No. 12-71

In The
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

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

Respondents.

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

PETITIONERS' REPLY TO THE RESPONSE OF INTER-TRIBAL COUNCIL OF ARIZONA, ET AL.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

The Ninth Circuit's newly created preemption analysis conflicts with this Court's Elections Clause authority, which recognizes that substantial deference must be given to the States' interest in regulating federal election procedures. Respondents Inter-Tribal Council of Arizona et al. (ITCA) concede that "the text of the [National Voter Registration Act (NVRA)] *does not expressly prohibit* States from asking for proof of citizenship," but rather argues that the NVRA "delegates to the [U.S. Election Assistance Commission (EAC)] the authority to decide the contents of the Federal Form with some limitations." ITCA Response at 34. (emphasis added). Respondents thereby acknowledge that the Ninth Circuit's interpretation gives the EAC the authority to preempt state law, even though the statute does not prohibit the state action at issue. This demonstrates the fundamental flaw in the Ninth Circuit's interpretation of the NVRA, because Congress did not intend to give the EAC such authority, and this Court has not recognized that a federal agency has the authority to preempt state law in the manner Respondents propose to empower the EAC. In fact, this Court has held that federal agencies are owed no deference on questions of preemption. *See Wyeth v. Levine*, 555 U.S. 555, 576 (2009).

The Court should grant review because the Ninth Circuit's erroneous decision conflicts with the approaches of the Fifth, Sixth, and Seventh Circuits

(and the Ninth Circuit itself), is contrary to this Court's precedent, and blocks the implementation of a voter-enacted Arizona law that simply asks for evidence of citizenship when people register to vote. As this Court has explained, "[a] State indisputably has a compelling interest in preserving the integrity of its election process [because] [c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal quotations and citation omitted). "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." *Id.*

The Ninth Circuit decision also casts doubt on the enforceability of other States' laws, and deters other States from enacting similar voter registration laws. *See* Brief of Alabama et. al. as Amici Curiae in Support of Petitioners (States' Amicus) at 7-9.

ARGUMENT

I. The Ninth Circuit's Interpretation of the Elections Clause's Preemption Analysis Conflicts with This Court's Authority Interpreting the Elections Clause.

Respondents mostly ignore the substance of Arizona's argument and the portions of the Court's

Elections Clause cases that support the State's argument. Instead they rely on a formalistic and inaccurate reading of the Elections Clause cases.

Respondents emphasize that the States' authority to "regulate federal elections" is a delegated rather than a reserved power. Response at 10 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 804-05 (1995) (plurality opinion)). By its terms, this distinction does nothing to advance Respondents' argument. Rather it is simply an observation about the construction of the Constitution itself. In any event, *Thornton* recognizes that far from a limitation on the States, the Elections Clause as interpreted by this Court "gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved'" and "States are thus entitled to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" 514 U.S. at 834 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) and *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983), respectively). As Justice Kennedy noted in his concurrence, "[t]he Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province." *Id.* at 841.

Nothing in *Thornton* supports the proposition that the Court would lightly presume that an ambiguous statutory phrase preempts a state referendum directly

aimed at securing the "integrity and reliability of the electoral process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008). Indeed, the Court's cases stand for precisely the opposite proposition. *See* Petition at 15-22 (explaining the Court's recognition of the States' historical role in administering federal elections and the Court's deference to the States' regulation of federal elections in its Elections Clause cases).

Here, the Ninth Circuit did more than reject appropriate presumptions; it reversed them. First, it construed a "tantalizingly vague" statute (Pet. App. 90c [Kozinski, J., concurring]) in a manner that was directly contrary to the State's unquestioned interests (*id.* at 41c), inconsistent with the language of another provision of the NVRA (*id.* at 107c [Rawlinson, J., dissenting]), and inconsistent with Congress's expressed intent in enacting the NVRA – "[t]o protect the integrity of the electoral process" (*id.* at 2h). The Ninth Circuit then held that the statute had preemptive effect. Given this Court's Elections Clause jurisprudence that recognizes the States' express role in administering federal elections, it is likely that the Court has "never mentioned Supremacy Clause principles or relied on them in any of its decisions" (ITCA Response at 16) because the Court has never addressed a case in which a circuit court so brazenly disregarded settled principles.

Respondents do not cite to any decision in which this Court, or any circuit court, has interpreted an

ambiguous federal statute in a manner that conflicts with a state law that regulates federal elections and held that the federal law preempts the state law. Instead, the cases that Respondents cite indicate that the Court is reluctant to hold that a federal law preempts a state law under the Elections Clause.

