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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

J. SCOTT DETAMORE
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tel. (303) 292-2021
detamore@mountainstateslegal.com

Attorney for Amicus Curiae
Mountain States
Legal Foundation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Supreme Court Rule 37.2(b), Mountain States Legal Foundation ("MSLF"), respectfully moves for leave to file the accompanying amicus curiae brief in support of Petitioners, Arizona, *et al*. All parties to this matter have consented to the filing of this amicus curiae brief except Coconino County, Arizona.

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include individuals who live and work in every State of the Nation, including Arizona.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States. For example, MSLF has been actively involved in this case throughout its duration. On June 20, 2006, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, sought to intervene at the United States

District Court. After intervention was denied, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, appealed the denial of intervention and also filed an amicus curiae brief in support of Defendants. *Gonzalez v. Arizona,* 485 F.3d 1041 (9th Cir. 2007). In the most recent appeal of this case, MSLF filed amicus curiae briefs with the panel and on rehearing en banc. *Gonzalez v. Arizona*, 624 F.3d 1162, 1168 (9th Cir. 2010); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc).

Here, MSLF wishes to highlight the fundamental principles of federalism and separation of powers, which are critically important to any analysis of federal preemption of State law. Though born as a compromise, federalism and separation of powers are essential elements in the system of checks and balances designed by the Framers to preserve liberty and State sovereignty. MSLF believes that the courts must consider and preserve the delicate balance between federal and State power in any preemption case, including preemption under the Elections Clause. In doing so, the courts must carefully consider the intent of Congress and construe State and federal statutes, if possible, to avoid conflict between the two.

MSLF submits that the Ninth Circuit ignored fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope and purpose of the Elections Clause. As a result, the Ninth Circuit created an ill-defined, amorphous, "harmonious operation" standard for Elections Clause preemption,

which is highly deferential to the federal government and in derogation of federalism principles. The Ninth Circuit's decision conflicts with the precedent of this Court and other Circuit Courts of Appeals.

Thus, MSLF urges that this Court grant the Petition for Certiorari to reemphasize and confirm the importance of federalism to the constitutional structure, and to reaffirm the States' compelling interest in maintaining the integrity of its State and federal electoral process. In doing so, this Court should correct the very wrong turn taken by the Ninth Circuit, thus preventing any other courts from following the missteps of the Ninth Circuit and further eroding individual liberty and unlawfully intruding into the affairs of the States and their citizens.

Though the Petition has touched on the federalism issues created by the Ninth Circuit's decision, MSLF brings a sharper focus to those principles and the Ninth Circuit's violation thereof. MSLF believes that this focus will be useful to this Court in determining whether to grant the Petition for Certiorari.

WHEREFORE, Mountain States Legal Foundation respectfully requests that this Court grant MSLF leave to participate as amicus curiae and to file the accompanying amicus curiae brief in support of Petitioners, Arizona, *et al*.

DATED this 15th day of August 2012.

Respectfully submitted,

J. SCOTT DETAMORE
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tel. (303) 292-2021
detamore@
mountainstateslegal.com

Attorney for Amicus Curiae
Mountain States
Legal Foundation

QUESTIONS PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's precedent and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requires persons who are registering to vote to show evidence that they are eligible to vote?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

REASONS FOR GRANTING THE PETITION..... 5

I. THE NINTH CIRCUIT'S DECISION ESTABLISHED A NEW PREEMPTION TEST THAT CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF FEDERALISM 5

A. Federalism Is Fundamental To The Liberty Of The People 5

B. The Ninth Circuit Created A New Federal Preemption Test That Is Highly Deferential To The Federal Government And Violates Fundamental Principles Of Federalism 9

C. The Ninth Circuit Ignored The Purpose And Narrow Scope Of The Elections Clause, Which Incorporates Principles of Federalism 14

D. The Ninth Circuit Ignored The Text And Purpose Of The NVRA And HAVA, Which Incorporate Principles Of Federalism 16

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.............................. 18

