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

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

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August 17, 2012

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INTEREST OF AMICI CURIAE

The amici curiae are States that have the constitutionally recognized authority to regulate the registration and qualification of voters. *See, e.g.*, U.S. CONST. art. I, § 2 and § 4. That power is inherent in the nature of sovereignty, and it pre-existed the establishment of the federal government. But States' exercise of that power will be diminished in law and in practice if the Ninth Circuit's misapplication of the National Voter Registration Act is not reversed. The effect of the Ninth Circuit's decision is to give the United States Election Assistance Commission unbridled legal authority over registration for federal elections and *de facto* authority over the registration of voters for state and local elections. The decision also casts doubt on the validity of laws in other States. The amici States thus have an interest in seeing the petition granted and the Ninth Circuit's decision reversed.[1]

STATEMENT

Congress enacted the National Voter Registration Act in 1993 ("NVRA"). It prescribes at least three methods for registering voters for federal elections. 42 U.S.C. § 1973gg–2(a). These methods are: (1) "by application made simultaneously with an application for a motor vehicle driver's license," *id.* § 1973gg–

[1] The amici States gave timely notice of their intent to file this brief to counsel for the parties on July 26, 2012. *See* Sup.Ct. R. 37(2)(a). The amici States do not need consent of the parties to file this brief. *See* Sup.Ct. R. 37(4).

2(a)(1); (2) "by mail application," *id*. §§ 1973gg–2(a)(2), 1973gg–4; and (3) "by application in person," *id*. § 1973gg–2(a)(3). States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law." *Id*. § 1973gg–2(a).

Of particular import to this case, Congress established the Election Assistance Commission ("EAC") to develop and promulgate a federal form for use in registering voters by mail.[2] *See* 42 U.S.C. § 15321 *et seq*. (establishing EAC). The NVRA directs the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2). The form must "enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg–7(b)(1). One of the express eligibility criteria that must be included on the form is a question about United States citizenship. *Id*. § 1973gg-7(b)(2).

When a State passes a voting law that changes its processing requirements, it can ask the EAC to include that requirement in the state-specific instructions that the EAC provides with the federal form. *See id*. § 1973gg–7(a). These changes are usually uncontroversial. For example, as of August 7, 2012, Maine had a request pending to change the registration deadline on the form to comply with a change in Maine law. *See* Letter from Julie L. Flynn,

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[2] The responsibilities of the EAC were formerly held by the Federal Election Commission. The Help America Vote Act of 2002 (HAVA), Pub.L. No. 107–252, 116 Stat. 1666, created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532.

Deputy Secretary of State, to Election Assistance Commission (August 1, 2012). So, although the EAC's federal form is nominally a short list of questions on a post-card-sized piece of paper, it is actually a multi-page list of state-specific requirements in small font. *See* National Mail Voter Registration Form, State Instructions.[3]

These state-specific instructions almost always require that the registrant provide specific identifying information on the federal form. For example, to register in California, "you must provide your California driver's license or California identification card number." *Id.* In Hawaii, "[y]our full social security number is required." *Id.* And "Michigan law requires that the same address be used for voter registration and driver license purposes." *Id.* Registrants must also review their States' specific voter registration qualifications and

". . . swear/affirm that:
- I am a United States citizen
- I meet the eligibility requirements of my state and subscribe to any oath required."

Id. at Voter Registration Application ¶9.

After Arizonans voted to approve Proposition 200 in a popular referendum, the Attorney General of Arizona requested preclearance of the law from the Department of Justice ("DOJ") under Section Five of the Voting Rights Act. And the Secretary of State of Arizona requested that the EAC modify Arizona's

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[3] a*vailable at* http://www.eac.gov/voter_resources/register_to_vote.aspx (last visited August 14, 2012).

state-specific instructions to require registrants to provide proof of citizenship with the federal form. The DOJ precleared the law, *see* Pet. at 6, but the EAC rejected Arizona's request to include the law in the state-specific instructions, *see* Letter from Thomas Wilkins to Arizona Secretary of State (March 6, 2006).[4]

After the trial court below concluded that the NVRA did *not* preempt Proposition 200 and denied a temporary restraining order, the EAC held a new vote on Arizona's request to add Proposition 200 to its state-specific instructions. *See* Certification, *In the Matter of Arizona Request for Accommodation*, Before the Election Assistance Commission (July 31, 2006).[5] That vote was a 2-2 tie, and resulted in another denial. *Id.* The Chairman and Vice Chairman both published explanations for voting, respectively, to approve of and reject the request. Chairman Paul DeGregorio concluded that "leaving out key instructions on the National Voter Registration Form was likely to cause more steps for the voters and possibly keep them from being able to cast a ballot." Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote, at 2.[6] He

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[4] *available at* http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%206%202006.pdf (last visited August 14, 2012).