In *Smiley v. Holm*, the Court deferred to state constitutional provisions permitting a gubernatorial veto as applied to legislative action on congressional districts even though the Elections Clause gave that authority solely to the States' legislatures. 285 U.S. at 370-72.[1]

Likewise, *Foster v. Love* does not support Respondents' contention that a heightened preemption test applies under the Elections Clause – they concede that whatever conflict was determined in that case "was limited to the facts before it." ITCA Response at 13 (citing *Foster*, 522 U.S. 67, 72 n.4 (1997)). Instead of manipulating the statutes before it to find a conflict, the Court in *Foster* broadly defined the

[1] Respondents misstate the holding of *Smiley*, claiming that this Court held that "the Elections Clause did not speak to the issue of whether a governor could veto reapportionment legislation where there is no federal legislation concerning the issue." ITCA Response at 19. Rather, the Court held that "there is nothing in article 1, § 4 which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Smiley*, 285 U.S. at 373.

term "election" in a federal statute to avoid conflicts with state laws that allowed absentee voting. 522 U.S. at 72 n.4.

The Ninth Circuit's decision therefore is contrary to the Court's preemption analysis under the Elections Clause and the Supremacy Clause and contrary to the federalism principles that support the Court's preemption analysis.

II. Respondents' Effort to Minimize the Different Approaches to Elections Clause Cases Among the Circuits Only Highlights the Confusion Facing Federal Courts.

Respondents also claim that the inconsistent approaches of other circuits, including the Ninth Circuit itself, do not warrant review. Again these assertions do not withstand scrutiny. First, although Respondents contend that "nowhere" in the existing Fifth, Seventh, and Ninth Circuit cases "did the courts explicitly apply Supremacy Clause principles to an Elections Clause case" (ITCA Response at 22), this argument ignores the reasoning of those circuits.

In *McIntyre v. Fallahay*, the Seventh Circuit specifically acknowledged that no different analysis is required. 766 F.2d 1078, 1085 (7th Cir. 1985) (relying on Supremacy Clause cases in determining preemption in an Elections Clause case).

In *Voting Integrity Project, Inc. v. Bomer*, the Fifth Circuit concluded that under the express terms of the Constitution, as recognized by this Court, States "'are given . . . a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.'" 199 F.3d 773, 775 (2000) (quoting *United States v. Classic*, 313 U.S. 299, 311 (1941)). "Thus, 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." *Id*. (emphasis added). The *Bomer* Court, like the Ninth Circuit in a later similar case, interpreted the term "election" to avoid creating a conflict. *Id*. at 776; *accord Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001).

In contrast to *Bomer* and *Kiesling*, the Ninth Circuit here misapprehended the appropriate analysis under the Elections Clause and then compounded its error by construing the NVRA to create a conflict.

Respondents highlight *Harkless v. Brunner* (ITCA Response at 23), but that case only illustrates the inconsistent approaches that have developed in the cases. In *Harkless*, the Sixth Circuit first concluded that as to the NVRA issue in that case, the federal statute was "clear." 545 F.3d 445, 454 (6th Cir. 2008). Consequently, its description of the plain statement rule was dicta. Even if that language is considered, however, it does not aid Respondents here as it directly

contradicts *Bomer*. *Compare Harkless*, 545 F.3d at 454-55 (stating that "[i]n ratifying Article I, Section 4, the states not only gave Congress plenary authority over federal elections but also explicitly ensured that all conflicts with similar state laws would be resolved wholly in favor of the national government") *with Bomer*, 199 F.3d at 775 (explaining State's explicit role under the Constitution and concluding only where there is a "direct[ ] conflict" must state law yield).[2]

The Ninth Circuit's approach, which assumes expansive Elections Clause powers for the Congress and then construes apparently ambiguous statutory language to create a conflict between state and federal law, warrants review. Nothing in the Response suggests otherwise.

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[2] Likewise, Respondents' citation to *Voting for America, Inc. v. Andrade*, No. G-12-44, 2012 WL 3155566 (S.D. Tex. Aug. 2, 2012) (ITCA Response at 23 n.5) only highlights the federal courts' confusion over the appropriate Elections Clause analysis. In *Andrade*, the three-judge panel found the en banc opinion in this case and *Harkless* persuasive, but recognized that "the full extent of the distinction between Elections Clause preemption and Supremacy Clause preemption need not be resolved at this time" because even under *Bomer,* the plaintiffs' particular NVRA challenge would be successful. 2012 WL 3155566, at * 16. The Fifth Circuit stayed the district court's decision in *Andrade* pending appeal on September 6, 2012. *Voting for America, Inc. v. Andrade*, No 12-40914, Order of September 6, 2012, Document 00511977361 (5th Cir. 2012).