TABLE OF CONTENTS – Continued

Page

A. The Ninth Circuit's Decision Conflicts With This Court's Prior Decisions In *Siebold* And *Foster*.................................. 18

B. The Ninth Circuit's Decision Conflicts With The Decisions Of Other Circuit Courts Of Appeals 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Ex parte Siebold, 100 U.S. 371 (1879) 18, 19, 20, 25

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) 8

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 23

Foster v. Love, 522 U.S. 67 (1997) 18, 19, 20, 25

Gade v. National Solid Waste Management Association, 505 U.S. 88 (1992) 10, 11

Geier v. American Honda Motor Comp., Inc., 529 U.S. 861 (2000) 12

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

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24

Hines v. Davidowitz, 312 U.S. 52 (1941) 23

Jones v. Rath Packing Co., 430 U.S. 519 (1977)........21

McIntyre v. Fallahay, 766 F.2d 1078 (7th Cir. 1985) 20, 21, 23, 25

Medtronic Inc. v. Lohr, 518 U.S. 470 (1996).............11

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 21

Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991) 5

Millsaps v. Thompson, 259 F.3d 535 (6th Cir. 2001) 15, 21, 22, 23, 25

TABLE OF AUTHORITIES – Continued

Page

Northwest Cen. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989) 22

Purcell v. Gonzalez, 549 U.S. 1 (2006) 13

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 11, 22

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 15

United States v. Classic, 313 U.S. 299 (1941)...........21

United States v. Missouri, 535 F.3d 844 (8th Cir. 2008) 24, 25

Voting Integrity Project, Inc. v. Bomer, 199 F.3d 773 (5th Cir. 2000) 23, 25

Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) 11

Wyeth v. Levine, 555 U.S. 555 (2009) 11

CONSTITUTIONAL PROVISIONS

Elections Clause, U.S. Const. art. I, § 4, cl. 1.....9, 14, 23

Supremacy Clause, U.S. Const. art. VI, cl. 2..............9

STATUTES

A.R.S. § 16-166(F)..3, 4, 9, 12

National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg through 1973gg-10..........*passim*

42 U.S.C. § 1973gg(b) 17

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 1973gg-4(a)(1) 2

42 U.S.C. § 1973gg-4(a)(2) 2, 3

42 U.S.C. § 1973gg-7(a)(2) 2

42 U.S.C. § 1973gg-7(b) 3

42 U.S.C. § 1973gg-7(b)(1) 3

42 U.S.C. § 1973gg-7(b)(2) 3

42 U.S.C. § 1973gg-7(b)(2)(A) 3

42 U.S.C. § 1973gg-7(b)(2)(B) 3

42 U.S.C. § 1973gg-7(b)(2)(C) 3

42 U.S.C. § 15483(a)(2), (a)(4) 17

Help America Vote Act ("HAVA"), 43 U.S.C. §§ 15301 through 15545 .... 16, 17

RULES

Supreme Court Rule 37.2 1

OTHER AUTHORITIES

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988) 5

THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., Morgan 1999) 6, 7

THE FEDERALIST No. 28 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) 6

TABLE OF AUTHORITIES – Continued

Page

THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., Morgan 1999)...........................7, 22

THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., Morgan 1999).................................6

THE FEDERALIST No. 59 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) 14, 15, 22

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

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

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

[1] Pursuant to Supreme Court Rule 37.2, letters and emails indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. All parties consent to filing of this amicus curiae brief except Coconino County, Arizona, and this brief is, therefore, appended to MSLF's Motion for Leave to File this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Central to the notion of a limited government are the constitutional principles of enumerated powers, separation of powers, and federalism. MSLF has, since its inception in 1977, engaged in litigation aimed at ensuring the proper interpretation and application of these constitutional principles and limiting the power of the federal government to encroach upon the liberty of the people and the sovereignty of the States.

Here, the Ninth Circuit ignored the fundamental principles of federalism, the compelling interest of Arizona in protecting the integrity of its electoral system, and the narrow scope of the Elections Clause. MSLF believes that its focus on these issues will be useful to this Court in determining whether to grant the Petition for Certiorari.

