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 U.S. Court of Appeals for the Ninth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are current and former Members of Congress whose names are listed in the Appendix. Members of Congress have a particular interest in seeing that federal statutes are properly interpreted and implemented. Because this case implicates Congress's intent in enacting the National Voter Registration Act of 1993, the views of *amici* are particularly relevant. *Amici* include the Ranking Member of the Committee on House Administration, which has jurisdiction over federal elections, as well as current and former members of the Committee on House Administration's Subcommittee on Elections and leading proponents of the National Voter Registration Act from the One Hundred Third Congress.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

It is beyond doubt that Congress has "'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States." *Foster* v. *Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833 (1995)). Congressional enactments in the area of federal elections therefore "necessarily supersede[]" conflicting state laws or state laws that present ob-

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Both parties have lodged blanket consents to the filing of *amicus curiae* briefs.

stacles to the accomplishment of Congress's purposes and objectives. See, *e.g.*, *ibid.*; *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

Exercising its sweeping authority under the Elections Clause, Congress enacted the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.* NVRA provides citizens with a simple and uniform method for registering to vote. Congress's purpose in enacting NVRA is spelled out in the statute itself—*i.e.*, to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). NVRA's intent—uniformly understood by the proponents and opponents of the statute alike—was to create a uniform and streamlined method of voter registration.

To this end, NVRA requires States to allow registration by mail (42 U.S.C. § 1973gg-2(a)(2)), delegates to a federal agency—the Election Assistance Commission (EAC)—the authority to design a uniform "Federal Form" that States "shall accept and use" (42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2)), prohibits States from developing their own forms that impose onerous requirements on would-be voters (42 U.S.C. § 1973gg-4(a)(2)), and directs States to "ensure" that eligible applicants who return a valid mail voter registration form on time are registered to vote (42 U.S.C. § 1973gg-6(a)(1)(B)).

In 2004, however, Arizona voters adopted Proposition 200, a ballot initiative imposing voter registration requirements that conflict with NVRA. Proposition 200 requires documentary proof of citizenship before an eligible voter will be added to the rolls. Thus, even though NVRA compels States to "accept and use" the EAC-developed Federal Form, Arizona

will refuse to register an otherwise eligible voter who fully and properly completes the Federal Form *unless* that individual *also* satisfies additional, state-imposed requirements.

This treatment of the Federal Form by Arizona does not comport with the plain language of NVRA.[2] The procedural hurdles erected by Proposition 200 conflict with NVRA's requirement that States "accept and use" the Federal Form and interfere with Congress's establishment of a uniform, streamlined voter registration system. And if there were any doubt that NVRA's express terms prohibit States from imposing obstacles to registration like those at issue here, the Act's legislative history resolves that ambiguity in favor of the en banc Ninth Circuit's reading of the statute. In passing NVRA, Congress specifically considered *and rejected* an amendment that would have *authorized* the States to require documentary proof of citizenship. NVRA's opponents in Congress objected to the statute in its present form on the ground that it would bar the *same* additional steps that Arizona now requires. "Congress' rejection of the very language that would have achieved the result [that petitioners] urge[] here weighs heavily against [their] interpretation" of NVRA. *E.g.*, *Hamdan* v.

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[2] Given the clarity of NVRA's requirements and the patent incompatibility of Proposition 200 with federal law, this case presents no occasion for the Court to decide the general applicability of a "presumption against preemption" or whether the standards for preemption under the Supremacy Clause differ from those under the Elections Clause, as articulated in *Siebold* and progeny. Compare, *e.g.*, *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2579-81 (2011) (plurality op.), with *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009). Proposition 200 is preempted under even the preemption standard championed by petitioners.

Rumsfeld, 548 U.S. 557, 579 (2006); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

Accordingly, Proposition 200's documentary proof-of-citizenship requirements are preempted by NVRA with respect to, at the very least, eligible voters seeking to register using the Federal Form.

ARGUMENT

I. Proposition 200 Requires Additional Documentation Before Permitting Registration Of Eligible Voters Who Have Timely And Properly Completed The EAC-Developed Federal Form.

Even under petitioners' proposed preemption analysis, "[w]here state and federal law directly conflict, state law must give way." *PLIVA, Inc.* v. *Mensing*, 131 S. Ct. 2567, 2577 (2011) (internal quotation marks omitted); *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("[S]tate law is naturally preempted to the extent of any conflict with a federal statute."); see Pet. Br. 33-34. That straightforward principle is dispositive of this case: NVRA *requires* something that Proposition 200 *prohibits—i.e.*, the acceptance and use of the EAC-developed Federal Form for voter registration.

