No. 13-806

In The
Supreme Court of the United States

STATE OF ARIZONA AND JANICE K. BREWER,
GOVERNOR OF THE STATE OF ARIZONA,

Petitioners,

v.

VALLE DEL SOL, INC., ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Under this Court's precedent, Respondents' challenge to Ariz. Rev. Stat. § 13-2929 did not present, and never has presented, "a live case or controversy" because Respondents have failed to establish their standing to seek injunctive relief. Respondents urge this Court not to review their standing without even citing the applicable standard (a certainly impending threat of harm), much less explaining how Respondents have satisfied it. Respondents' alleged standing is based on the threat of prosecution under § 13-2929, yet Respondents have failed to allege, let alone demonstrate, that either the individual Respondent (Luz Santiago) or any member, employee, or volunteer of any organizational Respondent engages in conduct that could arguably violate § 13-2929.

Respondents have also failed to demonstrate any legal basis for the Ninth Circuit's findings that § 13-2929 is void for vagueness under the Due Process Clause and preempted by federal law. The Ninth Circuit, *sua sponte*, found the statute unconstitutionally vague based on grammatical imprecision even though neither Respondents nor the District Court raised the issue and in spite of substantial evidence that the statute has a common understanding. And the Ninth Circuit found preemption essentially because Congress has criminalized the same conduct. This Court has construed the vagueness and preemption doctrines narrowly; they are not licenses for courts to become policymakers. The Court should accept review and reverse the opinion below.

A. The Ninth Circuit Decided Important Standing Issues Incorrectly.

This Court has repeatedly recognized that Article III "is an essential limit on [courts'] power: It ensures that [courts] act as *judges*, and do not engage in policymaking properly left to elected representatives." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) (granting certiorari because of Article III's importance); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) ("Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' In our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." (citation omitted)).

Litigants should be able to rely on fair and consistent application of this Court's Article III precedent, but the Ninth Circuit largely disregarded it, erroneously finding that Santiago and three organizations[1] have standing to challenge § 13-2929. Pet. 20-23. Respondents dispute this contention, but, similar to their approach in the lower courts, Respondents' arguments are based on conclusory assertions and a misapplication of this Court's precedent.

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[1] Southside Presbyterian Church ("Southside"), Border Action Network ("BAN"), and Arizona South Asians for Safe Families ("ASASF").

1. The Ninth Circuit found that Santiago and the organizations have standing to challenge § 13-2929 based on their "reasonable" concerns about future harm notwithstanding this Court's rejection of the "reasonable likelihood" standard and holding that threatened harm must be "certainly impending" to constitute an injury in fact. *Clapper*, 133 S. Ct. at 1147; Pet. 20-22. Respondents do not acknowledge, much less defend, the Ninth Circuit's application of the "reasonable likelihood" standard. Opp'n Br. 6-13. Instead, Respondents attempt to defend the Ninth Circuit's analysis by misconstruing the issues.

a. Respondents assert that the Ninth Circuit correctly determined that Santiago has standing because it applied the "well-established principle" that Santiago need not "'await and undergo a criminal prosecution.'" Opp'n Br. 11 (quoting *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010)). Arizona has never argued that Santiago must be prosecuted to have standing, but Respondents' assertion addresses only what is *not* required. The issue here is the Ninth Circuit's failure to acknowledge what *is* required – that Santiago's threatened injury be "'certainly impending.'" *Clapper*, 133 S. Ct. at 1143 (citation omitted).

