No. 12-71

In The Supreme Court of the United States

STATE OF ARIZONA, et al.,

Petitioners,

v.

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

RESPONSE OF 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, AND HOPI TRIBE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and People for the American Way Foundation are nongovernmental corporations. They have no parent organizations and no stock.

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SUMMARY OF ARGUMENT

Respondents Inter Tribal Council of Arizona, Inc., et al. ("Respondents," "ITCA Respondents," or "ITCA Plaintiffs") file this response in opposition to Arizona's Petition for Writ of Certiorari.

Arizona's previous application to this Court for a stay of the Ninth Circuit's mandate required Arizona to show that the Court would likely grant a writ of certiorari, and that there was at least a fair prospect that the Court would find the Ninth Circuit's decision erroneous. The Court denied Arizona's application, with no indication that the stay had been denied for any reason other than Arizona's failure to make those showings. *Arizona v. Abeytia*, No. 11A1189, 2012 U.S. LEXIS 4878 at *1 (U.S. June 28, 2012).

Arizona's Petition for Writ of Certiorari provides no persuasive new reason to grant certiorari. Arizona now argues that the Ninth Circuit applied a new, heightened standard for Elections Clause preemption because its analysis did not employ Supremacy Clause principles, such as the plain statement rule and the presumption against preemption. (Pet. App. i, 15). Arizona's petition, however, fails to cite a single federal court decision that applied either the plain statement rule or the presumption against preemption to an Elections Clause preemption analysis, and it fails to recognize that not one of the ten judges

sitting *en banc* found those principles applicable to this case. (Pet. App. 1c-122c) (*Gonzalez III*).

The Ninth Circuit carefully examined the text of the Constitution, followed this Court's Elections Clause cases, and correctly concluded that the standards for conducting a preemption analysis under the Elections Clause are less deferential to states than the standards for conducting a preemption analysis under the Supremacy Clause. This distinction, long reflected in this Court's decisions, derives from the fact that the Elections Clause specifically assigns the federal government the power to regulate federal elections, including the authority to negate or alter any state law involving federal elections. As a result, State authority to regulate federal elections is subordinate to Congressional regulation. In contrast, a Supremacy Clause preemption analysis requires additional considerations so as to balance federal authority with the police power reserved to the States under the Tenth Amendment.

Beyond its unsupported assertion that the Ninth Circuit applied an incorrect standard to its preemption analysis under the Elections Clause, Arizona's argument is little more than a claim that the Ninth Circuit interpreted the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq.* (Pet. App. 1h-28h), incorrectly. In a meticulous opinion written by Judge Ikuta and joined by all but two members of the ten-member *en banc* panel, the Ninth Circuit

found that Arizona Rev. Stat. § 16-166(F) – which requires that county recorders "reject" any and all voter registration applications, including those using the National Mail Voter Registration Form (the "Federal Form"), that are not accompanied by the Arizona requirements of documentary proof of citizenship – conflicts with the NVRA requirement that a state must "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4 (Pet. App. 7h). Justice O'Connor reached the same determination as part of the majority on the preceding three-judge panel. (Pet. App. 1a-106a) (*Gonzalez II*). The Ninth Circuit's conclusion that these federal and state provisions conflict is straightforward and consistent with the text of the NVRA and Arizona law, and does not require further review by this Court. Furthermore, as a case of first impression, there are no jurisprudential reasons, such as a conflict with a Supreme Court decision or the need to resolve a circuit court split, which favor granting certiorari.

PROCEDURAL HISTORY

Congress passed the NVRA in 1993 in part to create uniform "[n]ational procedures for voter registration for elections for Federal office." 42 U.S.C. § 1973gg-2 (Pet. App. 3h-4h). As discussed below, one of those procedures specifies that the United States

Election Assistance Commission ("EAC") "shall develop a mail voter registration form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). Other provisions state that "[e]ach State shall accept and use" the Federal Form, and "[i]n addition to accepting and using" the Federal Form, "a State may develop and use" its own voter registration form. 42 U.S.C. § 1973gg-4(a)(1-2) (Pet. App. 7h-8h).

In November 2004, Arizona voters passed Proposition 200. Two provisions within Proposition 200 affect voting. One provision requires the County Recorder to "reject any application for registration that is not accompanied by satisfactory proof of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h-50h). A second requires voters who vote on Election Day to provide specified forms of identification at the polls. *Id*.[1] In December 2005,

[1] The United States Attorney General precleared the voting changes contained within Proposition 200 in 2005 under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. NVRA compliance is not within the scope of Section 5 review, and as Section 5 provides, the Attorney General's decision not to object to a voting change has no effect on future litigation, such as NVRA litigation, to enjoin the change: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Indeed, the Department of Justice participated in the briefing and oral argument before the Ninth Circuit in *Gonzalez III* on the side of the plaintiffs on the NVRA issue.

Arizona proposed to the EAC that Arizona be allowed to apply the proof of citizenship provision to the Federal Form. On March 6, 2006, the EAC wrote to Arizona's Secretary of State and stated that "the EAC concludes that the policies you proposed would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4(a))." (Op. App. 11-12.) On March 13, 2006, Arizona's Secretary of State wrote the EAC and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote." (Op. App. 18-19.)

Shortly thereafter, two sets of plaintiffs filed lawsuits contending that Proposition 200's proof of citizenship and polling place identification requirements violated various federal constitutional and statutory provisions. Each lawsuit contained the claim that Arizona's new proof of citizenship provision violated the NVRA. The two lawsuits were consolidated; one set of plaintiffs is the ITCA Plaintiffs. (Pet. App. 7c.)

