to their state-specific instructions.

* * *

The Court should be mindful not to "exacerbate" the "federalism costs" of the NVRA by reading it broadly to preempt state laws. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) (discussing Section Five of the Voting Rights Act). There is no dispute that the Elections Clause does not give Congress the power to regulate state and local elections. But, in practice, the preemption of state election law often does just that. When Congress intends to "conscript state agencies to carry out

federal election mandates," *Gonzalez III*, 677 F.3d at 391 (internal quotation mark omitted), it is not too great a burden for Congress to make that intention plain. In this case, preemption also means elevating the policy choices of a federal commission above the considered judgment of state voters and legislatures. If Congress had intended to depart from the traditional state-federal balance so markedly, Congress would have made its intent plain on the face of the statute.

II. Principles of constitutional avoidance compel a narrow reading of the NVRA.

There have always been grave doubts about the constitutionality of the NVRA. The first President asked to sign the NVRA vetoed it as a "constitutionally questionable Federal regulation on the States in an area of traditional State authority." *See* President George H. W. Bush's Message to the Senate Returning Without Approval the National Voter Registration Act of 1992 (S. 250, 102nd Cong. (July 2, 1992)), in 1 PUB. PAPERS 1072 (1992).[11] Similarly, some of the *amici* States have argued elsewhere that the NVRA is unconstitutional. The President and some of the States identified two potential constitutional problems with the NVRA: (1) whether Congress has the power to enact the NVRA at all and (2) whether certain applications of the NVRA violate the Tenth Amendment. This Court has

---

[11] *available at* http://bushlibrary.tamu.edu/research/public_papers.php?id=4533&year=1992&month=7.

not resolved these issues on their merits. *See Wilson v. Voting Rights Coal.*, 116 S. Ct. 815 (1996) (denying certiorari).

The *amici* States take no position on the constitutionality of the NVRA in this case. The *amici* States instead contend only that the lingering question of the NVRA's constitutionality compels this Court to give the NVRA a narrow berth. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Whatever one thinks about the constitutionality of the NVRA, there is no doubt that the Ninth Circuit's reading of the statute increases its coercive interference on state governments and expands Congress's power under the Elections Clause.

A. States have argued that the NVRA is not a lawful exercise of Congress's power under the Elections Clause.

The NVRA's first potential constitutional infirmity is that Congress's power under the Elections Clause does not necessarily encompass the power to define the electorate for federal elections. The Elections Clause, of course, gives Congress the power to regulate the "time, place, and manner" of conducting elections for federal office. But a separate clause, the Qualifications Clause, gives States authority to define the electorate for federal offices, absent a specific amendment to the contrary. *Cf., e.g.*, U.S. Const. amend. XIX (women's suffrage).

Specifically, the Qualifications Clause defines the federal electorate as the same voters who are qualified to vote for "the most numerous Branch of

the State Legislature." U.S. Const. art. I § 2, cl. 1; U.S. Const. amend. XVII; *see also* U.S. Const. art. II, § 1, cl. 2 (State control over presidential electors). In other words, the Constitution "adopts as the federal standard the standard which each State has chosen for itself." *Oregon v. Mitchell*, 400 U.S. 112, 288 (1970) (Stewart, J., dissenting in part and concurring in part). The Framers intended this compromise to prevent both the States and Congress from gaming the definition of the electorate for federal elections. "It must be satisfactory to every State, because it is conformable to the standard already established . . . . It will be safe to the United States, because it is not alterable by the State governments . . . ." The Federalist No. 52 (James Madison) (J. Cooke ed., 1961).

This Court's precedents on the relationship between the Elections Clause and Qualifications Clause provide little guidance on whether Congress has the power to define the electorate in federal elections. In the leading case on the subject, *Oregon v. Mitchell*, four Justices voted to uphold the power of Congress under the Fourteenth Amendment to set age 18 as a universal minimum voting age, while four voted against finding that authority. But "all eight of those Justices" concluded "that the Constitution requires the same qualifications for state and federal elections." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 233 (1986) (Stevens, J., dissenting). Only Justice Black read the Elections Clause to give Congress the authority to establish a different age qualification for federal elections than

for state elections.[12] The real-world effect of *Oregon v. Mitchell* was quickly mooted by the Twenty-Sixth Amendment, which set the uniform age of 18 for both state and federal elections. U.S. Const. amend. XXVI.[13]

This Court has never directly addressed whether "the manner" of an election includes the subject of voter registration or whether registration is more akin to "qualification." But "[i]t is difficult to see how words could be clearer in stating what Congress can control and what it cannot control." *Oregon*, 400 U.S.

---

[12] The U.S. Solicitor General actually conceded the point that Justice Black resolved in the United States' favor. The Solicitor General told the Court at oral argument in *Mitchell* that "the executive branch did not support the validity of [the section of the statute] on any constitutional basis." Richard S. Greene, *Congressional Power over the Elective Franchise: The Unconstitutional Phrases of* Oregon v. Mitchell, 52 B.U. L. Rev. 505, 565 (1972).

