No. 12-71

In The Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the Ninth Circuit's improper application of federal pre-emption standards.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether Congress can defy the states' constitutional power under the Elector Qualifications Clause to determine *who* votes by creating regulations for *how* elections are to be conducted under the Elections Clause that impede the states' ability to ascertain the citizenship and eligibility of prospective voters.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

This case hinges on the proper interpretation of "tantalizingly vague language" in the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq*. The NVRA directs that the states "shall accept and use" a federal voter registration form created by the U.S. Election Assistance Commission (EAC) for registration by mail. 42 U.S.C. § 1973gg-4. The National Mail Voter Registration Form ("Federal Form") requires prospective voters only to check a box to signify their eligibility to vote as U.S. citizens and sign, under penalty of perjury, an affirmation that they are U.S. citizens, meet state eligibility requirements, and subscribe to any oath required. 42 U.S.C. § 15483(b)(4)(A)(i); 42 U.S.C. § 1973gg-7(b)(2)(C). No other proof of U.S. citizenship is required by the Federal Form for registration by mail, thus making it highly susceptible to fraud. The NVRA, however, allows states to create and use their own forms, which, like the Federal Form, may require only such "identifying information" as necessary to enable state officials to assess prospective registrants' eligibility. 42 U.S.C. § 1973gg-4(a)(2); 42 U.S.C. § 1973gg-7(b).

Believing that the state was becoming a safe haven for illegal immigrants through lax standards in the issuance of identity cards, Arizona amended its voter registration procedures by state initiative (Proposition 200) in 2004, requiring County Recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Prospective registrants using the Federal Form are asked to

provide one of various forms of proof while registering. As a result, Arizona contends that it "accepts and uses" the Federal Form, but has properly required supplemental documents in light of its compelling interest in avoiding fraudulent voting by the large number of unqualified electors living within its borders. Since its passage, Proposition 200 has been credited with preventing 20,000 ineligible individuals from improperly registering to vote. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 95. The Ninth Circuit, however, held that Arizona's practice of supplementing the Federal Form was superseded by the NVRA. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012).

The question then is the proper interpretation of "accept and use." In the opinion below, at the onset, the Ninth Circuit found that the framework of the Elections Clause, not the Supremacy Clause, properly governed the issue. *Id*. at 392-93. In so doing, the Ninth Circuit majority was able to justify ignoring pre-emption doctrine, which would give deference to state interests, while engaging in statutory construction. The majority concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." *Id*. at 392 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). The Ninth Circuit majority next determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." *Gonzalez*, at 394. The court finally concluded that because

of the supplemental proof requirement, Arizona did not "accept and use" the Federal Form, and therefore Arizona's requirement was preempted "when applied to the Federal Form." *Id*. at 403.

The majority opinion thus threatens the delicate balance of our federalist system by reading the powers of the Elections Clause so broadly that states become mere bystanders to the conduct of federal elections – even when confronted by ineligible noncitizens voting. With a proper consideration of state prerogatives in the electoral process, Arizona's proof of citizenship requirements mesh with the intent of the NVRA and other federal statutes, and do not conflict with them.

II. ARGUMENT

The Ninth Circuit erred when it determined that the Supremacy Clause did not control its pre-emption analysis. This allowed the Ninth Circuit to disrupt the "delicate balance" between the states and the federal government. Not only did the Ninth Circuit ignore the role the states retain in the electoral system under the Elections Clause, it also failed to properly address how its ruling implicated the Elector Qualifications Clause, an area of paramount state power. Accordingly, the traditional rules of pre-emption should have applied in this case, such as the presumption against pre-emption and the plain statement rule. Under such normal pre-emption rules, the fact that the states were not clearly prohibited from taking supplemental steps to ensure voter eligibility would have been taken into account in Arizona's

favor. Additionally, longstanding rules of statutory construction would have shown how Arizona's proof of citizenship requirements worked in concert with the larger purpose of the NVRA and other federal statutes dealing with voting and registration by noncitizens.

A. The Elector Qualifications Clause controls in this case, thus the Ninth Circuit should have given proper deference to Arizona's statutory scheme.

The U.S. Constitution grants Congress the power to regulate congressional elections. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, Sec. 4. This power to regulate *how* elections are held is broad. As Chief Justice Hughes stated:

> It cannot be doubted that these comprehensive words embrace 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) (emphasis added).

Yet the Framers established *state*, and not federal, definition of voter qualifications. Qualifications for voters in federal legislative elections correspond to those for voters in the "most numerous Branch of the State Legislature." U.S. Const. art. I, Section 2, cl. 1. As James Madison wrote in Federalist No. 52,

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned.