In the post-trial appeal, a majority of the Ninth Circuit panel in *Gonzalez II*, consisting of Judge Ikuta and Justice O'Connor, who sat by designation, found that Arizona's rejection of Federal Form applications that do not include proof of citizenship violated the NVRA because the State was not "accepting and using" the Federal Form. (Pet. App. 1a-47a,

61a-62a.) Judge Kozinski dissented on the NVRA claim but the focus of his dissent was that the panel never should have considered the NVRA claim on the merits because "the law of the circuit" doctrine precluded the panel from doing so. (*Id.* at 79a-80a.) Arizona petitioned for rehearing *en banc* and its petition was granted. (Pet. App. 1b-6b.)

In an opinion by Judge Ikuta, the *en banc* panel in *Gonzalez III* also found for plaintiffs on the NVRA claim, in an 8-2 vote. (Pet. App. 1c-43c.) As discussed below, the court found that by rejecting Federal Forms that do not provide proof of citizenship, Arizona was not "accepting and using" the Federal Form. (*Id*. at 10c-43c.) The majority included Judge Kozinski who explained his change in position as follows:

> The dissent sees some inconsistency between my conclusion today and that in my "well drafted dissent to the original panel opinion." But, as a member of the three-judge panel, I had no occasion to construe the statute de novo because we were bound by law of the circuit and law of the case. . . . As an en banc court, we cannot defer to *Gonzalez I*. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I

> believe the preemptive reading of the statute is somewhat better than the alternative.

(Pet. App. 94c-95c) (Kozinski, C.J., concurring) (citations omitted). Judge Rawlinson, joined by Judge Smith, dissented on the NVRA claim. Judge Rawlinson noted that the NVRA allows a state to "develop and use" a state mail-in form and that the state form, in certain respects, may include additional requirements beyond those prescribed by the EAC for the Federal Form; she reasoned from this that Arizona could thus reject Federal Forms that do not satisfy requirements that Arizona independently establishes. (Pet. App. 100c-122c) (Rawlinson, J., concurring and dissenting).

Arizona promptly moved to stay the mandate and the ITCA Respondents opposed the request. The *en banc* court denied Arizona's motion by a 7-3 vote. (Op. App. 1-10.) The Ninth Circuit held, *inter alia*, that Arizona did not demonstrate a reasonable probability that the Supreme Court would grant certiorari or a significant possibility that the Court would reverse the Ninth Circuit's decision. (Op. App. 7-8.)

Arizona then applied to this Court for a stay of the mandate. Justice Kennedy referred the matter to the entire Court and the Court denied the application for a stay. Justice Alito would have granted the application for a stay. *Arizona v. Abeytia*, 2012 U.S. LEXIS 4878 (U.S. June 28, 2012).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Ninth Circuit Properly Analyzed the Issue of Preemption under the Elections Clause

Arizona's principal attack upon the Ninth Circuit's decision is that the Ninth Circuit allegedly erred by failing to apply preemption principles found in this Court's Supremacy Clause cases. (Pet. App. 15-25.) Specifically, Arizona claims that the Ninth Circuit erred by not applying the "presumption against preemption" and the "plain statement rule." (Pet. App. 15.) Finally, Arizona claims that the Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), demonstrates that Supremacy Clause principles should apply to an Elections Clause case. (Pet. App. 20-22.) Additionally, Arizona asserts that the Ninth Circuit erred by preempting without first finding a "conflict between the NVRA and Proposition 200" as part of its preemption holding. (Pet. App. 17.) Arizona also contends that "[t]he Circuit Courts of Appeals are Split Concerning the Appropriate Preemption Analysis for Challenges to State Laws Under the Elections Clause." (Pet. App. 22-25.) As detailed below, none of these arguments stand scrutiny.

A. The Ninth Circuit Correctly Followed This Court's Consistent Line of Elections Clause Precedent in Applying its Preemption Analysis

The Ninth Circuit correctly distinguished between the preemption analysis required under the Elections Clause and that required under the Supremacy Clause, and its thorough analysis of preemption issues followed a consistent line of Supreme Court precedent, in which this Court applied less deferential review in Elections Clause cases, than it did in Supremacy Clause cases. Indeed, none of the ten judges on the Ninth Circuit *en banc* panel found that Supreme Court precedent requires application of Supremacy Clause preemption principles to Elections Clause cases. Arizona has failed to cite a single Elections Clause case that applied the presumption against preemption, the plain statement rule, or other Supremacy Clause preemption principles. Arizona also fails to show how the decision in *Arizona v. United States* is relevant to the Elections Clause.

The Ninth Circuit correctly distinguished between the preemption analysis required under the Elections Clause and Supremacy Clause preemption. The Elections Clause gives Congress the authority to make or alter any state election regulation relating to the time, place, and manner of federal elections: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in

each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators." U.S. Const. art. I, § 4, cl. 1 (Pet. App. 1h).

This Court has found that the Framers reserved to Congress the authority to make or alter any regulation concerning the time, place, or manner for federal election as a safeguard against potential state abuse. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 808-09 (1995). For this reason, the Court has stated that the power to regulate federal elections is relatively unusual in that the federal government delegates authority to the states, as opposed to the more typical arrangement where the states have reserved authority, or inherent authority, arising from their sovereignty:

> [T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that '[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof.' This duty parallels the duty under Article II that 'Each State shall appoint, in such Manner as the Legislature

> thereof may direct, a Number of Electors.' Art. II, §1, cl. 2. These Clauses are express delegations of power to the States to act with respect to federal elections.
>
> This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.

U.S. Term Limits, 514 U.S. at 804-05.

This Court repeatedly has made clear that a state statute regulating the time, place or manner of federal elections is void if it conflicts with federal law. In *Ex Parte Siebold*, 100 U.S. 371 (1879), the Court explained that the state and federal regulations affecting federal elections should be treated as one harmonious system of rules adopted by the same legislature, but when the federal and state laws conflict, the state law is void to the extent there is a conflict:

> The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules loses sight of the fact that the regulations made by Congress are paramount to those made by the State legislature, and, if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.

> No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.

100 U.S. at 384. The Court stated there would be an "intrinsic difficulty" under this system if federal and state authority were equal "[b]ut no such equality exists" because the "power of Congress . . . is paramount." *Id.* at 392.