INTRODUCTION

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

A State may, however, develop and use its own mail voter registration form that meets all of the

criteria stated in section 1973gg-7(b) for the registration of voters in elections for federal office. 42 U.S.C. § 1973gg-4(a)(2). The section 1973gg-7(b) criteria provides that a mail voter registration form "may require . . . identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

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

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

Following the implementation of Proposition 200, Arizona has continued to "accept and use" both the Federal Form and Arizona's Form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with both the Federal Form and the State Form, whichever the applicant selects. Petition at 6. In all respects, both the State and Federal Form incorporate the requirements of the NVRA. *Id*. The Arizona Secretary of State makes the Federal Form available to anyone who requests it. *Id*. In addition, that form is publicly available for downloading and printing. *Id*.

Thus, the issue below was whether Proposition 200, insofar as it requires more than an attestation under penalty of perjury to establish citizenship, or any other eligibility requirement, conflicts with the NVRA, and is, therefore, preempted. The Ninth Circuit erroneously held that Proposition 200's requirement that for confirmation of citizen status (A.R.S. § 16-166(F)) was preempted by the NVRA.

REASONS FOR GRANTING THE PETITION

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

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

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

Federalism, together with separation of powers, is necessary to the preservation of liberty. "The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). Federalism is also integral to the protection of liberty:

> In the compound republic of America, the power surrendered by the people, is *first divided between two distinct governments*, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a *double security arises to the rights of the people*. The different governments will

> controul (sic) each other; at the same time that each will be controlled by itself.

THE FEDERALIST No. 51, at 291 (James Madison) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

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

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

THE FEDERALIST No. 28, at 149 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

Madison also explained that the federal system of dual sovereignty steered a safe passage between the perils of a large republic and the dangers of a small one. In large republics, Madison expounded that "the [federal] representative[s] [are] too little acquainted with . . . local circumstances and lesser interests." THE FEDERALIST No. 10, at 50 (James Madison) (Clinton Rossiter ed., Morgan 1999). In small republics, on the other hand, representatives may become "unduly

attached to these [local interests], and too little fit to comprehend and pursue great and national objects." *Id*. Madison concluded that the federal system created by the Framers "form[ed] a happy combination in this respect" and promoted wise legislation at both the national and local level; "the great and aggregate interests being referred to the national, the local and particular[,] to the state legislatures." *Id*.

Thus, most powers were reposed in the States, and only enumerated powers in the federal government:

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

THE FEDERALIST No. 45, at 260-61 (James Madison) (Clinton Rossiter ed., Morgan 1999) (all emphasis added).

Thus, in the federalist system, the States may regulate what concerns the liberties of the people. Regulation of the integrity of electoral systems, as demonstrated below, is essential to ensuring the

liberties of the people and is thus a compelling interest of every State. Therefore, if the federal government is to limit the ability of the State to protect the integrity of its elections, even for federal office, it must make its intent to do so manifestly clear or there must be a direct conflict between the federal enactment and that of the State.

Today, the federal government, with its broad constitutional authority, its army of administrative agencies, and its vast financial resources, possesses almost unlimited power to regulate the lives of American citizens. Given these realities, State governments provide an increasingly important institutional check on potential abuses of federal power:

> [O]ur federal system provides a salutary check on governmental power. . . . [O]ur ancestors "were suspicious of every form of all-powerful central authority. To *curb this evil, they both allocated governmental power between state and national authorities*, and divided the national power among three branches of government. Unless we zealously protect these distinctions, *we risk upsetting the balance of power that buttresses our basic liberties*. In analyzing this brake on governmental power . . . the *diffusion of power between federal and state authority takes on added significance as the size of the federal bureaucracy continues to grow*."

F.E.R.C. v. Mississippi, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting in part) (internal quotations omitted) (all emphasis added).

Accordingly, whenever there is a conflict between State and federal law, federalism considerations should be applied to preserve the delicate balance between the two sovereign interests, which preserves the liberty of the people.