A. NVRA's Requirements

"[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted). Thus, this Court's inquiry properly "begin[s] with the language employed by Congress and the assumption that the

ordinary meaning of that language accurately expresses the legislative purpose." *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) (internal quotation marks omitted). NVRA's language is clear and unambiguous.

In enacting NVRA, Congress vested the EAC with the authority to "develop a mail voter registration application form for elections for Federal office"—*i.e.*, the Federal Form. 42 U.S.C. §§ 1973gg-7(a)(2), 15329. The statute specifies certain features that the EAC *must* include in the Federal Form and certain features that the EAC may *not* include. Compare 42 U.S.C. § 1973gg-7(b)(2) (requiring attestation and signature under penalty of perjury), with 42 U.S.C. § 1973gg-7(b)(3) (forbidding "any requirement for notarization or other formal authentication").[3] And the Act requires that States "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1).

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[3] Petitioners' invocation of the *expressio unius* canon is unavailing. Cf. Pet. Br. 38-39. That Congress expressly prohibited "notarization or other formal authentication" requirements does not warrant the inference that *other* requirements are *not* prohibited, since the *expressio unius* canon "has force only when the items expressed are members of an 'associated group or series.'" That is not the case here. See, *e.g.*, *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Furthermore, "[w]e do not read the enumeration of one case to exclude another *unless* it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Ibid.* (emphasis added). In the context of this case, there is compelling evidence that Congress did "consider[] the unnamed possibility"—*i.e.*, that NVRA would prohibit additional state-imposed proof-of-citizenship requirements—and effectively said "***yes***" to it. The Conference Committee chose the House version of NVRA over the Senate version, eschewing a provision that would have reserved to States the ability to impose such requirements. See *infra* pp. 19-20.

NVRA also provides an overall direction for the EAC to follow in the course of developing the Federal Form. Specifically, the Federal Form "may require only such identifying information * * * and other information * * * as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1). Petitioners repeatedly assert that "*States* can require voter registration applicants using the Federal Form to provide state-specific 'information as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" *E.g.*, Pet. Br. 27 (emphasis added), 35, 40. But that ignores the statutory text: although States may establish State-specific *eligibility requirements* and ask the EAC to revise the Federal Form in light of those requirements, the statute unambiguously leaves it to the *EAC* to develop the Federal Form—and that includes determining what information is "necessary" to assess eligibility (and therefore what information the Federal Form asks of applicants). 42 U.S.C. § 1973gg-7(b)(1). States, in other words, must take the EAC-developed Federal Form as they find it.[4]

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[4] After Proposition 200 was passed, Arizona petitioned the EAC to amend the Federal Form to incorporate Proposition 200's additional proof-of-citizenship requirement. The EAC refused and further advised that, pursuant to NVRA, "Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." Letter from Thomas R. Wilkey, Executive Director, EAC, to Jan Brewer, Arizona Secretary of State (Mar. 6, 2006) (J.A. 181, 187).

As developed by the EAC, the Federal Form is a straightforward, streamlined application that fits on a single piece of paper that may be folded, stamped, and mailed. 11 C.F.R. § 9428.5. At all relevant times, the Federal Form has contained two items pertaining to citizenship:[5]

- An attestation signed under penalty of perjury that the applicant meets each of the eligibility requirements, including that of citizenship. See 42 U.S.C. § 1973gg-7(b)(2); 11 C.F.R. § 9428.4(b)(1)-(2).
- The question "Are you a citizen of the United States of America?" and boxes for the applicant to indicate whether the answer is yes or no. See 42 U.S.C. § 15483(b)(4)(A)(i).

Importantly, even when States design their own registration forms, they still must "accept and use" the Federal Form "prescribed by the [EAC] pursuant to section 1973gg-7(a)(2)." 42 U.S.C. § 1973gg-4(a)(1); see also 11 C.F.R. § 9428.3(c). NVRA thus requires that States "accept and use" the Federal Form *as developed by the EAC*.

