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 JESUS GONZALEZ, ET AL.

THOMAS C. HORNE
Attorney General of Arizona
DAVID R. COLE
Solicitor General
Counsel of Record
PAULA S. BICKETT
Chief Counsel, Civil Appeals
THOMAS M. COLLINS
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
Phone (602) 542-3333
Fax (602) 542-8308
dave.cole@azag.gov
thomas.collins@azag.gov
Counsel for Petitioners

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

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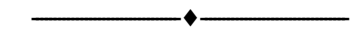
INTRODUCTION

The Petition challenges the Ninth Circuit's application of a heightened preemption analysis to conclude that the National Voter Registration Act (NVRA) preempts an Arizona law requiring applicants for voter registration to provide evidence of citizenship with their federal voter registration form ("the Federal Form").

The Court should grant review because the Ninth Circuit's erroneous decision is contrary to this Court's precedent, blocks the implementation of a voter-enacted Arizona law that ensures the eligibility of applicants for voter registration, casts doubt on the enforceability of other States' laws, and deters other States from enacting similar voter registration laws. *See* Petition at 15-22; *see also* Brief of Alabama et al. as Amici Curiae Supporting Petitioners (States' Amicus) at 5-9.



ARGUMENT

I. Respondents Do Not Substantially Address the Inconsistency Between This Court's Elections Clause Precedent and the Unique Approach that the Ninth Circuit Undertook in This Case.

Rather than address the State's arguments, Respondents simply reiterate their belief that the Ninth Circuit followed this Court's case law. *See* Gonzalez Response at 15-19. Respondents do not substantially

address the State's contention that the Ninth Circuit's approach to the Elections Clause is at odds with settled precedent and that precedent is consistent with Supremacy Clause preemption principles. Instead, Respondents simply restate the premise that the Congress may enact federal election procedures. That is not disputed here. The issue here is whether the Ninth Circuit's narrow interpretation of ambiguous language in the NVRA to make it conflict with state law is correct in light of Elections Clause preemption principles. It is not. The State's Reply to the Response of Inter-Tribal Council of Arizona et al. (ITCA) addresses why the Ninth Circuit's decision conflicts with this Court's authority. Reply to ITCA at 2-6.

Likewise, Respondents' reliance on circuit court cases addressing States' Tenth Amendment challenges to the NVRA is unavailing. Gonzalez Response at 20-21. Those cases addressed whether Congress had the authority to pass the NVRA, not how specific provisions of the NVRA operate in the context of federal elections administered by state election officials. And the Seventh and Ninth Circuits recognized the baseline premise that state sovereignty should be respected. *See, e.g., Ass'n of Comm. Orgs. for Reform Now* (*ACORN*) *v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995) (rejecting decree language that went beyond NVRA's terms because "the Department of Justice, in proposing such a decree, and the district judge, in entering it, failed to exhibit an adequate sensitivity to the principle of federalism"); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) (recognizing that "an informed understanding of the duality of

sovereignty imbedded within the Constitution of the United States" is an important consideration on remand). The Sixth Circuit did not address the scope of preemption beyond rejecting a Tenth Amendment claim. *Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Miller,* 129 F.3d 833 (6th Cir. 1997). These cases do not support the sweeping disregard for interpretive principles that the Ninth Circuit engaged in here. Nowhere do Respondents explain why the statute, even if it is ambiguous, should be given a construction that creates a conflict, rather than a reading, supported by the text of the NVRA itself, that recognizes that Proposition 200 is consistent with its terms.

Nor do any of the more recent cases that Respondents cite support the Ninth Circuit's opinion. For example, in *Harkless v. Brunner*, 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. Here, in contrast, the Ninth Circuit's interpretation of the NVRA is not supported by its language. *Project Vote v. Long*, 682 F.3d 331 (4th Cir. 2012), addressing a different NVRA provision, did not address preemption at all, while *United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008), addressed a different provision of the NVRA and does not support the Ninth Circuit's decision. Indeed, to the extent that the Eighth Circuit discussed the Elections Clause at all, it noted the unsettled nature of how to address ambiguous provisions of the NVRA under the Elections Clause. 535 F.3d at 850 n.2.