The Federalist No. 52, at 326 (J. Madison) (C. Rossiter ed. 1961). The Elector Qualifications Clause clearly establishes the states' authority to regulate *who* may vote in elections. As Justice Douglas, writing for a unanimous Court, wrote, "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, *Pope v. Williams*, 193 U.S. 621, 633; *Mason v. Missouri*, 179 U.S. 328, 335, absent of course the discrimination which the Constitution condemns." *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50-51 (1959) (superseded by statute).

In this case, the Ninth Circuit's decision allows Congress, through indirect means, to restrict

Arizona's authority to determine its Elector Qualifications. The Federal Form requires prospective voters only to check a box to signify their eligibility to vote as U.S. citizens and sign an affirmation under penalty of perjury. 42 U.S.C. § 15483(b)(4)(A)(i); 42 U.S.C. § 1973gg-7(b)(2)(C). No other proof of U.S. citizenship is required by the form for registration by mail, which, as Arizona determined and sought to remedy, makes it susceptible to fraud. In *United States Term Limits v. Thornton*, 514 U.S. 779, 829 (1995), this Court held that Arkansas's restriction on qualifications for service in Congress was "an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly." Justice Stevens noted that "'constitutional rights would be of little value if they could be . . . indirectly denied.' . . . The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections." (internal citations omitted) *Id*.

This indirect violation of the Elector Qualifications Clause, if left standing, would upset the delicate balance of the federalist system. As Justice Kennedy wrote in his concurring opinion in *U.S. Term Limits v. Thornton*, "That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." *Id*., at 841.

The lax standards of proof of citizenship on the Federal Form, in conjunction with Arizona's unique

situation as a border state, a main gateway for illegal immigration, and a state with one of the highest percentages of illegal immigrants among its total population, conspire to undermine Arizona's constitutional prerogative to set the qualifications for its electors. Indeed, although all states have some presence of illegal immigrants, the illegal immigrant population is unevenly distributed throughout the country. According to the Pew Hispanic Center, "Unauthorized immigrants are concentrated in a relatively small number of states. The dozen states with the largest unauthorized numbers account for more than three-quarters (77%) of this population." Jeffrey S. Passel and D'Vera Cohn. "Unauthorized Immigrant Population: National and State Trends, 2010." Washington, DC: Pew Hispanic Center (February 1, 2011), p. 15.

Arizona is ranked among the highest states for both largest total number of illegals present in the state (8th) and the largest percentage of illegals within the total state population (5th). *Id*. Arizona is also the "main gateway for illegal border crossers" from Mexico. Daniel González, "Big Cut Set For Border Troops," *The Arizona Republic*, Dec. 21, 2011, p. A1. It stands to reason that a state with an extraordinary illegal immigration population would need to take precautionary measures to guarantee the integrity of the vote.

Furthermore, this large group of illegal immigrants has motives beyond voting when seeking voter registration card. A voter registration card can be

used to help an individual establish his identity, which is necessary when obtaining a driver's license or proving authorization to work in the U.S. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 90. Pursuant to the Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324a *et seq.*, prospective employees must establish their identities and ability to work in the U.S. by filling out a Form I-9, Employment Eligibility Verification, provided by the U.S. Citizenship and Immigration Services. (Available at http://www.uscis.gov/files/form/i-9.pdf.) Among the form's "Lists Of Acceptable Documents" used to establish identity is a voter's registration card. Thus, the laxity of the Federal Form's required proof of citizenship along with the need to seek work authorizations provides aliens with the means, motive and opportunity for fraudulent voter registration.

In short, the Ninth Circuit majority should have analyzed the interaction of the NVRA and Proposition 200 under the Electoral Qualifications Clause and normal rules of pre-emption doctrine. As will be shown below, even when analyzed under the Elections Clause, however, deference should be given to Arizona's nonintrusive means of ensuring the integrity of the electoral process. When pre-emption rules are used to evaluate the issue, Proposition 200 works in concert with the NVRA.

B. The Ninth Circuit's Misreading of the Elections Clause Improperly Turns States into "Mere Bystanders" in the Federal Electoral System.

The Ninth Circuit opinion rests on the proposition that the states have no inherent or reserved power in the regulation of federal elections: "In contrast to the Supremacy Clause, which addresses pre-emption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." *Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012). Instead, the majority stated that the Election Clause "establishes its own balance" and that the "'presumption against pre-emption' and 'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." *Id*.

