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SUPREME COURT, U.S.

Nos. 11A1189

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, et al.
Petitioners

v.

MIRIAM M. GONZALEZ, et al.
Respondents

and

KEN BENNETT, in his official capacity as Arizona Secretary of State, et al.
Petitioners

v.

INTER TRIBAL COUNCIL OF ARIZONA, et al.
Respondents

PETITIONERS' APPLICATION TO STAY MANDATE BEFORE THE HONORABLE JUSTICE ANTHONY M. KENNEDY

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To the Honorable Anthony Kennedy, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), Petitioners the State of Arizona, Secretary of State Ken Bennett, and thirteen Arizona counties respectfully move for an order staying the mandate of the United States Court of Appeals for the Ninth Circuit pending the filing of and final action by this Court on a petition for certiorari seeking review of the Ninth Circuit's judgment April 17, 2012 judgment in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (*Gonzalez III*). App. 1-73. On April 24, 2012, Petitioners filed their Motion to Stay Mandate in the Ninth Circuit, requesting that the court stay its issuance of the mandate to allow Petitioners to request this Court's certiorari review. On June 7, 2012, the Ninth Circuit denied Petitioners' Motion to Stay. App. 74-84. Because the mandate is scheduled to issue on June 15, 2012, Petitioners request that an order be entered directing the Ninth Circuit to stay its mandate before June 15, 2012. Alternatively, if the mandate issues before a decision on this application, Petitioners request an order directing the Ninth Circuit to recall its mandate pending certiorari proceedings.

Petitioners will file a petition for certiorari within ninety days of the April 17, 2012, Ninth Circuit's decision in *Gonzalez III*. At issue is whether the court of appeals erred in determining that Article I, Section 4, Clause 1 of the U.S. Constitution (the Elections Clause) requires a heightened preemption analysis and

that therefore the National Voter Registration Act (NVRA), 42 U.S.C. § 1973, preempts the application of Arizona law, Arizona Revised Statute (A.R.S.) section 16-166(F) (popularly known as Proposition 200), which requires persons who register to vote to provide sufficient proof of citizenship, even though the Arizona law is entirely consistent with the NVRA.

Petitioners' stay request is warranted because there is a reasonable probability that the Court will grant certiorari review and reverse the court of appeals' decision. After Arizona has applied Proposition 200's proof-of-citizenship requirement in several elections, and on the eve of a new election cycle, the Ninth Circuit has issued a divided opinion and denied a stay of mandate that thwarts the State's authority to administer elections to ensure fair federal elections. In so doing, the majority cast aside this Court's long-standing precedent interpreting the Elections Clause and interpreted the NVRA in a manner fundamentally at odds with that Act's stated purpose and express language as well as that of other federal election provisions. Absent a stay, the Ninth Circuit's mandate will likely result in an injunction preventing the State from ensuring that eligible voters are given the opportunity to vote, casting unnecessary doubt on federal elections.

The effect of the Ninth Circuit's erroneous construction of the Election Clause and the NVRA, if not corrected, will not only be felt in Arizona, it will also

cast a pall on the efforts of other States to ensure the eligibility of their voters. The Ninth Circuit's actions do irreparable harm to the fair administration of federal elections in Arizona by seeking to prevent the State from enforcing reasonable regulations that are entirely consistent with the NVRA and the State's authority under the U.S. Constitution. Moreover, because the Respondents have not demonstrated any harm as result of the application of Proposition 200, the balance of equities weigh heavily in Arizona's favor.