Perhaps petitioners could have sought judicial review of the EAC's action and challenged directly the design of the Federal Form. See generally 5 U.S.C. § 704; ITCA Br. 19, 44-45. They did not do so. Now petitioners quibble with the procedures by which the EAC rejected Arizona's request to amend the Federal Form to include state-specific instructions reflecting the proof-of-citizenship requirement. Pet. Br. 17-19, 45. Their collateral attacks on the Federal Form are not properly before this Court. See Rule 14.1(a).

[5] The most recent version of the Federal Form is available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (revised Mar. 1, 2006).

B. Proposition 200's Requirements

Proposition 200 provides that county recorders, who are responsible for maintaining Arizona's voter registration rolls, "shall *reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[6] Proposition 200 § 4.F (J.A. 173) (emphasis added; capitalization omitted), codified at Ariz. Rev. Stat. § 16-166(F). Arizona "requires submission of proof of U.S. citizenship along with *whichever* application form the registrant submits." Separate Statement of Facts in Support of Mot. for Partial Summ. J. by Defs. State of Ariz. and the Ariz. Sec'y of State ¶ 9 (emphasis added), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Gonzalez_StatementofFacts.pdf; see also Letter from Jan Brewer, Arizona Secretary of State, to Paul S. DeGregorio, Chairman, EAC (Mar. 13, 2006) (J.A. 189) (affirming that "Arizona's county recorders [will] continue to administer and enforce the requirement that *all* voters" provide documentary evidence of citizenship) (emphasis added).

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[6] Evidence deemed "satisfactory" by Proposition 200 is limited to: (1) the number of the applicant's Arizona driver's license or other identification license issued after October 1, 1996, or the number of a driver's license issued by another State if the license indicates on its face that the applicant has provided satisfactory proof of citizenship, (2) a photocopy of the applicant's birth certificate, (3) a photocopy of the applicant's passport, (4) the applicant's actual naturalization documents (or the number of the certificate of naturalization, which the county recorder must verify), (5) "other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986," and (6) the applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number. Proposition 200 § 4.F (J.A. 173-175).

In other words, Arizona law requires the rejection of a properly completed Federal Form, even if the applicant is eligible to vote, unless that applicant *also* submits proof of citizenship that Proposition 200 deems "satisfactory."

C. Proposition 200 is not consistent with NVRA's "accept and use" requirement

1. Arizona may not reject the Federal Form on the ground that it does not contain what Proposition 200 would deem "satisfactory" proof of citizenship without violating the plain terms of NVRA's "accept and use" mandate. See 42 U.S.C. § 1973gg-4(a)(1). As the decision below explained, "on its face the NVRA does not give states room to add their own requirements to the Federal Form." Pet. App. 38c; see also *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 408 F.3d 1349, 1353 n.4 (11th Cir. 2005) ("The Act mandates that the states accept a particularly defined federal registration form * * * for purposes of registration for federal elections."); *Diaz* v. *Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006). When a State conditions acceptance of the Federal Form on additional state-imposed requirements, it interferes with "the clear directives of the mail-in registration processes protected by the NVRA." See *Charles H. Wesley Educ. Found.*, 408 F.3d at 1355.

2. It would seem obvious that Proposition 200—which directs Arizona's county recorders to "reject" even properly completed Federal Forms if they are unaccompanied by additional evidence of citizenship—conflicts on its face with Section 1973gg-4(a)(1)'s mandate that States "accept" the Federal Form. In ordinary usage, *rejecting* something is, after all, the opposite of *accepting* it. See *The Compact Oxford English Dictionary* 1549 (2d ed. 2000) (defining

"reject" as "[t]o refuse (something offered); to decline to receive or accept."); *Webster's New Int'l Dictionary* 1915 (3d ed. 1986) (equating "reject" with "decline to accept"). Peace is not war; black is not white; freedom is not slavery; and rejection is not acceptance. See generally G. Orwell, *1984*, at 2 (1949).

To circumvent this reality, petitioners go to great lengths to minimize Proposition 200's "shall reject" language. Indeed, they argue that Arizona actually does "accept the Federal Form," so that there is no inconsistency between Arizona law and NVRA. Pet. Br. 20; see also *id.* at 21, 27, 39-41. They even go so far as to say that "submission of the Federal Form without the requisite evidence of citizenship does not result in denial" of the application under Arizona law. *Id.* at 20. But the district court found otherwise. J.A. 251 ("If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was *rejected*[.]") (emphasis added) (cited at Pet. Br. 20). That factual finding is not only unassailable under the clearly erroneous standard of review, *Brown* v. *Plata*, 131 S. Ct. 1910, 1929 (2011), but also clearly *correct* in light of Proposition 200's plain language, Ariz. Rev. Stat. § 16-166(F).