Yet this notion that the states are mere bystanders in the conduct of elections is incompatible with the ratification debates and this Court's decisions. As James Madison stated at Virginia's ratifying convention,

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. *It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government*, in order to enable it to produce

> uniformity, and prevent its own dissolution. And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively under the control of the state governments, the general government might easily be dissolved. *But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised.*

3 J. Elliot's Debates on the Federal Constitution 367 (1876) (emphasis added). Furthermore, as Justice Kennedy observed in *United States Term Limits v. Thornton*, the states are not completely without power in the conduct of elections. He wrote:

> [B]ecause the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution *. . . grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, § 4, cl. 1.*

United States Term Limits v. Thornton, 514 U.S. 779, 841-42 (1995) (Kennedy, J., concurring) (emphasis added).

In *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court struck down Louisiana's open-primary scheme for violating the Elections Clause. The Court noted, however, that the states still have responsibility to run and regulate elections. In the opinion, the Court described the Elections Clause as:

> "[A] default provision; it invests the States with responsibility for the mechanics of congressional elections, . . . *but only so far as Congress declines to pre-empt state legislative choices*, see Roudebush v. Hartke, 405 U.S. 15, 24, 31 L. Ed. 2d 1, 92 S. Ct. 804 (1972) ("Unless Congress acts, Art. I, § 4, empowers the States to regulate").

Foster v. Love, 522 U.S. 67, 69 (1997) (emphasis added). This pre-emption should be clearly stated, as was the case in *McConnell v. FEC*, in which the Elections Clause issues were implicated by the Bipartisan Campaign Reform Act's regulations of the states. This Court wrote:

> Several plaintiffs contend that Title I exceeds Congress's Election Clause authority to "make or alter" rules governing federal elections, U.S. Const., Art. I, § 4, and, by impairing the authority of the States to regulate their own elections, violates constitutional principles of federalism. In examining congressional enactments for infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer the States and state officials in carrying out federal regulatory schemes. . . . By contrast, Title I

> of BCRA only regulates the conduct of private parties. It imposes no requirements whatsoever upon States or state officials, and, *because it does not expressly pre-empt state legislation*, it leaves the States free to enforce their own restrictions on the financing of state electoral campaigns.

McConnell v. FEC, 540 U.S. 93, 186 (2003). The NVRA contains no such express pre-emption of a state's nonintrusive measures to establish eligibility.

Furthermore, this Court's opinions show that while congressional power is paramount, the federal regulation preempts state statutes only as far as they conflict. "The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1880). As shown below, the NVRA can clearly be read to allow states to take action as Arizona has done to preserve the integrity of the electoral process.

It must also be noted that congressional power to regulate elections under the Election Clause is not for mere convenience but is intended to safeguard rights. Returning to Justice Hughes's discussion in *Smiley*, supra, Congress has the power to impose "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). In this case, the fundamental rights of many different parties have

been implicated. Congress sought to promote the voting rights of prospective registrants through the NVRA. However, not only do Arizona and the other states have a right to determine their elector qualifications, but the individual voters of Arizona themselves have the right to have their votes counted without being diluted by unqualified voters. "Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes." *Anderson v. United States*, 417 U.S. 211, 227 (1974).

Therefore, as Judge Kozinski wrote, this Court has ample justification for applying pre-emption rules in the instant case. Judge Kozinski listed multiple reasons: the states' and their citizens' interest in ensuring the vote is granted only to qualified electors; the states' interest that the electoral process is conducted properly since they are being commandeered to administer it; the states' interest in their reputation for electoral fraud, and the risks of fraud and malfeasance that may differ from state to state. *Gonzalez v. Arizona*, 677 F.3d 383, 440 (9th Cir. 2012). Judge Kozinski concluded, "A case such as ours, where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." *Id*.

C. Proposition 200 Does Not Conflict With the NVRA Under Normal Rules of Pre-emption and Statutory Construction.

The next question is the proper interpretation of the Congress's direction to the states that they must "accept and use" the Federal Form. Does the NVRA mean "use this form and nothing else"? Judge Kozinski laid out two possible interpretations of this "tantalizingly vague language":

> For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

Gonzalez v. Arizona, 677 F.3d 383, 439 (9th Cir. 2012).

If this Court adopts traditional pre-emption doctrine associated with the Supremacy Clause as discussed above, the NVRA would not preempt Proposition 200. The NVRA includes no express direction that the Federal Form precludes states from seeking supplemental proof to establish citizenship.

> In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption

> that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996). Furthermore, federal law will impliedly pre-empt state law when the state and federal laws "conflict" – that is, when "it is impossible . . . to comply with both state and federal law" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, 530 U. S. 363, 372-73 (2000).