Factual and Procedural Background

Passed by Congress in 1993, the National Voter Registration Act was enacted in order to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," "make it possible for Federal, State, and local governments to implement [it] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," "protect the integrity of the electoral process," and " ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1)-(4). Congress set out to achieve these goals by allowing applications for driver's licenses to double as voter registration forms, *see* 42 U.S.C. § 1973gg-2(a)(1), by requiring the States to permit voter registration by mail, *see* 42 U.S.C. § 1973gg-2(a)(2), and by having public assistance agencies and other state offices serve as

registration sites, *see* 42 U.S.C. § 1973gg-5(a)(2)(A).[1] The NVRA does not apply to States that do not require voter registration or that permit voters to register at the time of voting in a general election for federal office. *See* 42 U.S.C. § 1973gg-2(b)(1), (2). Arizona requires voters to register for state or federal elections up to twenty-nine days before a primary or general election. *See* A.R.S. § 16-120.

The NVRA led to the creation of the Federal Mail Voter Registration Form ("federal form"). Congress charged the U.S. Election Assistance Commission ("EAC") with developing a federal form in consultation with the States. *See* 42 U.S.C. § 1973gg-7(a)(2). The NVRA directs the States to "accept and use" the federal form when submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2). The NVRA also allows applicants to register by mail for federal elections using a state form. *See* 42 U.S.C. § 1973gg-4(a)(2). Since the inception of the NVRA, Arizona has used and accepted the federal form for voter registration. App. 133; *see* 42 U.S.C. § 1973gg-7(a)(2).

The NVRA, by its terms, provides that the federal form should provide only such identifying information as to enable the States to assess the eligibility of an applicant. 42 U.S.C. § 1973gg-7(b)(1). After a federal form is submitted by an applicant, States must notify registrants of the "disposition" of their application.

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[1] Congress also established procedures for removing ineligible persons from the voter rolls. *See* 42 U.S.C. § 1973gg-6(c).

Id. § 1973gg-6(a)(2). Congress did not specify what form the notice should take, but instead left that decision to the States.

Consistent with the State's constitutional authority and the NVRA, Arizona voters passed Proposition 200 in 2004. Among other provisions, Proposition 200 required individuals who register to vote to provide satisfactory evidence of citizenship. A.R.S. § 16-166(F).

> "Satisfactory evidence of citizenship" may be shown by including, with the voter registration form, any of the following: the number of an Arizona driver's license or non-operating identification license issued after October 1, 1996 (the date Arizona began requiring proof of lawful presence in the United States to obtain a license); a legible copy of a birth certificate; a legible copy of a United States passport; United States naturalization documents or the number of the certificate of naturalization; "other documents or methods of proof that [may be] established pursuant to" federal immigration law.

Gonzalez v. Arizona, 485 F.3d 1041, 1047 (9th Cir. 2007) (*Gonzalez I*) (quoting A.R.S. § 16-166(F)) (alterations original).

Following approval of the measure by Arizona voters, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. App. 139-48. Arizona specifically stated that the measure would "require applicants registering to vote to provide evidence of United States citizenship with the application." App. 139. Arizona's submission was comprehensive, including analysis by the Arizona Legislature's Legislative

Council and other public information related to the measure's passage. App. 140-51. The Department of Justice precleared it on January 24, 2005. App. 149.

Following the implementation of Proposition 200, Arizona has continued to accept both the federal form and Arizona's form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with whichever application form the registrant submits. App. 133-34. The Arizona Secretary of State makes the federal form available to anyone who requests it. App. 134. In addition, that form is publicly available for downloading and printing on the EAC's website. App. 134.

This case has a lengthy procedural history that has resulted in five published opinions. After Arizona passed Proposition 200, several Plaintiffs brought overlapping Complaints that were consolidated in the district court. The Complaints raised a range of challenges to Proposition 200. Relevant here, one set of Plaintiffs included the Inter Tribal Council of Arizona, organizations that assist with voter registration efforts in Arizona, and one individual (Steve Gallardo, who was a state representative at the time the Complaint was filed). App. 9. These Plaintiffs, referred to as the ITCA Plaintiffs, filed suit against then-Arizona Secretary of State Jan Brewer in her official capacity as chief election officer of Arizona. Another group of Plaintiffs, including five organizations and five individuals, filed suit against the Secretary, the State of Arizona, and the recorders

and election directors of Arizona's fifteen counties. App. 9. These Plaintiffs are referred to as the Gonzalez Plaintiffs. Collectively, Respondents brought claims including constitutional violations (undue burden on right to vote, poll tax violation), violation of the Civil Rights Act, violation of section 2 of the Voting Rights Act, and violation of the NVRA. App. 9-10.