The Court's most recent Elections Clause case, *Foster v. Love*, 522 U.S. 67 (1997) involved Louisiana's open primary law for Congressional elections. Louisiana conducted a Congressional primary in October. Under the Louisiana law, if one candidate received a majority of the vote, there would be no general election in November. The issue before the Court was whether this procedure conflicted with federal law providing for a general election in November. *Id.* at 69-70. In deciding the case, the Court quoted *Ex Parte Siebold*'s holding that Congressional regulations relating to federal elections are paramount to state law, and if and when there is a conflict, the state law is void. *Foster*, 522 U.S. at 69. Louisiana argued that there was no conflict between its law and the federal statute because Louisiana provided for a general election on the day prescribed by federal law, and that election would

occur whenever no candidate received a majority of the votes in the primary. According to Louisiana, this meant that its system regulated the "manner" of the election and not the "time" of the election. The Court rejected this argument as "wordplay" and "an imaginative characterization" of the statute, and instead applied a straightforward interpretation of the state statute. *Id.* at 72-73. The Court made clear that the conflict was limited to the facts before it: "This case thus does not present the question whether a State must always employ the conventional mechanics of an election. We hold only today that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 71 n.4.

In this case, the Ninth Circuit specifically adopted the principles enunciated in *Ex Parte Siebold* and *Foster* in deciding upon the analytic framework to be used to determine whether the proof of citizenship provision, as applied to the Federal Form, conflicts with the NVRA:

> Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold,* we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold,* 100 U.S. at 384. If the state law complements the congressional procedural scheme,

> we treat it as if it were adopted by Congress as part of that scheme. *See id.* 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. *Foster,* 522 U.S. at 74, 118 S.Ct. 464; *see id.* at 72-73, 118 S.Ct. 464. 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.

(Pet. App. 19c-20c.)

In contrast to preemption under the Elections Clause, preemption under the Supremacy Clause reflects our constitutional system of "dual sovereignty," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), and are therefore more searching when reviewing Congressional action that implicates powers traditionally reserved to the states. The Supremacy Clause provides that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. art. X. This Court has described

the tension between federal authority under the Supremacy Clause and state authority as a "delicate balance," *Gregory*, 501 U.S. at 460. By arguing that this case should be governed by Supremacy Clause rules – including a presumption against preemption, *see Wyeth v. Levine*, 555 U.S. 555, 565 (2009), and a requirement that Congress make its intention to preempt state law "clear and manifest," *Gregory*, 501 U.S. at 461 (internal citation omitted), Arizona overlooks the critical differences between the Elections Clause and the Supremacy Clause.[2]

Those differences were clearly identified by the Ninth Circuit (Pet. App. 11c-17c), which properly found that Supremacy Clause preemption principles do not apply to an Elections Clause case:

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[2] Arizona also presents an incomplete account of this Court's Supremacy Clause jurisprudence. In addition to express preemption, the Court has recognized two other types of preemption under the Supremacy Clause. One is "field preemption," where "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Arizona v. United States*, 132 S. Ct. at 2501. The other is "conflict preemption" where "compliance against both federal law and state regulations is a physical impossibility," *id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963), or "where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Arizona v. United States*, 132 S. Ct. at 2501 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

> Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a "delicate balance" between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance. For this reason, the "presumption against preemption" and "plain statement rule" that guide Supremacy Clause analysis are not transferable to the Elections Clause context.

(Pet. App. 16c.)[3] The Ninth Circuit further observed that in *Foster*, the Supreme Court did not use the Supremacy Clause analysis used by the Fifth Circuit, and did not mention the "plain statement" rule or the "presumption against preemption" in its decision. (*Id*. at 17c.) The Ninth Circuit also further noted that the Supreme Court never mentioned Supremacy Clause principles or relied on them in any of its decisions involving the Elections Clause. (*Id.*)

[3] Regulation by States of federal elections could not logically be reserved to States under their police powers, because States could not have exercised said powers before federal elected offices were created by the adoption of the U.S. Constitution. It follows that States could not find inherent powers to control the election of federal offices, and thus, any power over federal elections must necessarily be found in powers expressly delegated to the States by the Constitution or Congress.

Arizona contends that the Supreme Court has "consistently applied" Supremacy Clause principles to Elections Clause cases because the Elections Clause involves regulation of a state police power:

> In all pre-emption cases and particularly in those which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . [the Court] "start[s] 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." Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Because of the States' constitutional role in the regulation of elections for federal office, this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause.

(Pet. App. 16.)

Arizona's argument fails on many levels. To begin with, as discussed above, a State's authority to regulate federal elections does not fall within its Tenth Amendment reserved power, rather it is a delegated authority under Article I, Section 4. Moreover, none of the Supreme Court decisions Arizona cites in support of its argument stand for the proposition that Supremacy Clause principles, such as the "plain

statement" rule and the "presumption against preemption," apply to the Elections Clause.

In addition to *Ex Parte Siebold* (Pet. App. 17-20) and *Foster v. Love* (Pet. App. passim), Arizona cites a number of cases for the proposition that States generally have broad authority to regulate the time, place, and manner of federal elections and/or that such authority exists provided there is no conflicting federal law. *Cook v. Gralike*, 531 U.S. 510 (2001) (Pet. App. 15); *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93 (2003) (Pet. App. 17); *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (Pet. App. 16); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (Pet. App. 15); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (Pet. App. 16, 18); *United States v. Classic*, 313 U.S. 299 (1941) (Pet. App. 16, 22); *Smiley v. Holm*, 285 U.S. 355 (1932) (Pet. App. 17.) However, none of these cases apply an analysis inconsistent with the analysis employed by the Ninth Circuit. In *Cook*, 531 U.S. at 522-26, this Supreme Court affirmed that state authority to regulate federal elections is a delegated authority, not a reserved power under the Tenth Amendment, and found that the state law at issue was not authorized by the Elections Clause. In *McConnell*, 540 U.S. at 186-87, the Court found that the federal statute at issue did not go beyond Congress's Elections Clause authority and that there was no Elections Clause preemption issue. Similarly, *Tashjian* and *Purcell* did not involve Elections Clause

preemption issues. In *Roudebush*, 405 U.S. at 23-26, the Court held that Indiana could conduct a recount of a close Congressional race but that the Senate would have the last word on who would be declared the winner so federal power was paramount. In *Classic*, 313 U.S. at 314-20, the Court held that the Elections Clause, among other provisions, gave Congress the authority to criminalize voter fraud in primary elections. And in *Smiley*, 285 U.S. at 372-74, the Supreme Court stated 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.