[5] *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20Vote%20Regarding%20Arizona's%20Request%20for%20Accommodation%20July%2031%202006.PDF (last visited August 14, 2012).

also opined that "[f]urther clarification of the federal government's role in developing the National Registration Form is needed to prevent future confusion." *Id*. Vice Chairman Ray Martinez concluded that "reversing [the EAC's] current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III July 10, 2006, at 3.[7]

ARGUMENT

The Ninth Circuit's disposition of this case has a certain irony to it. One of Congress's goals in adopting the NVRA was to provide clear guidelines "for Federal, State, and local governments to implement [voter registration] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg(b)(2). But the lower courts' disposition of this case—first finding Proposition 200 not preempted, then finding it to be preempted years later—has caused nothing but confusion among federal and

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[6] *available at* http://www.eac.gov/assets/1/Page/Chairman%20Paul%20DeGregorio%20Regarding%20Arizona%20and%20the%20Federal%20Voter%20Registration%20Form%20August%208%202006.pdf(last visited August 14, 2012).

[7] *available at* http://www.eac.gov/assets/1/News/Vice%20Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona%27s%20Request%20for%20Accomodation.pdf (last visited August 14, 2012).

State election officials, not to mention voters. And the *en banc* decision's bottom line—that Arizona cannot enforce a law enacted by popular referendum—nullifies the effect of Arizonans' votes in the name of making it easier for them to register to vote.

The amici States request that the Court grant Arizona's petition for a writ of certiorari for two overarching reasons. First, there is a compelling need for this Court to resolve the NVRA's application to state-specific registration requirements in general, and proof-of-citizenship requirements in particular. Second, the lower court's decision will have bad on-the-ground consequences for the future of Arizona's election system and for the relationship between the States and the EAC.

A. The Ninth Circuit's decision casts doubt on the enforceability of other States' laws.

As Judge Kozinski has noted, the Ninth Circuit's "reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona." *Gonzalez v. Arizona*, 624 F.3d 1162, 1207 (9th Cir. 2010) ("*Gonzalez II*") (Kozinski, J., dissenting). This is so for two reasons.

1. First, the Ninth Circuit's bottom-line conclusion contradicts the EAC's longstanding practice. The EAC has long provided state-specific instructions along with the federal form. But now the Ninth Circuit has declared that the NVRA "on its face . . . does not give states room to add their own requirements to the Federal Form." *Gonzalez v.*

Arizona, 677 F.3d 383, 401 (9th Cir. 2012) (en banc) ("*Gonzalez III*").

Like Arizona, other States require registrants to provide supplemental registration information on the federal form. "In Alabama, '[y]our social security number is requested.' Connecticut requires a 'Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.' Hawaii tells applicants that '[y]our full social security number is required. . . .'" *Gonzalez II*, 624 F.3d at 1207 (Kozinski, J., dissenting) (quoting Federal Form).

The EAC has chosen to include these state-specific requirements on the federal form, notwithstanding the purported uniformity required by the NVRA. The Ninth Circuit's decision calls the EAC's longstanding practice into question, and may compel the EAC to alter how it incorporates state-specific instructions on the federal form in the future.

2. Second, the Ninth Circuit's decision casts doubt on the enforceability of other States' laws that require proof of voter eligibility and that the EAC has *not* incorporated into the federal form's instructions. When voting on Arizona's request, Vice Chairman Ray Martinez noted that legislators in Colorado were actively "considering [similar] legislation," and he predicted that "[o]ther states are likely to follow." Position Statement of Commisioner Ray Martinez III, at 3. Vice Chairman Martinez was right. In the years since the Ninth Circuit initially *upheld* Arizona's citizenship requirement as *not* preempted by the NVRA, *see Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) ("*Gonzalez I*"),

state legislatures across the country have considered and enacted similar measures.