The district court consolidated the actions and, following briefing and an evidentiary hearing, denied preliminary relief. *Gonzalez v. Arizona*, 435 F. Supp. 2d 997 (D. Ariz. 2006). A two-judge motions panel of the Ninth Circuit then granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006). And this Court considered the consequences of the Ninth Circuit's interlocutory injunction of sufficient importance to grant the State's petition for certiorari and vacate the Ninth Circuit's injunction. *Purcell v. Gonzalez,* 549 U.S. 1, 8 (2006) (noting that it expressed no opinion on the correct disposition of the appeal). A panel of the Ninth Circuit then affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the States from requiring proof of citizenship. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2007) (*Gonzalez I*).

Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the Secretary and other Defendants moved for summary

judgment on the NVRA claim, which was granted. The case proceeded to trial on Plaintiffs' other claims, including constitutional violations and violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Civil Rights Act of 1964. App. 85. After a trial, the district court judge entered judgment against Plaintiffs. App 132. In rejecting Plaintiffs' claims, the district court found that the State had established evidence of voter fraud in Arizona. App. 99-100, 117. The court also found that the State had an important interest in voter confidence in elections. App. 117. Finally, the court concluded that "Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots." App. 118.

Both the Gonzalez Plaintiffs and the ITCA Plaintiffs appealed the grant of summary judgment on the NVRA claim among other issues. A divided second panel of the Ninth Circuit reversed the district court's summary judgment ruling on the NVRA claim. *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), *reh'g en banc granted & opinion withdrawn*, 649 F.3d 953 (9th Cir. 2011) (*Gonzalez II*). The majority rejected the holding of *Gonzalez I* and held that the NVRA "supersedes Proposition 200's voter registration procedures, and that Arizona's documentary proof of citizenship requirement for registration is therefore invalid." *Id.* at 1169. The State petitioned for rehearing en banc and the court granted rehearing. *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2011).

Following the en banc hearing, the Ninth Circuit, in another divided opinion, concluded that the NVRA preempts Proposition 200 with regard to federal elections. App. 1-73. The court noted that Elections Clause "empowers both the federal and state governments to enact laws governing the mechanics of federal elections." App. 13. The majority explained that the Election Clause permits Congress to "'conscript state agencies to carry out' federal mandates." App. 14 (quoting *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)). The majority concluded, " a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out whatever procedures Congress requires." App. 14.

Following from this conclusion, the court then determined that as a matter of law the provision of the NVRA that requires States to "accept and use" the federal form did not permit Arizona to use the federal form and requires information consistent with the federal form but not required by it. App. 28-30. Thus, "under Congress's expansive Elections Clause power, we must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA." App. 35. Accordingly, under the Ninth Circuit's opinion, because the federal form does not require registrants to provide documentary proof of citizenship the State cannot

consider any information beyond the federal form to determine whether or not an individual is a citizen who is eligible to vote.

Chief Judge Kozinski concurred, but observed the following:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation *confirming what's in the form*. This wouldn't render the federal form superfluous, just as redundant braking systems on cars and secondary power supplies on computers aren't superfluous.

App. 49 (emphasis added).

He also noted that, although this Court "has never articulated any doctrine giving deference to the states" under the Elections Clause, this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." App. 50. He then concluded that only this Court "can adopt such a doctrine." App. 50.