B. The Ninth Circuit Created A New Federal Preemption Test That Is Highly Deferential To The Federal Government And Violates Fundamental Principles Of Federalism.

The Ninth Circuit ignored fundamental principles of federalism in determining that the NVRA, enacted pursuant to the Elections Clause, preempted Arizona's proof of citizenship requirements contained in Proposition 200 (A.R.S. § 16-166(F)). Instead, as demonstrated below, the Ninth Circuit ruled that federalism concerns apply only to preemption of State law under the Supremacy Clause, U.S. Const. art. VI, cl. 2,[2] not to preemption under the Elections Clause, U.S. Const. art. I, § 4, cl. 1.[3]

---

[2] "This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every states shall be bound thereby, any Thing in the Constitution notwithstanding."

[3] "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

The Ninth Circuit observed that preemption under the Supremacy Clause "must strive to maintain the delicate balance between the States and the Federal Government." *Gonzalez v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012). On the other hand, the Ninth Circuit ruled that the right to regulate federal elections was not a right reserved to the States by the Tenth Amendment. *Gonzalez*, 677 F.3d at 392. According to the Ninth Circuit, only those sovereign rights that predated the Constitution could be reserved by the Tenth Amendment. *Id*.

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

"Preemption may either be expressed or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Waste Management Association*, 505 U.S.

88, 98 (1992). This Court has recognized two types of implied preemption:

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

Id. at 98 (internal quotations and citations omitted).

There are "two cornerstones of . . . pre-emption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The first is that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991) ("ways in which federal law may pre-empt state law . . . turn on congressional intent"). The second cornerstone of preemption analysis is that "in *all* preemption cases" there is a presumption "that the *historic police powers* of the States were not to be superseded by [federal law] unless [this result] was the *clear and manifest purpose* of Congress." *Wyeth,* 555 U.S. at 565 (quoting *Lohr,* 518 U.S. at 485) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, (1947)) (emphasis added).

Importantly, there is a "presumption against preemption [that] is *rooted in the concept of federalism*."

Geier v. American Honda Motor Comp., Inc., 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (emphasis added). This presumption serves to place preemption in the hands of Congress rather than the Judiciary:

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

Id. (internal quotations omitted).

Ignoring these principles, the Ninth Circuit proceeded, without considering Congressional intent or whether a conflict existed between the NVRA and Proposition 200, to create its own "harmonious operation" test for Elections Clause preemption:

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

Id. at 394 (internal citations omitted). Thus, the Ninth Circuit substituted its own, ill-defined, amorphous, "harmonious operation" test which is highly

deferential to the federal government and in derogation of federalism principles.

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

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

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

Arizona is no less concerned with national elections for legislators to represent the interests of Arizona and its people than with State and local elections. Indeed, given the vast expansion of federal power into every aspect of life, Arizona must be

especially careful in assuring that those elected to the Senate and the House are elected fairly, and without fraud, by voters who are eligible to vote.

C. The Ninth Circuit Ignored The Purpose And Narrow Scope Of The Elections Clause, Which Incorporates Principles of Federalism.

The Ninth Circuit also failed to consider the very limited purpose and scope of the Elections Clause: leaving to the States the regulation of federal elections and reserving to the federal government only such power as might be necessary to protect its existence from abusive election regulations. U.S. Const. art. I, § 4, cl. 1. Thus, the "[Constitutional Convention] submitted the regulation of elections for the Federal Government in the first instance to the *local administrations*; which in ordinary cases, and when no improper views prevail, may be *both more convenient and more satisfactory*[.]" THE FEDERALIST No. 59, at 330-31 (Alexander Hamilton) (Clinton Rossiter ed., Morgan 1999) (emphasis added).

But the federal government also "*reserved* . . . a right to interpose, whenever *extraordinary circumstances* might render that interposition necessary to its own safety." *Id*. at 331 (emphasis added). Indeed, Hamilton described the right of the national legislature to regulate as one to be exercised only "in the *last resort*." *Id*. at 329 (emphasis added). Thus, the power to regulate elections remained with the States,

with only a residual power granted to the federal government for extraordinary circumstances. States were not entrusted with plenary control over federal elections only because "every government ought to contain in itself the means of its own preservation." *Id*. at 330.