Petitioners try to sidestep this finding. They assert that, while Arizona county recorders will request additional information from an applicant who submits a Federal Form unaccompanied by "satisfactory" evidence of citizenship, recorders do not reject the form outright. Pet. Br. 20, 27. But this hardly qualifies as *accepting* the Federal Form, which is what NVRA requires. In law as well as in life, "yes, but only if . . ." is another way to say "no": It is fundamental that a purported "acceptance" that changes or adds to the terms of an offer is a *rejection*. See, *e.g.*,

Restatement (Second) of Contracts § 59 (1981) ("A reply to an offer which purports to accept it but is conditional on * * * assent to terms additional to * * * those offered is not an acceptance but is a counter-offer."); 1 Williston on Contracts § 5:3 (4th ed. 2012) ("an answer purporting to accept upon condition is not an acceptance at all"); Corbin on Contracts § 3:28 (LexisNexis 2012) ("An expression that purports to be an acceptance, but is so expressed as to be operative as an acceptance only on a condition that is not specified in the offer, is not an acceptance at all."); Farnsworth on Contracts § 3:21 (4th ed. 2004) ("An attempt to add or change the terms of the offer turns the offeree's response from an acceptance into a counteroffer and a rejection of the offer.").[7]

NVRA requires Arizona to *accept* valid Federal Forms timely submitted by eligible applicants, whereas Proposition 200 requires election officials to *reject* those very same forms unless the applicant satisfies the "satisfactory" proof-of-citizenship requirement. Proposition 200 cannot stand because it conflicts with, and therefore is preempted by, NVRA's scheme for uniform, streamlined mail voter registration via the EAC-developed Federal Form.

Petitioners assert that the *EAC* lacks the authority to promulgate regulations that preempt State law. Pet. Br. 44-45. This may (or may not) be so. But

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[7] Petitioners also conspicuously fail to identify any limiting principle for their interpretation of "accept and use." Under Arizona's interpretation, a State conceivably could receive an applicant's Federal Form, place it in a file unread (or "use" it to line a bird cage), and then request the applicant to complete its own, State-specific registration form, all without violating NVRA. This would nullify Congress's intent in providing a uniform and streamlined voter registration process.

in all events, it is a red herring. Petitioners acknowledge (*e.g.*, *id.* at 13, 45), as they must, that the EAC has the authority to develop the Federal Form. 42 U.S.C. § 1973gg-7(a). It is *Congress*, by enacting NVRA, that required States to "accept and use" the Federal Form as developed by the EAC. 42 U.S.C. § 1973gg-4(a)(1).

3. Moreover, Arizona's refusal to accept the Federal Form violates NVRA in still another, independent respect. Pursuant to NVRA, each State "shall * * * ensure" that any eligible applicant who submits a "valid" mail voter registration form on time is registered to vote. 42 U.S.C. § 1973gg-6(a)(1)(B).[8] A Federal Form completed in accordance with the Federal Form's instructions (and *only* those instructions) is "valid" because state-imposed procedural requirements do not and cannot affect the validity of the Federal Form. See *Charles H. Wesley Educ. Found., Inc.* v. *Cox*, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004) ("Congress simply did not allow the states to impose restrictions that would permit denial of an application that otherwise satisfies the federal re-

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[8] Petitioners argue (Pet. Br. 41) that 42 U.S.C. § 1973gg-6(a)(2), which requires election officials to "send notice to each applicant of the disposition of the application," also authorizes States to demand proof of citizenship as a matter of course from applicants using the Federal Form. A "disposition" is just that, however: the announcement of a result, not a request for more documentation. Congress meant what it said and said what it meant. See *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). As the EAC put it, election officials cannot "take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their [F]ederal application using a [S]tate form." Letter from Gavin S. Gilmour, Associate General Counsel, EAC to Dawn Roberts, Director, Division of Elections, Florida Department of State (July 26, 2005), quoted at J.A. 234.

quirements."), aff'd, 408 F.3d 1349 (11th Cir. 2005); *Ass'n of Cmty. Orgs. for Reform Now (ACORN)* v. *Edgar*, No. 95 C 174, 1995 WL 532120, at *1-2 (N.D. Ill. Sept. 7, 1995) (invalidating "Address Verification Form" rule because it "impos[ed] a requirement that [was] not authorized by" 42 U.S.C. § 1973gg-6(a)(1)). Yet Arizona fails to "ensure" the registration of eligible applicants who properly complete the Federal Form unless they comply with Proposition 200's proof-of-citizenship requirement.

The Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002), confirms that conclusion. Arizona contended below (see Pet. App. 40c) that HAVA's information-verification provision, 42 U.S.C. § 15483(a)(5), means that a State may require applicants using the Federal Form to produce additional evidence of citizenship.[9] This argument fails to account for the distinction between verifying information that is *already* on voter registration forms and requesting *new* information. Under HAVA, States must reject voter registration forms that

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[9] HAVA's savings clause provides that "[e]xcept as specifically provided in [42 U.S.C. § 15483(b)] * * * nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws: * * * The National Voter Registration Act of 1993." 42 U.S.C. § 15545. Thus, even though HAVA gives States some discretion in implementing its provisions, 42 U.S.C. § 15485, and allows them to impose stricter "election technology and administration requirements," 42 U.S.C. § 15484, they may not establish requirements that are "inconsistent with the Federal requirements under [HAVA] or any law described in [§] 15545," *ibid.*, including NVRA. Proposition 200's proof of citizenship requirement is "inconsistent" with NVRA for the reasons given above and, accordingly, is not sheltered by HAVA.

do not include "in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or * * * in the case of any other applicant * * * the last 4 digits of the applicant's social security number." 42 U.S.C. § 15483(a)(5)(A)(i).[10] The Federal Form already includes a space for applicants to enter a "[v]oter identification number as required or requested by the applicant's state of residence." 11 C.F.R. § 9428.4(a)(6). HAVA therefore directs state election officials to use the applicant's identification number and match his or her other responses against the information in the State's motor vehicle agency database, 42 U.S.C. § 15483(a)(5)(B)(i), or the Commissioner of Social Security's database, 42 U.S.C. § 15483(a)(5)(B)(ii).

HAVA's verification procedure goes hand-in-hand with NVRA's unqualified "accept and use" provision and does not diminish the latter's force. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) ("When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.") (internal quotation marks omitted); see also *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) ("[A]bsent 'a clearly expressed congressional intention,' ... [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substi-

[10] "If an applicant * * * has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes." 42 U.S.C. § 15483(a)(5)(A)(ii).

tute.'"). Applicants using the Federal Form supply their driver's license or social security number in the space indicated (if they have one, *see supra* note 10), and States, after verifying the provided information to the extent possible, must "accept and use" the Federal Form by registering eligible applicants without requiring supplementation.[11] Read together, NVRA and HAVA allow States to match information supplied on the Federal Form with information in other databases, but forbid States from conditioning acceptance of the Federal Form on the receipt of other information (*e.g.*, documentary evidence of citizenship) that the Federal Form does not already require.

II. NVRA's Legislative History Supports Its Plain Meaning.

Consultation of NVRA's legislative history is unnecessary in view of the clarity of the statutory text. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."). But if there were any doubt, the statute's legislative history would unam-

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[11] This does not mean that all successful registrants may cast their ballots without further ado. HAVA requires some first-time voters who register by mail to provide identification before they vote. 42 U.S.C. § 15483(b). Voters who supplied their driver's license or social security number on their registration forms, *see supra* note 10 and accompanying text, are exempt from this requirement if the State election official is able to match that number against existing identification records. 42 U.S.C. § 15483(b)(3)(B). All other voters must at some point exhibit an acceptable form of identification (or a photocopy of the same if voting by mail). 42 U.S.C. § 15483(b)(2)(A), (b)(3)(A). This could include "current and valid photo identification" or "a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter." *E.g.*, 42 U.S.C. § 15483(b)(2)(A)(ii).

biguously confirm Congress's intent to preempt state-law proof of citizenship requirements. The history shows that Congress intended to create a uniform method of voter registration by mail that would be effective in all States, and specifically contemplated—and rejected—state efforts to require documentary verification of citizenship. Over the course of multiple Congressional sessions, the proponents of the legislation sought to bring uniformity to a patchwork quilt of voter registration laws and to prevent States from imposing burdensome requirements like that established by Proposition 200.