Arizona also attempts, unsuccessfully, to find support for its argument in this Court's recent Supremacy Clause decision in *Arizona v. United States*, noting that this Court applies Supremacy Clause preemption analysis "even in areas in which Congress possesses broad constitutional powers." (Pet. App. 20.) The constitutional power that Congress exercises when it regulates federal elections, however, is not simply "broad." It is the product of a constitutional provision that expressly addresses and specifically defines the respective roles of state and federal government. Under the Elections Clause, the States must create regulations involving the time, place, and manner of federal elections, but any of those regulations can be nullified or modified by Congress. The

overriding authority of the federal government is thus expressly embodied in the constitutional text.

As noted above, Arizona's position found no support from any members of the Ninth Circuit *en banc* panel. The two dissenters explicitly stated that they reached their position "notwithstanding whether a presumption against preemption generally exists under the Elections Clause, as it does under the Supremacy Clause." (Pet. App. 101c.) In his concurring opinion, Judge Kozinski stated that the Supreme Court "has never articulated any doctrine giving deference to the states under the Elections Clause," (Pet. App. 91c) and agreed that the majority was correct in finding that the Supreme Court has not adopted the clear statement rule or the presumption against preemption in any Elections Clause case.[4] (Pet. App. 90c.)

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[4] Judge Kozinski's concurrence suggested that the states' interest in curbing electoral fraud might warrant application of Supremacy Clause principles to Elections Clause cases (Pet. App. 90c-91c). Arizona does not make this argument, and it is unclear how this concern that is topical in nature could provide a basis for rethinking this Court's longstanding view of the allocation of authority specified by the Framers in the Elections Clause. In any event, Congress provided specific and substantial criminal penalties for election fraud in the NVRA, including criminal penalties for false statements about eligibility to vote, which complement an array of other preexisting federal criminal penalties for corruption of the election process. The Ninth Circuit decision does not impair Arizona's right to prosecute election fraud under its own laws, and this case provides no other reason to believe that Arizona's ability to curb electoral

(Continued on following page)

B. The Ninth Circuit Properly Found that the NVRA and the Requirements of Proposition 200 were in Conflict with One Another

Arizona's argument that the Ninth Circuit did not find a conflict between the NVRA and Proposition 200 is flatly wrong. Contrary to Arizona's claim, the Ninth Circuit expressly found a conflict between the NVRA and Proposition 200. The Ninth Circuit majority's concluding paragraph states, *inter alia*, that "[g]iven the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections." (Pet. App. 59c.) Another portion of the opinion states that "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the conflict between the state and federal procedures." (Pet. App. 34c.)

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fraud will be materially impaired by the Ninth Circuit's decision. Accordingly, this case fails to present a question that warrants a fundamental reconsideration of the Court's Elections Clause jurisprudence.

C. There is No Circuit Split as to Matters of Preemption in Elections Clause Cases

Finally, Arizona contends that there is a circuit split on whether Supremacy Clause preemption analysis applies to Elections Clause cases. (Pet. App. 25.) Arizona relies primarily on three cases: *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773 (5th Cir. 2000); *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169 (9th Cir. 2001); and *McIntyre v. Fallahay*, 766 F.2d 1078 (7th Cir. 1985). Arizona's contention is unavailing for several reasons. First, even if there was a circuit split, it would be of little or no consequence since (as discussed above) this Court already has made clear that Elections Clause preemption analysis is different from Supremacy Clause preemption analysis. Second, and in any event, there is no circuit split. Arizona observes that *Bomer* and *McIntyre* held that there must be a direct conflict between federal and state law to trigger Elections Clause preemption (Pet. App. 23), but that poses no issue to be decided by this Court since the Ninth Circuit found a direct conflict. *Keisling* is inapposite since it was decided by a Ninth Circuit three-judge panel and, by definition, the Ninth Circuit's *en banc* holdings in this case supersede any conflicting holdings in *Keisling*. Moreover, nowhere in the *McIntyre*, *Bomer*, or *Keisling* opinions did the courts explicitly apply Supremacy Clause principles to an Elections Clause case or apply the plain statement rule or the

presumption against preemption. The only circuit court cases that have addressed the issue of whether Elections Clause preemption differs from Supremacy Clause preemption is this case and *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008), and in both cases, the courts distinguished the two preemption analyses.[5] Thus, there is no circuit conflict.[6]

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[5] Indeed, a federal district court in Texas that recently granted a motion for preliminary injunction on three NVRA claims, *inter alia*, analyzed the question of whether Supremacy Clause principles applied to Elections Clause preemption. *Voting for Am., Inc. v. Andrade*, No. G-12-44, 2012 U.S. Dist. LEXIS 108303 (S.D. Tex. Aug. 2, 2012). It found that *Bomer* did not reach the issue, and that the only circuit courts which had, *Gonzalez* and *Harkless*, had found that Supremacy Clause preemption did not apply to an Elections Clause case. *Id*. at *46-50.