Since it is clearly not impossible for Arizona to use and accept Federal Forms when they ask for supplemental proof, Congress's intent must be determined. Turning to canons of statutory interpretation to divine the full purposes and objectives, "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 438-39 (1935) (Cardozo, J., dissenting). As Justice Kennedy also wrote, "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

> The NVRA's stated purposes are:
>
> (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 Act in a manner that enhances the participation of *eligible citizens* as voters in elections for Federal office;
>
> (3) to *protect the integrity of the electoral process*; and
>
> (4) to ensure that *accurate* and current voter registration rolls are maintained.

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

The stated goal of the statute is thus to promote the registration and participation of *eligible* citizens in a sound electoral process. Under federal and Arizona state law, of course, only U.S. citizens are eligible voters. 18 U.S.C. § 611; Ariz. Rev. Stat. § 16-101.

The NVRA allows states to create their own mail voter registration forms and demand information necessary to assess prospective voters' eligibility. 42 U.S.C. § 1973gg-4(a)(2). A state's registration form must meet the same criteria as the Federal Form:

> The mail voter registration form . . . may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant),

> *as is necessary to enable the appropriate State election official to assess the eligibility of the applicant* and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b) (emphasis added). It is unclear why it would be acceptable to seek "other information" when filling out a state form for federal elections but unacceptable to seek "other information" when filling out a federal form for federal elections. It would only make sense if the statutory requirements of the Federal Form set a floor, which the states could supplement as Arizona did.

In addition, the NVRA creates criminal penalties for submission of voter registration applications, or casting of ballots, that are known to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held. 42 U.S.C. § 1973gg-10(2).

> Criminal penalties
>
> A person, including an election official, who in any election for Federal office –
>
> (2) knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by –
>
> (A) the procurement or submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held; or

> (B) the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18, United States Code . . . or imprisoned not more than 5 years, or both.

42 U.S.C. § 1973gg-10. The NVRA also requires administrators of federal elections to "ensure that any eligible applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1). Finally, election administrators are required to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" in certain cases. 42 U.S.C. § 1973gg-6(a)(4).

Thus, the "end in view," in Justice Cardozo's words, of the NVRA is the promotion of the registration of *eligible* voters. Lax standards of proof when establishing citizenship increase the number of *ineligible* citizens who are registered, as has been demonstrated most recently in Florida and Colorado. See Ivan Moreno, "Colo. Furthers Citizenship Checks," Associated Press, Oct. 23, 2012. In addition, the NVRA recognizes that states may have their own information requirements to assess eligibility. To read the statute to mean that states with a high level of unqualified electors within their borders cannot take nonintrusive measures to prevent fraud would not comport with the meaning of the text as a whole.

The NVRA must also be read in the context of many federal statutes that address alien voting and

registration. If a potential registrant misrepresents his citizenship on a Federal Form and then votes, he is potentially subject to numerous federal criminal statutes. See Federal Prosecution of Election Offenses, 7th Ed. 2007, published by the U.S. Department of Justice; Christopher Indelicato and Naomi Pames, Election Law Violations, 45 Am. Crim. L. Rev. 305, Spring, 2012.

- 18 U.S.C. § 911 criminalizes false representations of U.S. citizenship. ("Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.")
- 18 U.S.C. § 611 makes it a crime for aliens to vote in "any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential Elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner."
- 18 U.S.C. § 1015(f) specifically criminalizes false claims to citizenship for the purpose of voting in any federal, state, or local election.
- 42 U.S.C. § 1973i(c) prohibits the knowing and willful (i) giving of false information of one's "name, address or period of residence in the voting district for the purpose of establishing [one's] eligibility

> to register or vote," (ii) *conspiring with another to encourage one's false registration or illegal voting*, or (iii) paying or accepting payment for registration or voting. *Id.* (emphasis added). Enacted as part of the Voting Rights Act of 1965, Congress intended that Section 1973i(c) protect both the actual results of elections, as well as the integrity of the electoral process. *United States v. Cole*, 41 F.3d 303, 307 (7th Cir. 1994).

There are many other instances in the federal criminal code that prohibit committing fraud and false statements generally which could be applied toward false statements on voter registration forms. See, e.g., 18 U.S.C. § 1001. In addition, it is important to note that Congress addressed the issue of false registration and voting as recently as 2002, during enactment of the Help America Vote Act (HAVA). Section 905(b) of HAVA, codified at 42 U.S.C. § 15544(b), states:

> (b) False Information in Registering and Voting. – Any individual who knowingly commits fraud or knowingly makes a false statement with respect to the naturalization, citizenry, or alien registry of such individual in violation of section 1015 of title 18, United States Code, shall be fined or imprisoned, or both, in accordance with such section.