Four States in three different federal circuits—Georgia, Alabama, Kansas, and Tennessee—have already enacted laws that are materially identical to Proposition 200. *See* Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(l) (2011); Tenn. Code Ann. § 2-2-141(a) (2011).[8] These laws all require proof of citizenship as part of the registration process. And they all provide, like Proposition 200, that the proof-of-citizenship requirement can be satisfied by providing a driver's license number or a photocopy of one of several enumerated documents. *See* Ga. Stat. Ann. § 21-2-216(g)(2); Ala. Code § 31-13-28(k); Kan. Stat. Ann. § 25-2309(l)(1)-(13); Tenn. Code Ann. § 2-2-141(b). Georgia's law was the first enacted and has been precleared under Section Five of the Voting Rights Act by the DOJ. *See* Ga. Stat. Ann. § 21-2-216(g)(1); Bill Rankin, *DOJ Approves Proof of Citizenship Requirement for Voter Registration*, Atlanta J.-Const. (Apr. 4, 2011).[9]

Even more state legislatures are actively considering laws like Arizona's. In their 2011 legislative sessions, "at least twelve states

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[8] Georgia's, Alabama's, and Kansas's statutes are almost verbatim replicas of Arizona's law. Tennessee's law is phrased in terms of *removing* the registrant from the voting list instead of *denying* the application.

[9] *available at* http://www.ajc.com/news/georgia-politics-elections/doj-approves-proof-of-898132.html. (last visited August 14, 2012).

introduced legislation that would require documentary proof of citizenship to register or vote." WENDY R. WEISER & LAWRENCE NORDEN, VOTING LAW CHANGES IN 2012, at 17 (2011).[10] This kind of legislation was introduced in States as diverse as Colorado, Connecticut, Oregon, Texas, Maine, and Massachusetts. *Id.*

In addition to the States that have enacted or are considering laws materially identical to Proposition 200, other States have similar laws that require applicants to provide proof of their eligibility. For example, as of August 7, 2012, Louisiana has lodged a request with the EAC to change its state-specific instructions to require applicants without a driver's license number to submit with their application either a copy of a photo ID or a document that proves the applicant's name and address. *See* Letter from Tom Schedler, Secretary of State, to Election Assistance Commission (July 16, 2012). *See also* La. Rev. Stat. Ann. 18:104(A)(16). Similarly, both Florida and Wisconsin require registrants to affirm that they are not felons, *see* Fla. Stat. § 97.041(2)(b); Wis. Stat. Ann. § 6.33(1), but the EAC has previously rejected Florida's request to include its felon-voting certification on the federal form. *See* Position Statement of Commissioner Ray Martinez III July 10, 2006, at 4.

The Court should not wait to grant cert until these other state laws are challenged. As this Court explained in its previous order in this case, "[c]ourt

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[10] *available at* http://usgovinfo.about.com/library/nosearch/voting_rights_laws_report.pdf. (last visited August 14, 2012).

orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Laws like Proposition 200 serve the States' "indisputably" compelling interest "in preserving the integrity of its election process." *Id.* at 4. And the trend among the States is decidedly toward adopting more of them. The Ninth Circuit's decision may chill these legislative developments and call into doubt the laws that are already on the books. The question presented in Arizona's petition deserves resolution by this Court.

B. The Ninth Circuit's decision will have significant on-the-ground consequences.

The Ninth Circuit's decision is likely to lead to two kinds of harmful consequences if it stands. It expands the power of a federal agency, which can now preempt validly-enacted state laws, and it unjustifiably increases the federal government's involvement in state and local elections.

1. First, the Ninth Circuit's decision expands the EAC's power by giving it the ability to nullify state-law voting requirements for the purposes of federal elections. The NVRA requires the EAC to develop the federal form "in consultation with the chief election officers of the States," 42 U.S.C. § 1973gg–7(a)(2), and in such a way as to "enable the appropriate State election official to assess the eligibility of the applicant." *Id.* § 1973gg–7(b)(1). But the primary check on the EAC's authority is that the NVRA *also* gives the States authority to come up with their own

NVRA-compliant forms if they disapprove the federal form. *See* 42 U.S.C. § 1973gg-4(a)(2). "[T]he NVRA itself expressly, not merely implicitly, authorizes a state to 'develop and use' its own form 'for the registration of voters in elections for Federal office,' in addition to accepting and using the [Federal Form].'" *Gonzalez III*, 677 F.3d at 445 (Rawlinson, J., dissenting). "[T]he plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg–7(b)." *Id.*

The Ninth Circuit's decision removes that check, and significantly changes the balance of power between the States and the EAC. Under the Ninth Circuit's decision, if a State enacts a voter-registration provision that a majority of the EAC dislikes, the EAC can preempt, with a simple vote, that state law insofar as it applies to federal elections. This is true even if the State's requirement is consistent with the express provisions of Section 1973gg–7(b) and "necessary to enable the . . . State election official to assess . . . eligibility." 42 U.S.C. § 1973gg–7(b)(1). If that is the rule, then there is no structural reason for the EAC to cooperate with the States going forward even if it may be statutorily obligated to do so. After the Ninth Circuit's decision, the EAC will incorporate state requirements only insofar as a majority of its members like them. That *ad hoc* political calculation is no check at all.