Arizona includes a footnote discussing *United States v. Missouri*, 535 F.3d 844, 850 n.2 (8th Cir. 2008) where Arizona claims that the "Eighth Circuit recognized that the plain statement rule is likely to be appropriate under the Elections Clause." (Pet. App. 25.) However, as Arizona acknowledges (*id.*), the Eighth Circuit did not reach this issue, 535 F.3d at 850 n.2. Moreover, the court never stated that it was "likely" the plain statement rule applies to the Elections Clause.

[6] A more detailed discussion of *McIntyre*, *Bomer* and *Keisling* only serves to further demonstrate why those cases are not in conflict with this case. In *McIntyre*, the issue was similar to that in *Roudebusch*. There was a close election for a United States House of Representatives seat from Indiana between McIntyre and McCloskey. McIntyre filed a state court action that McCloskey removed to federal court. The House recounted the votes and seated McCloskey. 766 F.2d at 1080-81. Relying on *Roudebusch*, the 7th Circuit found that the state court could hold a re-recount but that the House had the final say anyway. *Id.* at 1084-85. As a result, Congressional procedures prevailed

(Continued on following page)

II. The Ninth Circuit Did Not Err in Finding That Proposition 200 and the NVRA Conflict and There is No Circuit Split Regarding the Ninth Circuit's Interpretation of the NVRA

Arizona contends that the Ninth Circuit erred in holding that the NVRA preempts the proof-of-citizenship requirement in Proposition 200. (Pet. App. 25-33.) Arizona's contention does not provide a proper basis for granting Arizona's petition for a number of reasons.

At the outset, there are no jurisprudential reasons for granting certiorari as to this issue. In particular, this holding does not conflict with any Supreme

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over the state procedures. *Bomer*, 199 F.3d at 774, involved the question discussed in Foster of whether Texas's use of early voting conflicted with the federal law setting Election Day as the first Tuesday after the first Monday in November. *Keisling* raised a similar question regarding Oregon's use of voting by mail over an extended period. 259 F.3d at 1170. In *Bomer*, 199 F.3d at 776, the Fifth Circuit applied *Foster* and found that "the Texas scheme is not inconsistent with the federal election statutes as interpreted by the court in *Foster*." It also found that three federal statutes authorized absentee voting for federal elections so it could hardly be the case that voting in federal elections was limited to one day as the appellants had urged. *Id.* at 776-77. The court in *Keisling* reached a similar conclusion. *Keisling*, 259 F.3d at 1176. Thus, the courts in *Keisling* and *Foster* did not rely on a Supremacy Clause preemption analysis to reach their decision but instead on the Supreme Court's interpretation in *Foster* of the federal Election Day law and on other federal laws allowing absentee voting before Election Day.

Court decision concerning the relationship between the NVRA and state voter registration provisions and, likewise, there is no circuit court split on this issue. *See* Sup. Ct. R. 10. Arizona does not contend otherwise.

Arizona's argument that the Ninth Circuit erred in its interpretation of the NVRA is merely a restatement of its previous mistaken argument that the Ninth Circuit should have applied Supremacy Clause principles. This is evident from the first sentence of this section of Arizona's brief ("If the court of appeals had applied traditional preemption principles, it would have found that Proposition 200's evidence-of-citizenship requirement was valid") (Pet. App. 25) and the last sentence as well ("The court of appeals erred in adopting an interpretation of the NVRA that ignores the plain statement rule and the presumption against preemption.") (Pet. App. 33.)

Moreover, the Ninth Circuit properly construed the express language of the NVRA and Proposition 200 in holding that Arizona is not lawfully accepting and using the Federal Form (by rejecting Federal Forms that do not include proof of citizenship). It also properly examined whether its interpretation is consistent with the purposes of the NVRA. In reaching these determinations, the Ninth Circuit discussed in detail the language of the NVRA, as well as the

language of Proposition 200 and Arizona's procedures for implementing Proposition 200. (Pet. App. 20c-43c.)

A few points are worth highlighting in particular. The first purpose Congress identified in passing the NVRA was "to establish procedures that will increase the number of citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1) (Pet. App. 2h).[7] To effectuate this, the NVRA sets forth three federally-required methods for registering voters for federal elections, including by-mail registration using the Federal Form created by the EAC. 42 U.S.C. § 1973gg-2 (Pet. App. 3h). The NVRA states that the EAC "shall develop a mail voter registration application form for elections for Federal office" in consultation with the States' chief election officers. 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). The statute also provides the following with respect to the Federal Form and any State mail-in form:

> (a) Form
>
> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission

[7] Congress also expressly found that "discriminatory and unfair registration laws and procedures have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a)(3) (Pet. App. 1h-2h).

> pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.
>
> (2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.
>
> (3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

42 U.S.C. § 1973gg-4(a) (Pet. App. 7h-8h).

Among other things, the Federal Form asks voters the question: "Are you a citizen of the United States of America?" with a check box to answer yes or no. Applicants who check "no" are instructed not to complete the form. In addition, the applicant must attest that he or she is a citizen and that the information is "true to the best of [the applicant's] knowledge under penalty of perjury." The Form does not require any additional proof of citizenship. (Pet. App. 60c-84c.)

Arizona's Voter Registration Form states that "[a] complete voter registration form must also contain *proof of citizenship* or the form will be rejected." (Pet. App. 85c.) (emphasis in original). The Arizona form

describes the ways an applicant can fulfill the proof of citizenship requirement. (Pet. App. 88c.) As enacted by Proposition 200, Arizona law states: "[t]he county recorder shall reject *any* application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h) (emphasis added). The statute goes on to define the documentation required to prove citizenship. *Id.* The Arizona Election Procedures Manual, which has the force and effect of law, Ariz. Rev. Stat. Ann. § 16-452, provides that any applicant whose application is rejected because she or he did not provide proof of citizenship must submit an entirely new registration form in order to attempt to register in the future. Arizona Secretary of State Procedures Manual (Oct. 2007) (Pet. App. 28c.)

