No. 11A1189

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, et al.
Petitioners

v.

JESUS 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' REPLY ON APPLICATION TO STAY MANDATE BEFORE THE HONORABLE JUSTICE ANTHONY M. KENNEDY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Argument

1. Respondents Have Not Shown Any Harm From the Implementation of Proposition 200.

Respondents argue that the State has not provided a sufficient showing of irreparable harm to warrant a stay of the mandate. *E.g.*, Gonzalez Br. at 18; ITCA Br. at 24. But it is clear that it is Respondents who have made no showing that they will be harmed if the Court stays the mandate. *See Hollingsworth v. Perry*, 130 S.Ct. 705, 713 (2010) (Kennedy, J., in chambers) (noting that balance of equities will favor applicants where respondents do not allege any harm). In an effort to obscure their inability to show that Proposition 200 imposes any harm, Respondents resort to the selective reading of the district court's findings of fact after trial, while their attack on the State's showing resorts to extra-record facts that actually support the State.

Respondents' claim of harm obscures the record in this case. Respondents' argument amounts to speculation that contradicts the district court's findings after trial. *See, e.g.*, Gonzalez Br. at 20 (speculating on reasons why person may not have proof of citizenship). Although Respondents correctly note the district court's observation that 20,000 individuals did not register after Proposition 200, ITCA Br. at 25, they ignore the district court's finding that of that number "[Respondents] have not produced any reliable evidence as to the number of these applicants or voting eligible persons who lack sufficient proof of identification or

are unable to obtain it." Appendix to Petitioners' Application to Stay Mandate (Ariz. App.) at 115. Similarly, Respondents exaggerate the alleged burden on would-be voters. *E.g.*, Gonzalez Br. at 20-21. For example, close to ninety percent of voting age Arizonans have a driver's license, Ariz. App. at 92, and "gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent significant increase over the usual burdens of voting." *Crawford v. Marion Cty.*, 553 U.S. 181, 198 (2008)(Stevens, J., announcing judgment of the Court).[1] In the vast majority of cases, providing a driver's license number is all an applicant must do in order to comply with Proposition 200. *See* Ariz. App. at 94; *see also* ITCA Appendix in Opposition to Application at 8 (noting that driver's license must be provided on federal form). In other situations, applicants have a number of other means to provide information, not one of which even requires the individual to appear in person. Ariz. App. at 114. Respondents had every opportunity to establish that eligible voters could not comply with Proposition 200. *Id.* at 85, 115-16. They failed to do so.[2]

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[1] The Ninth Circuit, in contrast, in rejecting a stay of mandate, stated that a stay would "den[y] [individuals] their fundamental political right to vote." Ariz. App. at 82.

[2] Respondents incorrectly assert, again without any pin citation to the record, that there was a "precipitous decline" in registration from voter registration drives.

Likewise, Respondents attempt to undermine the State's evidence of voter fraud by referring to an Election Assistance Commission (EAC) report that is not in the record. Gonzalez Br. at 13-14. Their attempt fails. Despite Respondents' citation (which lacks any pinpoint cite) for the proposition that the EAC determined that there has been no fraud, a word search of the document does not reveal the word "fraud" at all, suggesting that determining whether or not there is fraud in voter registration was not the purpose of the report. *See generally* The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-10, a Report to the 112th Congress (June 30, 2011), http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf. Furthermore, the EAC report shows that Arizona has experienced a "dramatic" increase of over twenty percent in the number of active registrants, rivaled only by New Mexico, during the time Proposition 200 has been enforced. *Id.* at 1(increase since 2006). This increase is not surprising. Arizona officials have made efforts to ensure that eligible voters are able to register to vote. For example, "the counties often, if not always, attend naturalization ceremonies." Ariz. App. 37 n.24. Thus, "[i]f a naturalized citizen seeks to register after the ceremony and presents his or her naturalization certificate as proof of citizenship, the document is accepted on its face and no further verification . . . is required."

See State Answering Brief In Appeal No. 08-17094 at 18 n.13 (noting lack of record support for similar assertion).