Judge Rawlinson dissented. She explained that, in contrast with the majority opinion, this Court's Elections Clause decisions "emphasize the respect that should be accorded to procedures implemented by states" and that Proposition 200

complemented the NVRA. App. 69. And she found that regardless of the scope of the Elections Clause, the NVRA by its terms provides that States may develop and use their own form for registering voters. App. 58-59. Furthermore, "the 'accept and use' provisions of the NVRA do not establish a conflict between Proposition 200 and the NVRA where one is not otherwise present in the *text* of the statutes." App. 60. Thus, it is not the federal form that dictates whether there is conflict, but the statute. App. 62 ("[T]he point of contention is whether Arizona defies the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form. The answer cannot be that the Federal Form is the end-all-be-all."). "Arizona is allowed to require proof of citizenship for federal voter registration because of its expressly granted authority to develop and use a form complying with § 1973-7(b) and may deny voter registration for federal office for lack of such proof." App. 64.[2]

Standard for Granting a Stay

Under 28 U.S.C. § 2101(f), this Court or any Circuit Justice may grant a stay of mandate "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari." Generally, an applicant must show that there is a reasonable probability of a granting of certiorari, a fair prospect that a majority of the Court will find error in the case,

[2] The Ninth Circuit also divided on the question of whether to stay the mandate with Judges Kozinski, Rawlinson and Smith voting to grant the stay. App. 83

irreparable harm to the petitioner, and that the balance of equities favors the petitioner. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). Petitioners meet the criteria for granting the stay.

Argument

1. Because the Ninth Circuit Erroneously Interpreted Both the Elections Clause and the NVRA, This Court Is Likely to Grant Certiorari and Reverse the Ninth Circuit's Judgment.

This case presents a critical issue concerning the interpretation of the Elections Clause as applied to the NVRA. In concluding that, as applied to the federal form, Proposition 200 was superseded, the Ninth Circuit departed from this Court's precedent.

Instead, the majority adopted a test of its own devising and in disregard of this Court's precedents. Rather than recognize that the Elections Clause grants States the authority to enact legislation consistent with federal law, the court instead ignored the terms of the NVRA itself and framed the issue as turning on whether "Congress addressed the same subject as the state law" and, if so, determining whether the two statutes "operate harmoniously in a single procedural scheme for federal voter registration." App. 18. Thus, the Court, in interpreting whether a State "accept[s] and use[s]" the federal form, concluded it need only "consider whether the state and federal procedures operate harmoniously when read together naturally." App. 25-26. Accordingly, the Court concluded that the

federal form itself, with only a check box indicating U.S. Citizenship, supersedes any requirement under state law concerning proof of citizenship. App. 25-26. In other words, notwithstanding that the NVRA, by its terms, "not only does *not* prohibit additional documentation requirements, [but also] expressly permits the states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant,'" App. 63 (Rawlinson, J., dissenting), the majority found Proposition 200 superseded. This interpretation proceeds from a false premise.

There is, of course, no dispute that the Elections Clause permits Congress to alter state laws respecting federal elections. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Black, J., announcing the judgment of the Court) (age of voters in federal elections). Just as plainly, however, the Elections Clause "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 511 (2001) (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986)). Accordingly, States have express authority to promulgate election codes, to regulate registrations, to prevent fraud, and to supervise voting. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

And, this Court has not suggested, let alone held, that Congress preempts state law by merely legislating on a related topic. To the contrary, this Court has

held that legislation under the Elections Clause requires express preemption or an actual conflict with federal law. Specifically, the Court has held that an Election Clause challenge fails where the congressional act at issue "does not expressly pre-empt state legislation," thus leaving the State free to enforce its law. *McConnell v. Federal Elections Comm'n*, 540 U.S. 93, 186 (2003), *overruled on other grounds by Citizens United v. Federal Election Com'n*, 130 S.Ct. 876 (2010); *see also* App. 62 (Rawlinson, J., dissenting) ("No provision of the NVRA expressly forbids states from requiring additional identifying documents to verify a voter's eligibility."). Furthermore, to the extent that Congress does legislate pursuant to the Elections Clause, a conflict extends "only so far as the two [provisions] are inconsistent and no farther." *Ex Parte Siebold*, 100 U.S. 371, 386 (1879); *see also Smiley v. Holm*, 285 U.S. 355, 369-72 (1932) (evaluating state procedures for enacting congressional districts for conflict with Elections Clause and federal statute and concluding no conflict existed). Contrary to this precedent, the Ninth Circuit majority broadened the scope of the NVRA to create a conflict where none existed.