Taken as a whole, the numerous criminal statutes enacted to penalize noncitizen voting, fraudulent voting and fraudulent voter registration suggest that Congress does not tolerate noncitizen voting.

The NVRA should not be read in a way that would allow ongoing fraud to occur. Election officials from more than 60 countries, including the head of Libya's national election commission, observed the 2012 American elections and found it "startling in that it depends so much on trust and the good faith of election officials and voters alike." Josh Rogin, "Foreign election officials amazed by trust-based U.S. voting system," Foreign Policy, Nov. 6, 2012. (Available at http://thecable.foreignpolicy.com/posts/2012/11/06/foreign_election_officials_amazed_by_trust_based_us_voting_system.) The news report continued:

> "It's very difficult to transfer this system as it is to any other country. This system is built according to trust and this trust needs a lot of procedures and a lot of education for other countries to adopt it," [Libyan Commissioner] Elabbar said. The most often noted difference between American elections among the visitors was that in most U.S. states, voters need no identification. Voters can also vote by mail, sometimes online, and there's often no way to know if one person has voted several times under different names, unlike in some Arab countries, where voters ink their fingers when casting their ballots.

Id. Disinterested foreign officials, with little experience running an election system, have confirmed Arizona's judgment about the risks of fraud. Surely the U.S. Congress did not intend to prohibit a reasonable requirement to establish American citizenship during registration.

D. The Elections Clause, Intended to Be Used Sparingly, Sought to Vindicate the People's Right to Equality of Their Representation in the House, Not Dilute Their Vote.

An underlying purpose of the Election Clause, it must be emphasized, is to protect the people's right of suffrage. Its wide scope provides the ability "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) (emphasis added).

At the Virginia ratifying convention, James Monroe asked Madison to explain why the Framers gave general power over congressional elections to the national government. Madison responded that the national government needed a remedy to correct disproportionate representation within a state, suggesting an attempt to prevent the imitation of Britain's "rotten boroughs" where electoral districts with tiny populations diluted the power of larger districts. He said:

> [I]t was thought that the regulation of time, place, and manner, of electing the representatives should be uniform throughout the continent. Some States might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally in some states,

> particularly South Carolina, with respect to Charleston, which is represented by thirty members. *Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government.*

3 J. Elliot's Debates on the Federal Constitution 367 (1876) (emphasis added). Other state ratifying conventions discussing the issue stressed "that the House of Representatives was meant to be free of the malapportionment then existing in some of the state legislatures . . . and argued that the power given Congress in Art. I, § 4, was meant to be used to vindicate the people's right to equality of representation in the House." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964) (internal citations omitted). In other words, the framers were concerned with the potential for improper dilution of the vote.

This Court should consider that, during its short life, Proposition 200 has been credited with preventing 20,000 ineligible individuals from improperly registering to vote. John Fund and Hans von Spakovsky, *Who's Counting: How Fraudsters and Bureaucrats Put Your Vote At Risk* (New York: 2012) 95. Although the Elections Clause gives Congress broad powers to regulate elections, it should not be used in a way that defeats its initial purpose and dilute the vote of thousands of Arizona citizens.

Finally, the Elections Clause reflects the framers' intention to prevent the abuse of power by spreading that power in a federal system. In Federalist No. 59,

Alexander Hamilton argued that there was no other aspect of the proposed Constitution "more completely defensible" than the Elections Clause because "every government ought to contain in itself the means of its own preservation." The Federalist No. 59, at 362 (A. Hamilton) (C. Rossiter ed. 1961). Without it, he explained, the states could let the federal government wither by inaction. Furthermore, Hamilton argued that the

> [The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, *whenever extraordinary circumstances might render that interposition necessary to its safety.*

(*Id.* at 362-63) (emphasis added). In this case, the safety of the federal government is threatened by noncitizen voting, just as in Arizona. The federal government has no interest in noncitizen voting, as indicated by numerous federal statutes prohibiting the practice.

CONCLUSION

The Ninth Circuit's decision is inconsistent with this Court's precedence and should be overruled. Arizona has taken reasonable, nonintrusive means to protect the sanctity of the electoral process. The

NVRA cannot be read as superseding Proposition 200 without doing violence to Arizona's constitutional prerogative to set the qualifications of its electors. When read in conjunction with normal rules of pre-emption or canons of statutory construction, the NVRA and Proposition 200 work in harmony, and do not conflict.

Respectfully submitted,

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