NVRA was developed "to establish national voter registration procedures for Federal elections." H.R. Rep. No. 103-9, at 1 (1993); accord S. Rep. No. 103-6, at 3 (1993) ("This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act."); *Young*, 520 U.S. at 275 (noting that NVRA creates "simplified systems for registering to vote in federal elections") (emphasis omitted). As proponents of NVRA explained, these national procedures would "streamlin[e] the voter registration process" administered by the States. 139 Cong. Rec. H2259 (daily ed. May 5, 1993) (statement of Rep. Bill Richardson). It was designed to "remov[e] many of the burdensome requirements found in some States and localities which impede the ability of a citizen to register to vote." 139 Cong. Rec. H2257 (daily ed. May 5, 1993) (statement of Rep. Martin Frost).

All involved in the legislative process understood that uniformity in these procedures was intended; thus, the Senate minority balked at NVRA precisely *because* it precludes additional state requirements.

See S. Rep. No. 103-6, at 52. Likewise, NVRA's opponents in the House decried the Act's goal of national uniformity. "In reality, this broad legislation exploits the motor-voter concept to nationalize all voter registration laws that are currently on the books in all 50 States." 139 Cong. Rec. H2265 (daily ed. May 5, 1993) (statement of Rep. Bob Livingston). See also H.R. Rep. No. 103-9, at 35 ("The bill limits the state's ability to confirm independently the information contained in voter registration applications[.]"). President George H.W. Bush had earlier vetoed a nearly identical bill in 1992 because it would have "forc[ed] [States] to implement federally mandated and nationally standardized voter registration procedures." 138 Cong. Rec. S9772-03 (daily ed. July 2, 1992) (vetoing S. 250, 102d Cong. (1992)).[12]

But the clearest evidence that Congress intended, through NVRA, to preclude State efforts to

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[12] Congress enacted NVRA against the background of the debates surrounding S. 250 and its associated House bills. See *Hearing on H.R. 2, Nat'l Voter Registration Act of 1993, Held Before the Subcomm. on Elections of the Comm. on H. Admin.*, 103d Cong. 1-2 (1993) (describing earlier bills and noting several Members' doubt that there was "more [to] be said" about NVRA given that "[e]veryone kn[ew] about" it). Asked to opine on S. 250 in the course of those debates, the Department of Justice noted that the bill would "limit[] significantly the ability of the states to use a variety of techniques to verify the app[l]icant's identity and eligibility." S. Rep. No. 102-60, at 53 (1991); see also *ibid.* (acknowledging that the "extent to which S. 250 would preclude confirmation procedures" was "unclear," and surmising that, as a result, S. 250 might require registrars to accept any registration application that was "facially complete"). As DOJ's submissions establish, Congress was well aware that enacting NVRA would limit State-level verification procedures, and consciously chose to pass NVRA in spite of that.

require documentary proof of citizenship to register for federal elections is that Congress specifically contemplated—and rejected—allowing States to require such proof. Chief Judge Kozinski's opinion concurring in the judgment below carefully marshaled the "legislative history that supports reading 'accept and use' in the exclusive sense, which would preclude states from seeking additional documentation." Pet. App. 91c.

"'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.'" *Cardoza-Fonseca*, 480 U.S. at 442-443; see also *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). The bill that ultimately became NVRA, H.R. 2, 103d Cong. (1993), passed the House without any allowance for States to require documentary evidence of citizenship. The Senate, however, passed the Simpson-Helms Amendment, which provided: "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." 139 Cong. Rec. S2897-04, S2901 (daily ed. Mar. 16, 1993). Senator Alan Simpson explained the purpose of this amendment: "It allows States to check documents to verify citizenship"—much as Arizona seeks to do now—and "simply makes clear that this bill must not be interpreted to stop any particular State from requiring documents." *Id.* at S2901.