Respondents attempt to distinguish *Clapper* because the *Clapper* respondents "could not be targeted under the law they challenged." Opp'n Br. 8, 11 (citing *Clapper*, 133 S. Ct. at 1148). Both here and in *Clapper*, however, the respondents *argued* that the challenged statute would likely be applied against

them. *See Clapper*, 133 S. Ct. at 1142; Brief in Opposition at 20, *Clapper*, 133 S. Ct. 1138 (No. 11-1025).[2] Santiago alleges that she can be prosecuted under § 13-2929 because she provides "food, shelter, and transportation to a congregation that includes many individuals she reasonably believes to be unauthorized immigrants." Opp'n Br. 11. Even accepting that factual assertion as true, such conduct would *not* violate § 13-2929 because, among other things, Santiago does not: (1) provide transportation or shelter[3] to aliens knowing or recklessly disregarding the fact that they have come to, entered, or remained in the United States unlawfully; or (2) provide transportation in furtherance of the aliens' unlawful presence.[4] *Compare* Opp'n Br. 11 *with* Ariz. Rev. Stat. § 13-2929(A). At best, Respondents have alleged a *possibility* that Santiago *could* violate § 13-2929, which is not sufficient to establish standing. *See Clapper*, 133 S. Ct. at 1147; *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009).

Respondents alternatively assert that Arizona's arguments boil down to a "disagreement with the lower court's assessment of the facts." Opp'n Br. 11-12.

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[2] Respondents are represented by the same office of the ACLU that represented the *Clapper* respondents.

[3] Nothing in § 13-2929 prohibits providing food to anyone.

[4] Respondents also assert that the predicate criminal offense requirement in § 13-2929 is "automatically fulfilled" by a violation of 8 U.S.C. § 1324, but fail to explain how Santiago's alleged conduct violates 8 U.S.C. § 1324. Opp'n Br. 13.

No lower court, however, made *factual* findings regarding Santiago's standing. Both the District Court[5] and the Ninth Circuit assessed *only* the allegations in the complaint. Pet. 12, 15. As Respondents tacitly concede, an injunction must be based on evidence and factual findings, *not* allegations. *See* Fed. R. Civ. P. 52(a); Opp'n Br. 12 n.3.

b. Respondents argue that the Ninth Circuit correctly determined that the organizations have standing because it "applied the test for organizational standing set forth by this Court in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)." Opp'n Br. 7. In *Havens*, an organization alleged standing to seek *damages* based on *past* harms. 455 U.S. at 378-79. Here, the organizations assert standing to seek injunctive relief based on alleged concerns about possible *future* harm. On these issues, *Clapper* controls.[6]

Again, Respondents attempt to distinguish *Clapper* by arguing that § 13-2929 "*directly criminalizes* many of [Respondents'] core activities." Opp'n Br. 8. As with Santiago, however, the organizations'

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[5] Arizona attacked Respondents' standing three times in the District Court, but the District Court did not consider any evidence on the issue, even though Arizona submitted Santiago's deposition testimony with its opposition to Respondents' class certification motion as evidence that Santiago lacks standing. Opp'n Br. 12 n.2; Pet. 8-12.

[6] Arizona does not contend that *Clapper* overruled *Havens*. *Contra* Opp'n Br. 8.

allegations fail to establish a violation of § 13-2929. The declarations BAN and Southside submitted, for example, allege that their members, employees, and volunteers provide transportation to persons *without knowledge of their immigration status*, which would not satisfy the mens rea requirement in § 13-2929(A)(1). *See* Harrigton Decl. ¶ 21; Allen Decl. ¶ 9.

2. The Ninth Circuit further misapplied this Court's precedent when it found that the organizations have standing based on vague allegations that *unidentified* members, employees, or volunteers face prosecution under § 13-2929. Pet. 22. Respondents argue that they need not identify any specific member, employee, or volunteer who is likely to suffer harm under § 13-2929 because such specificity is required *only* for representational standing. Opp'n Br. 10. *All* plaintiffs, however, must make a "clear showing" of their alleged harm. *See*, *e.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *Summers*, 555 U.S. at 499 ("'Standing,' we have said, 'is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of perceptible harm.'" (internal quotations and citation omitted)). Respondents offer no reason why organizations should be subject to a lower standard when asserting standing in their own right.

3. Finally, the Ninth Circuit applied the incorrect legal standard when it concluded that BAN and ASASF have standing to challenge § 13-2929 based on the organizations' conclusory and bald assertions that they diverted resources to address concerns

about the Act of which § 13-2929 is a part – S.B. 1070. App. 18-19. Standing must be assessed on a provision-by-provision basis. Pet. 23. Respondents defend the Ninth Circuit's *conclusion* that BAN and ASASF diverted resources because of § 13-2929, Opp'n Br. 10, ignoring that the conclusion is not supported by the Ninth Circuit's own factual findings, *see* App. 18.