The majority relied on *Siebold* and *Foster v. Love*, 522 U.S. 67 (1997), but neither of those cases warrants striking down a state law that does not conflict with any federal statute and that expressly furthers a federal objective (i.e. ensuring the registration of eligible voters). *See* App. 70-73 (Rawlinson, J., dissenting). *Seibold* involved a challenge by election judges to their prosecution for violations

of a federal statute that criminalized conduct in federal elections. 100 U.S. at 378-82. The petitioners argued that if Congress chose to regulate congressional elections, it must do so comprehensively rather than partially. *Id.* at 382-83. The Court rejected this proposition, concluding that Congress may alter the law respecting state practices "either wholly or partially" under the Elections Clause. Although "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them," *id.* at 383-84, the conflict extends only "so far as the two are inconsistent, and no farther," *id.* at 386. A conflict arises "if both cannot be performed." *Id.* The Court explained that "we are bound to presume that Congress has [legislated] in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." *Id.* at 393. *Siebold*'s conclusion thus "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395. The *Seibold* Court clarified that the scope of preemption was controlled by whether, as a legal matter, a conflict exists between the two laws.

Nor does *Foster* alter the analysis. In that case, there was a plain conflict between the federal statute and the state law. *Foster*, 522 U.S. at 72-73; *see also Wyeth v. Levine*, 555 U.S. 555, 588 (2009) (Breyer, J., concurring) (citing *Foster* for the proposition that "[p]reemption must turn on whether state law conflicts with

the text of the relevant federal statute or with federal regulations authorized by that text" and describing *Foster* as "finding . . . conflict preemption").

Indeed, a careful reading of *Foster* demonstrates that far from suggesting an entirely new scheme for reviewing cases under the Election Clause, the Court was cautious to narrow its opinion to the particular conflict that arose. 522 U.S. at 72 (noting that decision does not turn on "isolating precisely what acts a State must cause to be done on federal election day (and not before it)"). After all, an expansive reading of Congress's determination that the date of election requires an "election" on that specific date would exclude state laws permitting absentee ballots. *See Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) (explaining that *Foster*'s interpretation of the word election permitted multi-day voting in challenge to absentee voting in federal elections).[3]

The Ninth Circuit's Elections Clause preemption analysis is particularly odd in this context because it leads to absurd results. First, the NVRA by its terms is designed to enhance the integrity of elections. Second, although it places certain mandates on the States, it "still leaves room for policy choice" including what

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[3] Nor is the majority's reliance on *U.S. Term Limits v. Thornton* persuasive. App. 15. While *Thornton* recognized that the U.S. Constitution delegates authority to the States respecting federal elections, it does not stand for the proposition that the Court should conclude that any legislation in the area of such elections displaces state law when there is no conflict. 514 U.S. at 832-33 (noting that the "Framers intended the Elections Clause to grant States authority to create procedural regulations").

information to require. *Young v. Fordice*, 520 U.S. 273, 286 (1997). "The NVRA does not list . . . all the other information the State may—or may not—provide or request." *Id.* Thus, at least one other circuit has consistently held that the NVRA does not dislodge the State's authority in terms of eligibility. *See, e.g., U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 385 (6th Cir. 2008) (States are "free to set eligibility standards and evaluate whether each applicant meets those standards"); *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000) (no violation of NVRA where person refused to provide social security number required by state and was therefore not registered). This is consistent with the NVRA's terms that charge state election officials with "assess[ing] eligibility." 42 U.S.C. § 1973gg-7(b)(1); *see also* App. 62-63 (Rawlinson, J., dissenting).