[13] Although *Oregon v. Mitchell* produced no majority opinion or precedential constitutional principle, its judgment essentially coerced Congress and the States into amending the Constitution. It left 47 States "with a choice to make before the 1972 presidential election: they could either lower the voting age to eighteen for all elections, or they would have to implement a dual voting system with different ages for federal and state elections." Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1193-94 (2012). Dual systems would have "cost at least $10 million to $20 million throughout the country" and "roughly half of the states would be unable to change their minimum voting ages before the 1972 election because their voting ages were fixed by state constitution." *Id.* at 1194. Ironically enough, amending the Federal Constitution—hardly an easy task—was, in this peculiar circumstance, the easiest way out.

at 210 (Harlan, J., dissenting in part and concurring in part). Lower courts have generally avoided this issue when addressing States' constitutional challenges to the NVRA. *E.g., Ass'n of Community Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794-95 (7th Cir. 1995) (conceding that the NVRA may be unconstitutional if it "ma[d]e it impossible for the state to enforce its voter qualifications"). In light of the uncertain legacy of *Oregon v. Mitchell*, the constitutionality of the NVRA is an open question and cautions against reading the NVRA broadly to preempt state law.

B. States have argued that the NVRA is unconstitutional under the Tenth Amendment.

The second potential constitutional infirmity in the NVRA is that it may unconstitutionally interfere with States' reserved power under the Tenth Amendment. *See, e.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836-37 (6th Cir. 1997) (describing Michigan's Tenth Amendment claims against the NVRA). Specifically, States have argued that the NVRA "conscripts state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment." *Id.* at 836. The NVRA was so coercive, the States alleged, that it had the intent and effect of controlling the manner in which the States conducted state and local elections as well as federal elections. *See id.* at 837. In other words, the cost of running a two-tiered system was "economic

dragooning that [left] the States with no real option but to acquiesce in" using the NVRA's standards for their state and local elections. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 (2012).

The lower courts rejected these Tenth Amendment challenges, but this Court never reviewed them on the merits. There were also important limitations on the lower courts' reasoning. Michigan's Tenth Amendment challenge was rejected because the Sixth Circuit concluded that "[n]othing in the Act prohibits a state from adopting separate registration requirements for the election of state officials," even if it would be financially difficult to do so. *Miller*, 129 F.3d at 837. As explained above, however, courts have invoked other federal laws to enjoin separate registration systems. Likewise, the Ninth Circuit panel that rejected California's Tenth Amendment challenge to the NVRA held only that the Act was not *facially* unconstitutional. *See Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415-16 (9th Cir. 1995). The court expressly "fores[aw] the possibility" that "a certain implementation of the statute sought by the United States, which is helpful but not essential to its interests, [would be] properly resisted by the state on substantial grounds related to its sovereignty." *Id.*

To be clear, the *amici* States are not arguing in this particular forum that the NVRA is unconstitutional; neither the facial nor as-applied constitutionality of the NVRA is directly at issue in this case. Instead, the States believe that the unresolved challenges to the NVRA's constitutionality should inform this Court's judgment about how broadly the NVRA preempts

state law. The NVRA's effects on the States' ability to conduct elections may well "flout the Constitution's express commitment of the task to the States." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring). At the very least, the Ninth Circuit's ruling exacerbates the NVRA's potential constitutional infirmities; this Court should adopt a reading of the NVRA that minimizes them.

* * *

The *amici* States respectfully request that this Court apply traditional principles of preemption and hold that the NVRA does not preempt Proposition 200. That each State can experiment with its own policy choices is "one of the happy incidents of the federal system." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And the "[d]enial of [the States'] right to experiment may be fraught with serious consequences to the nation." *Id.* This Court can safely presume that Congress does not intend to stay state experimentation through preemption, especially when the experiment concerns the best way to administer free and fair elections.

For its part, the NVRA recognizes that each State will have its own ideas about how best to "assess the eligibility of" potential voters. 42 U.S.C. § 1973gg–7(b)(1). And it requires the EAC to listen to those ideas and incorporate them into the federal registration form that States must "accept and use." *Id.* § 1973gg–4(a)(1). Proposition 200 is consistent with the purposes of the NVRA and the States' compelling interest in ensuring that only eligible

voters can cast a vote. The Court should reverse the Ninth Circuit and lift the injunction against the enforcement of Proposition 200.

CONCLUSION

The Court should reverse the Ninth Circuit.

Respectfully submitted,

LUTHER STRANGE
Ala. Attorney General

John C. Neiman, Jr.
Ala. Solicitor General

Andrew L. Brasher*
Dep. Ala. Solicitor Gen'l
OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
abrasher@ago.state.al.us

Counsel for Amicus Curiae
**Counsel of Record*

December 14, 2012