Worse, the EAC's newly-recognized preemptive power is unconstrained by any legal standard. When explaining his vote in favor of adding Proposition 200 to the federal form's "instructions," EAC Chairman DeGregorio requested "[f]urther clarification of the

federal government's role in developing the National Registration Form . . . to prevent future confusion." Statement of EAC Chairman Paul DeGregorio regarding the EAC's Tally Vote of July 6, 2006, at 2. But the Ninth Circuit's decision is likely not what he had in mind. There is nothing in that opinion to guide the EAC in exercising its newly-recognized power to preempt state law.

It is unlikely that Congress intended to give the EAC the power of discretionary preemption. Although "[t]he federal balance is remitted, in many instances, to Congress," it is rarely vested in "a single agency official." *Alaska Dept. of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 517 (2004) (Kennedy, J., dissenting). Instead, this Court has "rightly reject[ed]" the notion that a state law is preempted "not by any federal statute or regulation, but simply by the Executive's current enforcement policy." *Arizona v. United States*, 132 S. Ct. 2492, 2524 (2012) (Alito, J., concurring in part and dissenting in part). *See also Wyeth v. Levine*, 555 U.S. 555, 576 (2009) (no judicial deference to administrative agencies on questions of preemption). The Ninth Circuit's opinion threatens to expand the power of the EAC beyond its proper scope.

2. Second, the Ninth Circuit's decision exacerbates federal interference in state and local elections. The Elections Clause does not give the federal government the power to regulate state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970). But, in practice, the Ninth Circuit's decision does just that. Although the right remedy to the Ninth Circuit's decision is still being litigated,

one of two things will happen in Arizona if the Ninth Circuit's decision stands. Neither is a good option.

One possibility is that Arizona will attempt to enforce Proposition 200 as to state elections, but not enforce it as to federal elections. Because Arizona cannot apply its eligibility requirements to federal elections, Arizona would need to create separate federal-state registration regimes to enforce both state and federal law. "[A]n Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials." *Gonzalez III,* 677 F.3d at 449 (Rawlinson, J., dissenting). This system of "dual registration" would require Arizona to "track whether . . . residents are registered to vote for federal elections, state elections, or both" and to distinguish between these classes of voters on Election Day. *Id.*

Arizona's attempt at dual registration would likely conflict with other federal laws. The story of Mississippi is instructive. Mississippi had separate registration for municipal and state elections until 1987. In that year, a federal court found that the dual registration system was confusing and burdensome, and violated Section Two of the Voting Rights Act. *See Operation Push v. Allain*, 674 F.Supp. 1245, 1269 (N.D. Miss. 1987), *aff'd sub nom*., *Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Then, after Congress enacted the NVRA, Mississippi tried to use a dual system of registration for state and federal elections—in other words, the same kind of system Arizona would need to adopt. But the DOJ refused to preclear the change under Section Five of the Voting Rights Act. *See Shelby*

County, Ala. v. Holder, 811 F.Supp.2d 424, 481 (D.D.C. 2011) (recounting this history). Like Mississippi, Arizona is covered by Section Five, and it will have to get DOJ's permission to change to dual registration, even though Proposition 200 has already been precleared. *See Young v. Fordice*, 520 U.S. 273 (1997) (requiring preclearance before change from single registration system to dual registration).

The other possibility is for Arizona to disregard the popularly-enacted state law and use the federal form for registering voters for both state and local elections. That is also the most likely result. Arizona's election officials will be under intense economic pressure to adopt, in practice, the EAC's standards, despite the fact that Arizona's voters directly enacted Proposition 200. "[M]aintaining two sets of registration rolls would impose massive administrative and economic burdens" on the State. *Welker v. Clarke*, 239 F.3d 596, 599 (3d Cir. 2001). For that reason, "most states [have] elected to adopt . . . a single, unified registration system and electorate." *Id.* If Arizona's officials fail to enforce Proposition 200, then the Ninth Circuit's decision will have controlled not only the way Arizona registers voters for federal elections, but the way Arizona registers voters for state and local elections as well.

The Court should review this case. Arizona is a sovereign State, its people directly enacted Proposition 200, and Proposition 200 has been in force throughout the pendency of this litigation. Arizona should not have to deal with the fallout from the Ninth Circuit's decision while it waits for this

Court to grant review of a case from another Circuit. For their part, other States have been, and are, "closely monitoring legal and policy developments on this issue." Position Statement of Commissioner Ray Martinez III July 10, 2006, at 3. Arizona and other States need certainty in administering their election laws. The amici respectfully request that the Court grant Arizona's petition.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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