Likewise, the majority's construction is at odds with the plain language of the NVRA because the Act provides, expressly, that States may "develop and use a state form in addition to the Federal Form, for federal elections." App. 62 (Rawlinson, J., dissenting). As the majority acknowledged, the NVRA provides that States may use this form "in addition" to the federal form and a State form "may include requirements that are not included in the Federal Form" such as proof of citizenship. App. 27 (majority opinion) (citing 42 U.S.C. § 1973gg-4(a)(2)). Because the NVRA provides the States this express authority, the Ninth Circuit has ignored its plain language and thus invalidated a state law requirement,

as applied to the federal form, that the NVRA expressly allows to be included in the state form. Congress could not have intended the Ninth Circuit's incongruous interpretation.

2. Because of the Impact of the Ninth Circuit's Decision on Other Cases, This Court Will Likely Grant Certiorari and Reverse the Judgment of that Court.

The interpretation of the NVRA and the Elections Clause raise public policy issues that go beyond this case. For example, in addition to the NVRA, Congress has passed the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301 to 15545, which was intended to ensure the updating of voting systems and to "establish minimum election administration standards" for States, among other purposes. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, preamble.

The HAVA provided, among other things, that States were prohibited from accepting voter registration forms from applicants who possess a driver's license or social security number if such applicants do not provide that information on the registration form. 42 U.S.C. § 15483(a)(5)(A). The Act further provided that the States are required to verify the accuracy of that information for purposes of voter registration. *Id.* § 15483(a)(5)(A)(iii).

The HAVA specifically requires the appropriate state officials to agree to match information from the statewide voter registration database with the information in the motor vehicle division database "to verify the accuracy of the

information provided" on voter registration applications. *Id.* § 15483(a)(5)(B)(i). In addition, under the HAVA, States must "ensure that voter registration records in the State are accurate" and must have a "system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote." *Id.* § 15483(a)(4)(A).

The HAVA states that its fraud-prevention measures are only "minimum requirements" and that the Act was not intended to prevent States from establishing election technology and administrative requirements that are "more strict" if those requirements are not inconsistent with federal law. *See id.* § 15484. Congress further provided that the "specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State." *Id.* § 15485.

Rather than interpret the NVRA consistent with the purposes of the HAVA, the *Gonzalez* majority concluded that the HAVA "savings clause," which states that it should not be interpreted to "supersede, restrict, or limit the application" of the NVRA, eliminates any need to reconcile the provisions of the NVRA with the HAVA. App. 33-34. But this reasoning assumes that the Ninth Circuit has correctly addressed the NVRA. Creating a conflict between the two laws cannot have been Congress's intent. Indeed, this Court acknowledged its consistent intent in *Crawford v. Marion County*. 553 U.S.181, 196-97 (2008) (explaining that

HAVA and NVRA "indicate that Congress believes that photo identification is one effective method of establishing a voter's qualifications to vote").

Finally, several other States have enacted provisions that are similar to Proposition 200. *See, e.g.,* Ala. Code § 31-13-28; Kan. Stat. Ann. § 25-2309 (effective January 1, 2013); Ga. Stat. Ann. § 21-2-216; Tenn. Code Ann. § 2-2141. Thus, the Ninth Circuit's published opinion, and no doubt its reasoning, will likely have a significant effect on other States' laws. *See Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1974 (2011) (noting in discussing procedural background that several other States have enacted similar provisions to statutes at issue in preemption case).

3. Because the Ninth Circuit's Decision Threatens to Prevent the State from Ensuring Fair Federal Elections, Petitioners Will Experience Irreparable Harm if the Stay Is Not Granted.

"Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., Circuit Justice). This injury is even more dramatic in the context of elections where a "State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. at 4 (quoting *Eu v. San Francisco County Democratic Central Comm.*, 498 U.S. 214 (1989)). Voters themselves are denied their rights by "debasement or dilution of the weight of

[their vote]." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533 (1964)). Failure to grant a stay in this context will do direct harm to the State on both counts. As Judge Kozinski cogently explained, "states are not disinterested bystanders" in federal elections. App. 50 (Kozinski, J., concurring). Noting that voting irregularities carry a long-term stain on States' reputations, Judge Kozinksi explained that "[m]aking sure that [federal] representatives are chosen by the state's qualified electors is of vital significance to the state and its people." App. 50.

In this case, the district court found that Arizona, like other States, has experienced fraud in its voter registration process. *See* App. 99-100, 117 (district court order); App. 50 (Kozinski, J., concurring) (noting that in this case "the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors"). For example, in 2005, the Maricopa County Recorder referred 159 matters to the county attorney based on evidence demonstrating that non-U.S. citizens had registered to vote. App. 171-74. Pima County has also referred to its county attorney several instances of non-citizens attempting to register to vote or cast votes in an election. App. 150-63. In these two counties, the State's largest, about 200 individuals' voter registrations were cancelled after they swore to the jury commission they were not U.S. citizens. App. 151-78. The trial record showed that nine persons in Arizona have been prosecuted for illegal voting and presentment of a false instrument for filing, including five people

alleged to be non-citizens. App. 99. Additionally, Maricopa County Elections Director Karen Osborne testified that some voter registration organizations had submitted garbage voter registration forms and had misled non-citizens into registering to vote. App. 99.

In its opinion, the majority expressly "recognize[d] Arizona's concern about fraudulent voter registration." App. 34.[4] Thus the damage done by this erroneous legal holding will become a factual reality if the Ninth Circuit's mandate is not stayed or recalled. As Judge Rawlinson explained, the NVRA is intended to "enhance[e] the participation of *eligible* citizens as voters in elections for Federal office." App. 66-67 (quoting 42 U.S.C. § 1973gg(b)). Yet the Ninth Circuit's ruling prevents States from taking steps to protect those very voters, despite the Elections Clause and the terms of the NVRA itself.

4. Because Respondents Cannot Show that Proposition 200 Prevents Eligible Persons from Registering, the Balance of Equities Tips Sharply in Petitioners' Favor.

Petitioners will suffer irreparable injury if the stay is not granted. Respondents, in contrast, can offer little countervailing interest. The district court record does not support the conclusion that eligible persons are being denied any opportunity to register to vote. At trial, there was no evidence of

[4] Without explanation, in denying the State's Motion for Stay, the Ninth Circuit noted "that Arizona has not provided persuasive evidence that voter fraud in registration is a significant problem in Arizona." App. 81.

disenfranchisement on the basis of Proposition 200. After two years of litigation and discovery, only one person was identified as lacking evidence of citizenship to register to vote, and she is not a party. App. 115. In contrast, as explained above, the trial court found that Arizona has experienced voter fraud. Given that Proposition 200 has not deprived eligible voters of the opportunity to register and addresses voter fraud, the balance of equities tips heavily in favor of the State.

Conclusion

Petitioners will file a petition for certiorari within ninety days of the judgment of the Ninth Circuit Court of Appeals. Petitioners respectfully request the Court to stay the mandate, or recall the mandate if necessary, to prevent irreparable harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Original and two copies of Petitioners' Application to Stay Mandate before the Honorable Justice Anthony M. Kennedy were filed on June 13, 2012, with:

Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543
dbickell@supremecourt.gov

I certify that, pursuant to Rule 29, one copy of Petitioners' Application to Stay Mandate before the Honorable Justice Anthony M. Kennedy was served on each party to the above proceeding or that party's counsel, and on every other person required to be served, via U.S. mail on June 13, 2012. The names and addresses of those served are as follows:

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I, David R. Cole, declare under penalty of perjury that the foregoing is true and correct.

Executed this 13th day of June, 2012.

David R. Cole