Respondents also rely on *United States Students Association Foundation v. Land*, 546 F.3d 373 (6th Cir. 2008) and *Charles H. Wesley Educational Foundation v. Cox*, 408 F.3d 1349 (11th Cir. 2005). But those cases do not support the Ninth Circuit's decision either.

In *Land*, the Sixth Circuit addressed whether Michigan was obligated to treat a voter as a registrant under a different provision of the NVRA once it had placed that voter on the active voting rolls, but before that person had received a voter registration card. 546 F.3d at 384-85. The court held that "it is likely that once Michigan gives an individual 'active' status in the QVF [Qualified Voter File], the status that would permit the individual to cast a regular ballot on Election Day, the individual becomes a 'registrant' protected by the NVRA." *Id.* at 384. Under *Land*, however, "Michigan is still free to set eligibility standards and to evaluate whether each applicant meets those standards." *Id.* at 385. Indeed, the court denied holding "that filling out an application is the event that triggers NVRA protection." *Id.*

Cox is likewise inapposite. There the statute barred bulk submissions of voter registration forms. 408 F.3d at 1354. The state statute had nothing to do with eligibility.

Respondents also assert that the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301-15545,[1] did nothing to relieve the alleged conflict between Proposition 200 and the NVRA. Gonzalez Response at 19-20. This argument is incorrect. First, contrary to the Ninth Circuit's conclusion (Pet. App. 41c), the HAVA "savings clause" that provides that it does not "supersede, restrict or limit the application of the NVRA," does not preclude Arizona's argument. The savings clause is not an independent basis for construing the NVRA itself. Rather, if the Ninth Circuit incorrectly applied the NVRA, then the HAVA savings clause is irrelevant. Furthermore, reading the HAVA and the NVRA together in the context of this case leads to the opposite conclusion from the Ninth Circuit's: each statute leaves the States with authority to protect the integrity of elections and public confidence in them. The HAVA imposed new requirements on States to "verify the accuracy of the information provided" on voter registration applications, 42 U.S.C. § 15483(a)(5)(B)(i), and indicated that its fraud-prevention measures are only "minimum requirements" permitting "more strict" state requirements consistent with federal law. 42 U.S.C. § 15484.

Furthermore, following the HAVA's passage, which included a new federal requirement that applicants provide identification prior to voting for the first time,

[1] The HAVA is reproduced in the Petition Appendix at 28h-42h.

the U.S. Election Assistance Commission (EAC) amended the Federal Form to specifically permit such compliance by "submit[ting] a COPY of this identification with their mail in voter registration form." Pet. App. 61c (emphasis in original); *see also* 42 U.S.C. § 15483(b)(3)(A) (providing for persons to mail copies of documents with the Federal Form). Consequently, the HAVA demonstrates that Congress did not intend to prevent States from requiring additional information concerning voter eligibility and that Proposition 200 is no obstacle to Congress's intent in passing either the HAVA or the NVRA.

Similarly, Respondents' observation that Arizona has applied Proposition 200 to forms provided for under the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff, Gonzalez Response at 7 n.6, only highlights the inconsistency of the EAC's approach to Proposition 200[2] and that of other federal agencies. The U.S. Department of Defense instructs military and overseas voters who register to vote using the federal post card application form to provide proof of citizenship in compliance with Arizona law. State's Supplemental Excerpts of Record in Case Nos. 08-17084 & 08-17115 at 24 ¶ 6.

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[2] As noted in the State's Reply to the ITCA, there is no deference to an agency on issues of preemption. *Wyeth v. Levine*, 555 U.S. 555, 576 (2009).