4. The Ninth Circuit's opinion also raises important standing issues that have not been settled by this Court regarding the evidentiary showing necessary to establish standing at the preliminary injunction stage. Pet. 25-27. Respondents argue that the absence of precedent on this issue does not merit review because it "has not resulted in conflicting decisions from the circuit courts or a misapplication of this Court's precedent in this case." Opp'n Br. 14. Of course, there could not be a misapplication of this Court's precedent on an issue this Court has not addressed. Based on this Court's rulings on related issues, however, the Court presumably would not condone the issuance of injunctive relief based on unverified allegations regarding the plaintiffs' standing.[7] The Ninth Circuit's finding to the contrary,

[7] *See*, *e.g.*, *Winter*, 555 U.S. at 22 ("[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[E]ach [standing] element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.").

however, demonstrates the need for clear precedent on this issue.

Respondents do not defend the Ninth Circuit's reliance on their pleading to find that Santiago has standing, but argue that the Ninth Circuit properly relied on two-year-old declarations from BAN and Southside because standing is assessed when the lawsuit is filed and "there is no basis to require plaintiffs seeking an injunction to continually produce new evidence demonstrating recent injuries." Opp'n Br. 15. But Arizona is *not* arguing that Respondents must "continually produce new evidence," Arizona is arguing that the two-year-old declarations Respondents submitted failed to show that *at the time* Respondents moved for injunctive relief they faced imminent irreparable harm. Pet. 27. This Court has "repeatedly held that an 'actual controversy' must exist not only 'at the time the complaint is filed,' but through 'all stages' of the litigation." *Already*, 133 S. Ct. at 726 (citation omitted). In *Already*, for example, the Court found that "[a]t the outset of this litigation, both parties had standing," but unanimously affirmed the lower courts' determination that Already's claim for prospective relief had become moot. *Id.* at 727, 733.

Here, as in *Already*, it was not the passage of time but the change in circumstances and the nature of harm alleged that made the declarations from BAN and Southside stale. The 2010 declarations addressed the organizations' efforts to address their constituents' concerns about the new law and harm that

purportedly *could* occur *if* § 13-2929 went into effect. Pet. 16-17. But the statute subsequently *did* go into effect and remained in effect for approximately *two years* before Respondents moved for injunctive relief. Pet. 8, 12-13. The declarations failed to make the requisite "clear showing" of *future* harm to BAN and Southside in 2012 because the declarations failed to address whether the organizations' alleged concerns came to fruition or whether the organizations had a continuing need to educate their constituents.

Under this Court's standing precedent, the Ninth Circuit had no authority to address the merits of Respondents' challenge to § 13-2929.

B. The Ninth Circuit's Opinion Conflicts with this Court's Precedent Regarding the Non-Merits Factors for Injunctive Relief.

The Ninth Circuit's cursory analysis of the non-merits factors failed to address the harm to Arizona or whether the evidence Respondents presented made a "clear showing" of their alleged irreparable harm. Pet. 23-24. Respondents argue that the Ninth Circuit properly failed to consider the harm to Arizona "given the magnitude of the unredressable harm to plaintiffs threatened with prosecution . . . " Opp'n Br. 16-17. But that argument has two flaws. First, courts' obligation to consider harm to all parties is unconditional. *See Winter*, 555 U.S. at 24 ("In each case, courts 'must balance the competing claims of injury . . . '" (citation omitted)).