After Proposition 200 was enacted, Arizona requested that the EAC modify the Federal Form to require Arizona registration applicants to provide documentary proof of citizenship. After the EAC rejected the State's request, Arizona proceeded nonetheless to apply the documentary proof of citizenship requirement to all Federal Form applications. (Pet. App. 34c, 41c n.29; Op. App. 18-19.)

The Ninth Circuit performed a detailed analysis in reaching its conclusion that Arizona's actions violate the NVRA. (Pet. App. 20c-43c.) The essence of that analysis is relatively straightforward and is based on the express language of the NVRA and

Proposition 200: the NVRA specifies that "[e]ach State shall accept and use" the Federal Form, 42 U.S.C. § 1973gg-4(a)(1) (Pet. App. 7h), which does not require proof of citizenship, whereas Proposition 200 states that a "county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (Pet. App. 49h). The conflict ("accept and use" vs. "reject") could not be clearer. Both provisions are mandatory and place Arizona election officials in the position of inevitably complying with one and violating the other.

Arizona's claim that this straightforward analysis is allegedly erroneous is largely a reiteration of the two Ninth Circuit dissenters' position in *Gonzalez III*, and thus has already been addressed, and persuasively rejected, by the *Gonzalez III* majority. The statutory language argument made by Arizona is that, because the NVRA allows States to "develop and use" their own form, which may include additional requirements not included in the Federal Form, Congress' intent was to allow States to reject Federal Forms that do not comply with those additional requirements. (Pet. App. 30.) This argument clearly misreads the statutory language. As pointed out by the *Gonzalez III* majority, States are required to accept and use the Federal Form, and "*in addition*," may "develop and use" their own form. States can neither develop and use the state form "*instead of*"

accepting and using the Federal Form, nor can States attach additional conditions to the acceptance and use of the Federal Form. Moreover, as the Ninth Circuit found, there is nothing illogical or inconsistent in requiring States to accept the Federal Form even when States may have additional requirements on their own form. (Pet. App. 31c-34c.) (emphasis added).

Furthermore, the NVRA expressly delegates authority to the EAC to determine the contents of the Federal Form (acting in consultation with the States). 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h). The EAC declined Arizona's request to provide a requirement of documentary proof of citizenship on the Federal Form (as used in Arizona) and, in so doing, stated that "[t]he Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of further proof." (Op. App. 15.) In response, Arizona's Secretary of State called the EAC's decision "completely inconsistent, unlawful, and without merit" and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. 16-166(F)." (Op. App. 18-19.) As the Ninth Circuit properly found, "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the

conflict between the state and federal procedures." (Pet. App. 34c.)

Arizona also argues that because one purpose of the NVRA is to enhance the integrity of elections, Proposition 200 is consistent with, and does not violate, the NVRA. (Pet. App. 27.) The Ninth Circuit recognized that one purpose of the NVRA is "to protect the integrity of the electoral process," 42 U.S.C. § 1973gg(b)(3) (Pet. App. 2h), and "recognize[d] Arizona's concern about fraudulent voter registration." (Pet. App. 41c.). However, as the Ninth Circuit court also properly pointed out, the "Elections Clause gives Congress the last word on how this concern will be addressed in the context of federal elections," and noted that "Congress was well aware of the problem of voter fraud when it passed the act and provided for numerous protections [against voter fraud]." (*Id.*)[8]

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[8] The *Gonzalez III* majority set forth the numerous anti-voter fraud protections contained in the NVRA:

> These safeguards include the NVRA's requirement that the Federal Form, the State Forms, and the Motor Voter Forms contain an attestation clause that sets out the requirements for voter eligibility. *Id.* §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury, *id.* §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C), and persons who knowingly and willfully engage in fraudulent registration practices are subject to criminal penalties, *id.* § 1973gg-10(2). In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. *See id.* § 1973gg-4(c). Finally, section 1973gg-6 requires states

(Continued on following page)

The Ninth Circuit further noted that, with respect to the Federal Form, Congress delegated to the EAC – and not the States – the responsibility for establishing procedures that will facilitate voter registration while protecting the integrity of elections, and the EAC decided to require applicants to sign their registration applications under penalty of perjury, but not to require documentary proof of citizenship. (Pet. App. 42c.)

Arizona makes two other related arguments. It contends that: (1) the burden on applicants of a proof of citizenship requirement is not excessive; and (2) the Ninth Circuit's decision "cannot be squared with" this Court's decision in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), which found that the burden imposed on voters by Indiana's photo identification law did not outweigh the benefits of the law. (Pet. App. 29.) The Ninth Circuit correctly rejected these arguments as well. It held that the proof of citizenship requirement undermines Congress's goal of streamlining the registration process for all applicants, and that *Crawford* dealt with a different issue and involved a different constitutional

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to give notice to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations. *See id.* § 1973gg-6(a)(2).

(Pet. App. 41c n.28.)

provision with a different constitutional test. (Pet. App. 37c-38c.)

Another argument Arizona makes is that because Congress, in enacting the NVRA, was interested in registering eligible voters and the NVRA includes provisions enabling state election officials to remove ineligible voters from the registration list, "Proposition 200 does not stand as an obstacle to the accomplishment and execution of Congress's purpose in enacting the NVRA."[9] (Pet. App. 31.) To support its argument, Arizona cites two cases, *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) and *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010) (Pet. App. 31), but Arizona's

[9] Arizona's use of the phrase "obstacle to the accomplishment and execution of Congress's purpose" is a clear attempt to import conflict preemption standards used under a Supremacy Clause analysis. (Pet. App. 26). The Ninth Circuit did not analyze the conflict between Proposition 200 and the NVRA under this precise phraseology, as Arizona notes (Pet. App. 27-28); however, the Ninth Circuit did not need to do so because Supremacy Clause preemption standards do not apply, as discussed above. Nonetheless, the clear import of the Ninth Circuit's analysis is that Arizona's proof of citizenship requirement is an obstacle to the accomplishment and execution of Congress's purpose. (Pet. App. 30c) ("the federal and state enactments treat the same subject matter" but "are seriously out of tune with each other in several ways"); (Pet. App. 34c) ("Proposition 200's registration provision clashes with the EAC's delegation of authority to the EAC"); (Pet. App. 36c) ("Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process.").

argument fails to account for the fact that the language "shall accept and use" is mandatory language requiring the states to perform a specific act and Arizona's refusal to follow the express language of the NVRA frustrates Congress's purpose. In contrast, the courts in *Bell* and *Buescher* found that the actions by the States did not contravene the express language of the NVRA and so those actions did not frustrate Congress's purpose.