The Conference Committee, however, rejected the Senate amendment and adopted the House version, finding that documentary proof "is not *necessary* or consistent with the purposes of this Act." H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.) (emphasis added). The Conference Committee expressed concern that the Senate version "could be interpreted by States to permit registration requirements that could effectively eliminate, or *seriously interfere* with, the mail registration program of the Act." *Ibid.* (emphasis added).[13] "These concerns lead the conferees to conclude that this section [*i.e.*, that added by the Simpson-Helms Amendment] should be deleted." *Id.* at 24. As Chief Judge Kozinski observed, "the conferees thus rejected the Simpson amendment * * * because the inclusive meaning of 'accept and use' was inconsistent with their vision of how the Act should operate." Pet. App. 93c.[14]

Senator Jesse Helms, who co-sponsored the Senate amendment, decried the Conference Committee's bill and urged its defeat because his amendment had been omitted. 139 Cong. Rec. S5739-01

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[13] The House and Senate Committees had previously determined that NVRA's provisions, such as the attestation requirement on mail voter registration forms, were "sufficient to deter fraudulent registrations." H.R. Rep. No. 103-9, at 10; S. Rep. No. 103-6, at 13 ("[T]he bill also provides that there will be sufficient safeguards to prevent an abuse of the system with fraudulent registrations.").

[14] This interpretation of NVRA's "accept and use" language is confirmed by the Congressional Record, which shows advocates for mail registration calling, as early as 1989, for "self-executing" registration forms. *Voter Registration: Hearing on H.R. 15, 17, and 87 Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong. 67 (1989).

(daily ed. May 11, 1993). However, the Senate agreed to the conference report by a vote of 62-36. *Id.* at S5748. Congressman Bob Livingston made a similar appeal on the floor of the House, urging his colleagues to recommit the conference report with instructions to include the Simpson-Helms Amendment. 139 Cong. Rec. H2265 (daily ed. May 5, 1993). As Congressman Livingston stated, "[NVRA] requires registration by mail, but it prohibits States from requiring notarization or authentication that may prove that you are who you say you are." *Ibid.* Members of the House—Congressman Livingston among them—worried that failure to allow States to impose a proof of citizenship requirement would encourage fraud. *E.g.*, *ibid.* (Rep. Livingston: "[NVRA] weakens existing State protection against fraud . . . ."); 139 Cong. Rec. H2273 (daily ed. May 5, 1993) (Rep. Cox: "Despite its benign name, this pernicious bill would make it nearly impossible to prevent ineligible people . . . from voting.").

Nevertheless, NVRA's simplified registration process—including its mail registration provisions—enjoyed strong and widespread support in the House. As Congressman Bernie Sanders succinctly stated in his remarks preceding the House's vote on the conference report, "it is right that when you want, you should have the opportunity to register by postcard." 139 Cong. Rec. H2259 (daily ed. May 5, 1993). The House accordingly rejected the Livingston motion to recommit by a vote of 253-170 (*id.* at H2275) and agreed to the conference report (*id.* at H2276).

There is no ambiguity here: Allowing States to require documentary proof of citizenship would do violence to this careful legislative balance struck by Congress. As Chief Judge Kozinski explained, the

legislative "history here consists of actions taken by legislative bodies"—*e.g.*, the Conference Committee's drafting decisions and the rejection of the Livingston motion by the House as a whole—"not just words penned by staffers or lobbyists." Pet. App. 94c. And this "Court has recognized that such drafting history *can* offer interpretive insight" when a statute is ambiguous. *Ibid.* "'Congress' rejection of the very language that would have achieved the result the [petitioners] urge[] here weighs heavily against [that] interpretation.'" *Ibid.* (quoting *Hamdan*, 548 U.S. at 579-80); see also *Doe* v. *Chao*, 540 U.S. 614, 623 (2004) (deletion of language that "would have covered" desired remedy "fairly seen * * * as a deliberate elimination of any possibility" of a court awarding that remedy). Arizona may disagree with Congress's legislative choices as a matter of policy, but it nonetheless must comply with NVRA's mandate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX: LIST OF *AMICI CURIAE*

Congressman Robert A. Brady (Pa.), Ranking Member, Committee on House Administration

Congressman John Conyers, Jr. (Mich.), Ranking Member, Committee on the Judiciary, Subcommittee on the Constitution

Congressman Charles A. Gonzalez (Tex.), Committee on House Administration, Subcommittee on Elections

Congressman Raúl M. Grijalva (Ariz.)

Congressman John R. Lewis (Ga.)

Congresswoman Zoe Lofgren (Cal.)

Congressman José E. Serrano (N.Y.)

The Honorable Allan B. Swift, Chairman, Committee on House Administration, Subcommittee on Elections, One Hundred Third Congress

The Honorable Wendell H. Ford, United States Senate Democratic Whip and Chair, Senate Committee on Rules and Administration, One Hundred Third Congress