Second, the purported risk of harm to Respondents is highly speculative – based on Respondents' pleading, vague and conclusory discovery responses, and outdated declarations. Pet. 23.[8] Respondents argue that the District Court's finding of irreparable harm was not an abuse of discretion, Opp'n Br. 16, but the District Court failed to make factual findings to support its conclusion and, therefore, necessarily abused its discretion. Pet. 13; Fed. R. Civ. P. 52(a); *Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

C. The Ninth Circuit's Opinion Conflicts with this Court's Due Process and Preemption Precedent.

1. The Ninth Circuit *sua sponte* invalidated § 13-2929 as unconstitutionally vague, finding the term "in violation of a criminal offense" "nonsensical" because an "offense" is an action or inaction and "one cannot violate or be in violation of an action." App. 23. Respondents argue that the Ninth Circuit applied the correct legal standard,[9] but vagueness depends on the

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[8] Respondents concede that the expenses the organizations incurred to "counteract" the anticipated effects of § 13-2929 do not constitute irreparable injury. Opp'n Br. 14.

[9] Respondents also characterize Arizona's argument as a factual dispute, Opp'n Br. 18, but statutory construction is an issue of law, not fact. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

common understanding of a statute's terms and the Ninth Circuit failed to address the statutes Arizona cited using similar terminology, or the evidence Arizona submitted showing that § 13-2929 has a common understanding. Pet. 18.

Respondents argue that the Ninth Circuit *did* address Arizona's evidence, Opp'n Br. 18, but the court addressed *only* the cases Arizona cited in which the courts used the phrase "violation of an offense." Citing one such case, the Ninth Circuit found that § 13-2929 would be clear if it incorporated specific criminal statutes *after* the phrase "in violation of a criminal offense." App. 25 n.14. That finding only undermines the Ninth Circuit's vagueness determination, however, because the Ninth Circuit did not find the statute vague because it referred to *all* criminal offenses; it found the statute vague because "one cannot violate or be in violation of an action." App. 23. Narrowing the list of criminal offenses to which the statute applies would not resolve that issue.

The Ninth Circuit also failed to follow this Court's precedents that require courts to construe, rather than invalidate, a statute where possible to do so. Pet. 24-25.[10] Respondents argue that the Ninth Circuit could not construe § 13-2929, relying on a case in which this Court refused to rewrite a statute that

[10] *See also Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010).

applied to "*all* entities" so that it would apply only to "the GRDA" or "state-owned utilities." *Wyoming v. Oklahoma*, 502 U.S. 437, 460-61 (1992) (emphasis added). But Arizona did not ask the Ninth Circuit to change the meaning of an unambiguous term; it asked the Ninth Circuit to construe the term "criminal *offense*" to mean what it was intended and commonly understood to mean – criminal *law*. Because Arizona's law enforcement officers were trained to enforce the statute accordingly,[11] the construction Arizona proposed would not change the statute's enforcement or application. Pet. 18.

2. The Ninth Circuit's finding that § 13-2929 is field and conflict preempted set an extremely low threshold for preemption, effectively finding preemption because § 13-2929 overlaps 8 U.S.C. § 1324. Pet. 25. It is well-established that "a State may make violation of federal law a crime." *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). Respondents dispute the applicability of that principle, Opp'n Br. 20-21, but without explaining how the principle could ever apply if, as Respondents contend and the Ninth Circuit found, a state cannot establish *any* penalties or prosecute *any* conduct that would also be a crime under federal law. Opp'n Br. 21; App. 39-43.

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[11] *See*, *e.g.*, Arizona POST, Implementation of the 2010 Arizona Immigration Laws, Statutory Provisions for Peace Officers 10 (June 2010), *available at* http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf.

This Court's "precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (citation omitted). The mere existence of a similar, but different, federal law is not enough to satisfy that threshold. *See*, *e.g.*, *id.* at 1985-86; *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011).

As Respondents and amicus note, the Ninth Circuit's field preemption finding conflicts with *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013), *cert. petition filed*, No. 13-1043 (Feb. 26, 2014). Opp'n Br. 22. It also conflicts with the Ninth Circuit's own holding in *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983), *overruled in part on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999), and state courts' holdings that Congress had *not* occupied the field of alien smuggling. Pet. 28. Respondents attempt to distinguish *Gonzales* on its facts, Opp'n Br. 22, but a finding of *field* preemption precludes *all* state activity and, therefore, does not turn on the particular manner in which a state seeks to enter the field.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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