Finally, as it argued before the Ninth Circuit, Arizona claims that *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), supports its position. In *McKay*, 226 F.3d at 255-56, the Sixth Circuit held that Tennessee did not violate the NVRA by refusing to register an individual who did not provide his Social Security number. As the Ninth Circuit found, *McKay* is distinguishable because the Federal Form permits states to ask for a Social Security number and provides specific instructions to Tennessee applicants regarding the need to provide their full Social Security number. (Pet. App. 34c n.26.) Arizona contends that the Ninth Circuit "misses the point" because the court in *McKay* based its decision on the fact that the NVRA does not prohibit the use of Social Security numbers, not on whether the Federal Form permits it. (Pet. App. 29.) Actually, Arizona misses the point. While 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 with some limitations.

The EAC did not include a proof of citizenship requirement on the Federal Form. If the Federal Form did not include an item allowing certain States to ask for a full Social Security number,[10] then Tennessee likewise would not be able to require applicants using the Federal Form to provide their full Social Security number.[11]

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[10] A provision of the Help America Vote Act of 2002 requires voter registration applicants to provide the last four digits of their Social Security number if they do not have a driver's license. 42 U.S.C. § 15483(a)(5)(A)(i)(II). (Pet. App. 33h.)

[11] Arizona cites *Young v. Fordice*, 520 U.S. 273 (1997) for the proposition that the NVRA leaves room for the states to make policy choices, including what information to require from voter registration applicants. (Pet. App. 28.) *Young* does not support Arizona's position. In *Young*, the central issue was whether voting changes that Mississippi made to implement under the NVRA needed to be precleared under Section 5 of the Voting Rights Act. 520 U.S. at 275. The Court held that aspects of Mississippi's NVRA implementation program required preclearance because they "reflected policy choice and discretion by Mississippi officials." *Id.* at 285. At the same time, the Court "recognize[d] that the NVRA imposes certain mandates on the states, describing those mandates in detail." *Id.* at 286. Though the Court did not specifically address whether the "accept and use" provision was mandatory or discretionary, the language that "[e]ach State shall accept and use" the Federal Form is clearly mandatory – not discretionary – language.

CONCLUSION

For the foregoing reasons, ITCA Respondents respectfully request that the Court deny Arizona's Petition for Writ for Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ; LUCIANO VALENCIA; 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,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

No. 08-17094

D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

ORDER

(Filed Jun. 7, 2012)

STATE OF ARIZONA; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County

Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder; KEN BENNETT,

Defendants-Appellees.

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN

No. 08-17115

D.C. No. 2:06-cv-01268-ROS

VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; PATTY HANSEN, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County

Election Director;
BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder;
F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

Before: KOZINSKI, Chief Judge, PREGERSON, RYMER, GRABER, BERZON, RAWLINSON, CLIFTON, BYBEE, IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.[1]

The State of Arizona moves to stay the mandate for a period of 90 days pending the filing of its petition for certiorari. A party moving to stay the mandate "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).[2]

[1] Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion.

[2] Ninth Circuit Rule 41-1 provides that a stay "will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1; *see also United States v. Pete,* 525 F.3d 844, 851 n.9 (9th Cir. 2008).

In determining whether there is "good cause for a stay" under Rule 41(d)(2)(A), we apply the three-part test laid out in *Barefoot v. Estelle,* 463 U.S. 880, 895-96 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). *See Coal. for Econ. Equity v. Wilson,* 122 F.3d 718, 719 (9th Cir. 1997) (order) (citing Supreme Court cases vacating stays of the mandate pending certiorari where the courts of appeals failed to apply the three-part test required by *Barefoot*). Under this test, the stay applicant must show that there is (1) "a reasonable probability that four Members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot,* 463 U.S. at 895 (internal quotation marks omitted); *see also Nara v. Frank,* 494 F.3d 1132, 1133 (3d Cir. 2007) (holding that in order to show "good cause for a stay" under Rule 41(d)(2)(A), the applicant must show "(1) a reasonable probability that the Supreme Court will grant *certiorari*; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay"); *Doe v. Miller,* 418 F.3d 950, 951 (8th Cir. 2005) (same); *Books v. City of Elkhart,* 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (same). In a close case, this court must balance the equities by assessing the harm to each party if a stay is or is not granted. *See Wilson,* 122 F.3d at 719 (balancing the equities and determining that a stay

would cause irreparable harm to the party opposing the stay); *see also Nara,* 494 F.3d at 1133; *Miller,* 418 F.3d at 951, 953; *Books,* 239 F.3d at 828-29.

We have held that "[o]rdinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay," and that the "matter is entrusted to the circuit court's sound discretion." *Bryant v. Ford Motor Co.,* 886 F.2d 1526, 1528 (9th Cir. 1989). A stay in this case, however, raises unusual factors, because it has the potential to affect the upcoming federal elections in Arizona. *See Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006) (per curiam) (noting the importance and sensitivity of the election context in this very case). If Arizona files a petition for certiorari in the next 90 days, the stay will continue until the Supreme Court either denies certiorari or grants certiorari and resolves the case. *See* Fed R. App. P. 41(d)(2)(B). These actions will likely occur in close proximity to the November elections. In light of the potential effect of our decision on an upcoming election, we must undertake a more searching inquiry in exercising our discretion to grant or deny a stay.