II. The Honor System Endorsed by Respondents Provides No Protection for the Integrity of the Voting System.

The State has noted this Court's eloquent statement of the legitimate interests that the States have in protecting the integrity of their voting process. *See* Reply to ITCA at 2. Respondents argue that Arizona should not be permitted to request evidence of citizenship when someone registers to vote, but should instead rely on the person's sworn statement that he or she is a citizen. The fallacy in that is that someone who is willing to vote illegally will be willing to sign a false statement. What Respondents are urging is that there should be nothing more than an honor system to assure that registered voters are citizens. That was not acceptable to the people of Arizona and the NVRA does not provide otherwise.

Respondents claim that the NVRA contains "a number of safeguards to prevent voter fraud," and therefore asking for evidence of citizenship should be unnecessary. Gonzalez Response at 3. It lists three alleged safeguards. The first is signing under oath as discussed above. The second is the requirement that first time voters vote in person at the polling place, where the voter's identity can be confirmed. However, that simply confirms that the person voting is the same person who registered. It does not ensure that the person is a citizen. Third, "the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable." Gonzalez Response at 4.

That simply would confirm that the address that the applicant gave was correct, and would say nothing at all about whether or not the voter was a citizen.

III. Proposition 200 Does Not Impose an Undue Burden on People Registering to Vote.

As noted in the Petition, the district court found after trial on the non-NVRA claims that Proposition 200 does not impose an undue burden. Petition at 8. Respondents argue that it is an undue burden to have to "locate the document, photo copy it, and enclose the photo copy." Gonzalez Response at 8. But this minor, ministerial task, is imposed on very few people. Over 90% can write down the driver's license number, and all naturalized citizens can write down the naturalization number. *See* Arizona Stay Application Appendix (Stay App.) at 92, 94-95, 113-15. Only a very few need to add a document.

In *Crawford v. Marion County Elections Board*, the Court explained that certain burdens may arise where a photo identification is required in order to vote, such as the loss of identification, but "[b]urdens of that sort, arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question" about the Indiana law requiring voters to provide photo identification. 553 U.S. 181, 197 (2008). Even if the burden may be "somewhat heavier . . . on a limited number of persons," this is not sufficient to sustain a "broad attack" on a state statute. *Id*. at 199-200.

IV. Respondents Misrepresent the Impact of Proposition 200.

Respondents misrepresent the record below.

First, Respondents ignore that the preemption of Proposition 200 as to then Federal Form is a legal, rather than factual question. Furthermore, Respondents selective citations to portions of the record before the district court does not distinguish between the record on summary judgment for their NVRA claim and their other claims, which proceeded to trial. The latter claims alleged constitutional and statutory violations, including violations of the Voting Rights Act. The district court ruled against Respondents on all of their claims and the Ninth Circuit reversed the district court's grant of summary judgment solely on the basis of Proposition 200's application to the Federal Form.

Respondents assert that "following enactment of Proposition 200, over 30,000 individuals were rejected for voter registration in Arizona" and that "[r]eflecting the demographic composition of Arizona, over 80% of the rejected voters were Latino." Gonzalez Response at 7 (citing the district court's findings after trial on non-NVRA counts). But the initial number does not distinguish between state and federal forms, the Federal Form being the subject of the Petition. The district court also found that some 30% of those initially rejected subsequently re-registered and that among those who did not, only 20% were Latino. *See* Stay App. at 97 (on file with the Court in No. 11A1189,

Arizona v. Abeytia). Furthermore, the court concluded that the difference in the electorate based on Proposition 200 was .1%. *Id.* And a drop off in registrations following the implementation of Proposition 200 was "not unexpected because the period before Proposition 200 included the 2004 Presidential election, which was accompanied by a drastic increase in the number of voter registrations." *Id.*

Similarly, Respondents assert that "[v]oter registration in community-based voter drives plummeted by 44%." Gonzalez Response at 8. This finds no support in the district court's order and is not supported by the record citation Respondents provide. Further, the district court found that "none of the [voter registration organization] Plaintiffs testified that Proposition 200 is a severe burden on their [asserted] First Amendment rights." Stay App. at 122. Likewise, contrary to Respondents' characterizations (Gonzalez Response at 8), the district court concluded that if a person has a driver's license that indicates he or she is not a United States citizen, providing additional information "is hardly a severe burden" especially in light of revisions to state and county procedures that permit such applicants, if they have become naturalized, to mail in a copy of their naturalization certificate. Stay App. at 114.