The fear was that "state Legislatures, by forbearing the appointment of Senators, may destroy the national Government." *Id*. at 332. Consequently, as a last resort in extraordinary circumstances, the Elections Clause allows the federal government to invade the States' inherent authority over elections in order to alter or amend State election laws that threaten the federal government's very existence. *Millsaps v. Thompson*, 259 F.3d 535, 539 (6th Cir. 2001) (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995)) ("[T]he Framers sought to curb the potential for abuses by the States and to give the nascent national government the power to preserve itself."). That is, without a reserved federal override, "the Framers feared that the existence of the federal government would depend upon the willingness of the States to hold federal elections." *Id*.

Thus, the original intent of the Framers was that the Elections Clause preserve the States' sovereignty to regulate elections. Congress would intrude on that sovereignty only minimally, and only then as a last resort in extraordinary circumstances. Thus, the Framers drafted the Elections Clause with an eye to maintaining the delicate balance between State and federal sovereignty.

Due to its failure to recognize the federalism principles inherent in the Elections Clause and the limited purpose and scope of that Clause, the Ninth Circuit arbitrarily created its own new preemption test that deferred to the federal government and rode roughshod over the sovereign interests of the State of Arizona, in derogation of principles of federalism.

D. The Ninth Circuit Ignored The Text And Purpose Of The NVRA And HAVA, Which Incorporate Principles Of Federalism.

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

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

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

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

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

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

federalism, also failed to consider or address these important features of the NVRA and HAVA.

As the foregoing demonstrates, this Court should grant the Petition to correct the grave errors made by the Ninth Circuit, to prevent the adoption of *Gonzalez*'s Election Clause preemption test by other courts, and to reemphasize the importance of federalism to individual liberty.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS OF APPEALS.

A. The Ninth Circuit's Decision Conflicts With This Court's Prior Decisions In *Siebold* And *Foster*.

The Ninth Circuit principally relied on *Ex parte Siebold*, 100 U.S. 371 (1879) and *Foster v. Love*, 522 U.S. 67 (1997). *Gonzalez*, 677 F.3d at 393-94. These cases do not support the Ninth Circuit's ruling. Instead, the Ninth Circuit's ruling conflicts with these cases. Both these cases, contrary to the ruling of the Ninth Circuit, required that the exercise of Elections Clause power must *actually conflict* with State law for preemption to occur. For example, in *Siebold*, this Court held that "[w]hen [Congress] exercise[s] [its power under the Elections Clause], the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them." 100 U.S. at 384 (emphasis added). That is, Congress may

preempt State laws, but only "so far as the two are *inconsistent, and no farther*." *Id*. at 386 (emphasis added). *Siebold* cautioned that when Congress exercises its Elections Clause power, "we are bound to *presume that Congress has done so in a judicious manner*; that it has endeavored to *guard as far as possible against any unnecessary interference with State laws and regulations*. . . ." *Id*. at 393 (all emphasis added). *Siebold* recognized and applied principles of federalism and preserved the delicate balance of power between the States and the federal government, precisely what the Ninth Circuit specifically rejected.

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

Moreover, in Foster, this Court very liberally construed "election," a key term in that case, in order to avoid a conflict. This Court refused to "pars[e] the term 'election' . . . down to the definitional bone." *Id*. at 72. Instead, this Court held that "election" meant the "combined actions of voters and officials meant to make a final selection of an officeholder," so long as, "if an election takes place, it may not be consummated prior to federal election day." *Id*. at 71-72.

Unlike the approach of the Ninth Circuit, this Court's deliberate effort to construe a statute to avoid finding a conflict between State and federal law, if possible, acknowledges the important role of federalism in the interpretation of the Elections Clause.