Applying *Barefoot,* we must first determine whether Arizona has demonstrated a reasonable probability that the Supreme Court will grant certiorari and a significant possibility that the Court will reverse our decision. *Barefoot,* 463 U.S. at 895. We conclude that Arizona has not met this standard. We are particularly mindful that (1) nine out of eleven members of the en banc panel agreed that

Proposition 200's registration provision is preempted by the National Voter Registration Act (NVRA); (2) we are not aware of any conflict between our decision and the decisions of other circuits; and (3) the Supreme Court has not yet addressed the legal questions governing this case. *See Wilson,* 122 F.3d at 719 (considering similar factors); *see also Miller,* 418 F.3d at 952 (finding little probability of further review by the Supreme Court where the issue was one of first impression and there was no inter-circuit conflict).

Second, we consider the equities. On the one hand, Arizona has "demonstrated the clear possibility of irreparable injury to its citizens" if a stay is not granted because "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Wilson,* 122 F.3d at 719 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Moreover, Arizona "'has a compelling interest in preserving the integrity of its election process.'" *Purcell,* 549 U.S. at 4 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)). If we deny the stay and the Supreme Court ultimately grants certiorari and reverses our en banc decision, the effect of our denial will be that Arizona must register applicants who use the Federal Form, but who would otherwise be ineligible to register to vote under Proposition 200 because they do not have the required forms of identification. Arizona stresses its concern that applicants using the Federal Form may in fact be ineligible to vote and argues that the

additional forms of identification required by Proposition 200 will prevent potential voter fraud. We note, however, that Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud. *See* 42 U.S.C. §§ 1973gg3(c)(2)(C), 1973gg-7(b)(2); *Gonzalez v. Arizona,* ___ F.3d ___, No. 09-17094, 2012 WL 1293149, at *12 (9th Cir. Apr. 17, 2012).

On the other hand, "[c]ountering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." *Purcell,* 549 U.S. at 4 (quoting *Dunn v. Blumstein,* 405 U.S. 330, 336 (1972)). If the Supreme Court ultimately denies certiorari or grants certiorari and affirms, the effect of the stay will be that Arizona may reject the registration forms of applicants who are eligible to vote, and who would otherwise be able to register using the Federal Form, but do not possess the forms of identification required by Proposition 200. Such applicants may be denied their fundamental political right to vote in the 2012 federal elections if the Supreme Court does not resolve the case by November. Applicants whose Federal Forms are rejected may be discouraged from registering to vote even if they have, or could obtain, the forms of identification required by Proposition 200. Even if the Court denies certiorari in time for the November elections, a decision to stay the mandate could itself "result in voter confusion and consequent incentive to remain away

from the polls." *Id.* at 4-5. Congress's determination that streamlined registration procedures are vital to ensure that voters are not frustrated in their ability to vote, *see Gonzalez,* ___ F.3d ___, 2012 WL 1293149, at *10, weighs heavily in favor of denying a stay. In light of these factors, including the public interest as determined by Congress, we deem the equities to weigh in favor of the appellants.

Accordingly, because Arizona has not demonstrated a reasonable probability that the Supreme Court will grant certiorari or a reasonable possibility that the Supreme Court would reverse, and because the equities do not weigh in favor of granting a stay, we conclude that Arizona has not made an adequate showing of "good cause" under Rule 41(d)(2)(A). We therefore exercise our discretion to deny the stay. As always, Arizona is free to renew its motion for a stay before the Supreme Court. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23.

DENIED.

Chief Judge Kozinski and Judges Rawlinson and N.R. Smith voted to grant the stay.

[SEAL]

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.,* (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use

the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona's Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute § 16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form

would have their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled·matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp 330, 351-355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections . . . or to 'alter' the laws initially promulgated by the states. Thus . . . article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller, 129 F.3d at 836.*

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a

Federal election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d F.3d [sic] 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission* pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. § 1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.[1] The NVRA requires the Federal Voter

[1] The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the

(Continued on following page)

Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.[2] These qualifications are presently reflected on

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Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

[2] These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C.§ 15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be

[3] *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

/s/ [Signature]
Thomas R. Wilkey
Executive Director

[SEAL]

JAN BREWER
SECRETARY OF STATE
STATE OF ARIZONA

March 13, 2006

Paul S. DeGregorio, Chairman
United States Election Assistance Commission
1225 New York Avenue, N.W.
Washington, DC 20005

Dear Chairman DeGregorio,

As the Secretary of State and Chief Election Officer for the State of Arizona, I have significant concerns about the March 8, 2008, letter from your executive director asserting that Arizona may not implement its proof of citizenship law with respect to voters who register using a Federal Mail Voter Registration Form (Federal Form). In my mind, such a policy is completely inconsistent, unlawful, and without merit

The executive director's opinion is incorrect and unlawfully prevents the State of Arizona from implementing an important voting security measure with respect to those voters using the Federal Form. Arizona's proof of citizenship requirement was passed by over one million voters in 2004, and was precleared by the U.S. Department of Justice (DOJ) on January 24, 2005. In addition, DOJ separately precleared our Arizona Voter Registration Form on May 6, 2005, which includes the proof of citizenship instructions now required of all citizens registering to

vote in Arizona. The DOJ has civil enforcement power over the National Voter Registration Act, and has expressed no concern about Arizona's proof of citizenship requirement when registering to vote.

As I stated in my March 9, 2006, letter, I believe your letter provides questionable legal support for its conclusion. After consulting with the Arizona Attorney General, I will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).

As I requested of you in December, I urge you to instruct voters using the Federal Form to register in Arizona that they provide sufficient proof of citizenship. To do otherwise would be incredibly irresponsible and may unnecessarily disenfranchise voters using the Federal Form to register.

Sincerely,

/s/ Janice K. Brewer
Janice K. Brewer
Arizona Secretary of State

JKB:kt