Respondents assert that some 20,000 people did not re-register. Gonzalez Response at 7. The district court, however, found that there was no proof that "the persons rejected are in fact eligible to vote." Stay

App. at 115. Respondents failed to "present[ ] any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it." *Id*. at 115. "Indeed, [Respondents] only produced one person . . . who [was] unable to register to vote due to Proposition 200's proof of citizenship requirement." *Id.* Post-mandate proceedings revealed that at most 758 Federal Forms lacked "evidence of citizenship" between 2008 and now. *Gonzalez v. Arizona*, CV No. 06-1268 (D. Ariz.) Dckt. # 1087.

Respondents then misrepresent the state of the record concerning voter fraud. Gonzalez Response at 33. Respondents falsely claim that the "district court did not find that voter fraud was a significant problem." *Id.* The district court in fact found that based on the evidence produced at trial "voter fraud is a legitimate and real concern" as was the State's interest in protecting voter confidence. Stay App. at 117-18.

This was well supported in the record. For example, in 2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commissioner they were not U.S. citizens. Stay App. at 99. Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now (ACORN) submitted "garbage" voter-registration forms and had misled noncitizens into

registering to vote. *See id.* at 99; *see also* Appellees' Supplemental Excerpt of Record in No. 08-17094 filed in the Ninth Circuit Court of Appeals at 209-10.

Indeed, the district court found that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the right of lawful voters are not debased by unlawfully cast ballots." Stay App. at 118. Moreover, the district court found that the State has "liberally construe[d] questions raised regarding the right of an elector to vote in favor of allowing the elector to vote" and that there was "no evidence of a purposeful misapplication of Proposition 200's requirements" or any intent to discriminate in its application. *Id.* at 115, 119.

Respondents also point to an EAC report from 2011 that is not in the record. Gonzalez Response at 36. The absence of discussion of voter fraud in the report is likely based on the fact that the report does not purport to be about finding fraud cases. U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010*, *A Report to the 112th Congress*, June 30, 2011, *available at* http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf. The same report found that Arizona, along with New Mexico, topped the nation in the number of active registrants since 2006, the period that Proposition 200 was in effect. *Id*. at 1. Even when Respondents reach outside the

record, what they uncover confirms that they have misrepresented the impact of Proposition 200.

V. The Court Should Not Wait for Other Statutes to Be Challenged.

Respondents urge the Court to wait to see if similar statutes passed in other States are challenged before granting review. Response at 37. Indeed, four States spanning three federal circuits have enacted legislation "materially identical to Proposition 200." States' Amicus at 8. And some twelve other States have recently contemplated following suit. *Id.* at 8-9. Waiting to resolve this matter until other challenges arise will itself "'result in voter confusion and [a] consequent incentive to remain away from the polls.'" *Id.* at 10 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)).

The people of Arizona enacted Proposition 200 and other States have recognized the States' interest in ensuring that eligible persons are registered. The Ninth Circuit's opinion thus casts a shadow over the decisions of numerous sovereigns who take their obligation to secure the vote seriously. The opinion will undermine voter confidence and calls out for this Court's review.

CONCLUSION

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

Respectfully submitted,

THOMAS C. HORNE
Attorney General of Arizona
DAVID R. COLE
Solicitor General
Counsel of Record
PAULA S. BICKETT
Chief Counsel, Civil Appeals
THOMAS M. COLLINS
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007
Phone (602) 542-3333
Fax (602) 542-8308
dave.cole@azag.gov
thomas.collins@azag.gov
Counsel for Petitioners