The Ninth Circuit, instead of following the lead of this Court's decisions in *Siebold* and *Foster* – looking for a direct conflict between the NVRA and Proposition 200, and determining the extent of any such conflict – created its own "harmonious operation" test in which such a conflict between State and federal law plays no part. Astonishingly, the Ninth Circuit opined that it had reached its novel test by "reading *Siebold* and *Foster* together." *Gonzalez*, 677 F.3d at 394. The Ninth Circuit misunderstood both *Siebold* and *Foster* and its ruling is in direct conflict with both. This Court should grant the Petition to resolve this conflict.

B. The Ninth Circuit's Decision Conflicts With The Decisions Of Other Circuit Courts Of Appeals.

Unlike the Ninth Circuit in this case, four other Courts of Appeals, have properly followed principles of federalism in analyzing Elections Clause preemption. In *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985), the Seventh Circuit was confronted with whether the "Contested Elections Act," a federal ballot-counting provision, preempted State ballot-counting laws under the Elections Clause. Utilizing

Supremacy Clause analysis, the Seventh Circuit first ruled that none of the laws in question "so pervades the field that all competing principles of state law must yield." *Id*. at 1085. The Seventh Circuit then ruled that "a federal law preempts state law only when the two inevitably conflict or the law contains an explicit preemption clause," and, therefore, held that "the Contested Elections Act neither conflicts with nor expressly preempts state rules." *Id*. (citing to the Supremacy Clause preemption cases of *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977)). Thus, *McIntyre* applied principles of federalism, as set out in Supremacy Clause preemption jurisprudence. The Ninth Circuit's decision is in direct conflict with *McIntyre*.

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

order to enforce the fundamental right involved," which include "prevention of fraud and corrupt practices."[4] *Id.*

The Sixth Circuit then analyzed the Elections Clause preemption allegation by utilizing Supremacy Clause precedent. First, the Sixth Circuit ruled that "'[w]hether federal law preempts state law turns principally on congressional intent.'" *Id.* at 538 (quoting *Northwest Cen. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)). In doing so, the Sixth Circuit started with "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[5] *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

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

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

The Sixth Circuit went on to note that a federal law preempts State law "when the two *actually conflict*" which occurs when "'compliance with both federal and state regulations is a physical impossibility,'" or when a State law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting for the first proposition *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), and for the second, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (emphasis added). In holding that there was no Elections Clause preemption, the Sixth Circuit observed that "all courts that have considered the issue have viewed statutes that facilitate the exercise of the fundamental right of voting as compatible with the federal statutes." *Id*. at 545. Thus, *Millsaps properly* upholds and applies principles of federalism. The Ninth Circuit's ruling is in direct conflict with *Millsaps*.

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

To similar effect is *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008). There, the United States contended that Missouri failed to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of [death or change in residency]," pursuant to the NVRA. *Id*. at 846. Missouri defended, arguing that "although Congress has authority to disrupt the federal/state balance of authority over elections, in order to do so, Congress 'must make its intention to do so unmistakably clear in the language of the statute (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460-61 (1991)).'" *Id*. at 850 n.2. The United States responded by offering the argument accepted by the *Gonzalez* court, that "the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states" and is, therefore, not subject to principles of federalism. *Id*. The Eighth Circuit, however, rejected the United States' argument:

> We . . . recognize regulation of federal elections could not have been technically reserved to the states by the Tenth Amendment, when such federal elections did not exist before the Constitution was established. . . . [A]lthough the regulation of federal elections is not one of the inherent powers that the Tenth Amendment reserves to the states . . . which existed before the Constitution was established, the text of the Elections Clause may arguably describe the *usual constitutional balance between the States and the Federal*

> *Government*. . . . If Congress intends to alter [that balance], it must make its intention to do so unmistakably clear in the language of the statute.

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

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

As the foregoing demonstrates, this Court should grant the Petition for Certiorari to resolve the split in the Circuit Courts of Appeals created by the Ninth Circuit's decision.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Certiorari.

Dated this 15th day of August, 2012.

Respectfully submitted,

J. SCOTT DETAMORE
MOUNTAIN STATES
LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
Tel. (303) 292-2021
detamore@
mountainstateslegal.com

Attorney for Amicus Curiae
Mountain States
Legal Foundation