To the extent that Respondents contend that the language in 42 U.S.C. § 1973gg-4(A)(1) that requires States "to accept and use" the Federal Form is unambiguous, their contention cannot be squared with the record in this case in which sixteen federal judges reviewed the statute and six of them would have read the statute differently from the en banc majority. *See* Petition at 8-9. Nevertheless, it is the Ninth Circuit that strains to reach its anomalous construction, as the plain text of the NVRA does not contemplate the result reached by the majority in this case.

The Response argues repeatedly that there were only two dissenting votes in the Ninth Circuit opinion, and quotes selectively from Chief Judge Kozinski's concurrence. It conveniently fails to note that Chief Judge Kozinski, in effect, suggested that this Court should review this case, because it "presents a far more suitable case for deciding whether we should defer to state interest," and that only this Court "can adopt such a doctrine." Pet. App. 91c. Chief Judge Kozinski wrote:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also

> requiring registrants to provide documentation confirming what's in the form.[3]

Id. 89c.

Chief Judge Kozinski also explained that although he concluded that this Court "has never articulated any doctrine giving deference to the states under the Elections Clause," this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors," is appropriate for review by this Court. *Id.* 91c.

III. The Ninth Circuit Erroneously Interpreted the NVRA as Authorizing the EAC, Not Congress, to Preempt State Law.

Respondents concede that "[w]hile the text of the NVRA does not expressly prohibit States from asking for proof of citizenship, it delegates to the EAC the authority to decide the contents of the Federal Form." ITCA Response at 34. In making this concession, Respondents recognize that although the Ninth Circuit strained to find a conflict between the language of the NVRA and Proposition 200, its decision in effect gives

[3] The State also respectively requests that this Court review Chief Judge Kosinski's dissent in *Gonzalez II* (Pet. App. 95a-101a) for an eloquent explanation of why the broader interpretation of the NVRA, which would make federal and state law consistent, is the more reasonable interpretation.

the EAC the authority to preempt state law. This demonstrates the fundamental flaw in the Ninth Circuit's interpretation. Respondents' concession recognizes that the Ninth Circuit's bottom-line conclusion not only holds that the EAC determines the content of the Federal Form but also authorizes the EAC to preempt state-law requirements.[4]

Respondents' concession that the NVRA "does not expressly prohibit states from asking for proof of citizenship" amplifies the conflict between the Ninth Circuit's decision and this Court's precedent. This Court has long held, consistent with ordinary principles of preemption, that a state statute is invalid under the Elections Clause only "so far as the conflict extends." *Ex parte Siebold*, 100 U.S. 371, 384 (1879). Thus in *Foster*, the Court examined the terms of the statute to determine if there was a conflict. 522 U.S. at 71-72. Here, however, as Respondents would have it, the conflict is not between the state and federal

[4] Respondents' concession is warranted as it is consistent with *Young v. Fordice*. There this Court recognized that "the NVRA does not list . . . all the other information the State may-or may not-provide or request," and therefore allows the States to make "policy choice[s]." 520 U.S. 273, 286 (1997). Respondents' effort to distinguish *Young* (ITCA Response at 35 n.11) does not address its language, but merely reasserts that the State must accept and use the Federal Form. There is no dispute that the State has accepted and used the Federal Form, provided that the applicant also presents evidence of citizenship, a request that Respondents concede is "not expressly prohibited by the NVRA." *Id.* at 34.

law, but between state law and the EAC's determination not to include Proposition 200's requirements in the Federal Form instructions. But on issues of preemption, no deference is due executive agencies. *Wyeth*, 555 U.S. at 576; *see also* States' Amicus at 10-12.

Moreover, Congress explicitly denied the EAC the authority "to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government except to the extent permitted under section 1973gg-7(a) of this title." 42 U.S.C. § 15329. In turn, 42 U.S.C. § 1973gg-7(a) permits only the development of the Federal Form, and "provid[ing] information to the States with respect to the responsibilities of the States under [the NVRA]."

The NVRA does not give the EAC the authority to determine what "accept and use" means, and the Ninth Circuit refused to even consider its views on the matter. *See* Pet. App. 43c n.29. In other words, the NVRA does not give the EAC preemptive power over existing state statutes. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355, 370-71 (1986) (rejecting preemptive power of federal agency where Congress did not grant agency such authority).

IV. Respondents Fail to Distinguish Other Decisions Relied upon by the State.

Respondents finally serially deal with the State's other arguments and authorities in an effort

to rehabilitate the Ninth Circuit's judgment. *See* ITCA Response at 32-34. However, none of the arguments raised by the Respondents do anything more than amplify the inconsistency between the Ninth Circuit's decision in this case and the decisions of other federal circuit and district courts around the country.

CONCLUSION

For the forgoing reasons, Petitioners request the Court to grant the Petition for Certiorari.

Respectfully submitted,

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