Id.[3] If anything, the EAC report confirms the dissent's correct view that Proposition 200 is perfectly consistent with the National Voter Registration Act. *See also U.S. Postal Service v. Nat'l Ass'n of Letter Carriers*, 481 U.S. 1301, 1303 (1987) (Rehnquist, J., circuit justice) (holding that stay of mandate preserving the status quo will not work irreparable harm on respondent).

In contrast, the State faces an immediate irreparable harm to its ability to protect eligible voters. Not only does the record fully support the conclusion that there has been fraud in Arizona voter registration, but the State's strong interest in maintaining the integrity of elections and the confidence of voters in the system will be immediately harmed. *See* Ariz. App. 50 (Kozinski, J., concurring).[4] This is a harm that cannot be undone. *Hollingsworth*, 130 S. Ct. at 713 (noting that stay appropriate where injury cannot be undone). In light of Respondents' failure to identify any evidence that Proposition 200 prevents people from registering to vote, the balance of equities tips sharply in the State's favor.

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[3] Respondents are disingenuous in stating that tribal identification is an impediment to registration. The State has acknowledged that there is no government data base for such numbers and thus such numbers are presumptively valid in Arizona. State's Supplemental Excerpts of Record in the Ninth Circuit Court of Appeals at 86.

[4] Notably Judge Kozinski dissented from the Ninth Circuit's order declining to grant a stay of mandate. *Id.* at 83.

2. The State Has Demonstrated That This Court Is Likely to Grant Certiorari and Reverse the Ninth Circuit.

Respondents claim that the State has not argued that the "the NVRA preemption issue is an important, unsettled question of federal law" and that the State's "argument that the Ninth Circuit's decision is erroneous and conflicts with relevant decisions of this Court lacks merit." Gonzalez Br. at 9-10 (citing Sup. Ct. R. 10). The State's Application demonstrates at length that the Ninth Circuit majority's opinion meets both criteria of Supreme Court Rule 10(c).

While Respondents attempt to minimize the constitutional questions raised by the Ninth Circuit's decision, *see, e.g.*, ITCA Br. at 10, both the majority and Judge Kozinski noted that the construction of the NVRA and its effect on Proposition 200 depended on whether the majority properly interpreted the Elections Clause. Ariz. App. at 15-16 (explaining that NVRA will be construed under court's Election Clause analysis and rejecting Supremacy Clause analysis); *id*. at 49-50 (Kozinski, J., concurring) (explaining concurrence). By approaching the Elections Clause from a maximalist perspective, the Ninth Circuit majority ignored this Court's precedent and created a "conflict" where one does not otherwise exist. While both the majority and the dissent below assume that Congress has authority to pass the NVRA, the issue in this case is not what Congress can do, but *what it did do*. *See Young v. Fordice*, 520 U.S. 273, 286

(1997) (explaining that NVRA left open question of what information a State may require).

The majority's approach ignores important federalism concerns. The majority acknowledged that Arizona maintains a single system for registration for state and federal elections. *See* Ariz. App. at 36 n. 30. Consistent with a system of dual sovereignty, the overlap of responsibilities is firmly established in the Constitution. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J, concurring) (noting that the Constitution, through Article 1, § 2, cl. 1, "uses the qualification for voters of the most numerous branch of State's own legislatures to set the qualifications for federal election."). Thus, the majority's Election Clause analysis betrays the very core of the constitutional framework by rejecting settled principles. Neither the Ninth Circuit, in its previous NVRA opinion, nor the leading Seventh Circuit case relied upon by the Respondents, so lightly casts off federalism concerns. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1416 (9th Cir. 1995) ("[D]irecting the district court on remand to impose no burdens on the state not authorized by the Act which would impair the State of California's retained power to conduct its state elections as it sees fit."); *Ass'n of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791, 798 (7th Cir. 1995) (overruling a portion of an injunction based on "fail[ure] to exhibit an adequate sensitivity to the principle of federalism"). At this juncture, the Ninth Circuit

opinion enjoins a state statute absent any conflict with federal law. Neither the Constitution nor this Court's decisions contemplate such a result.

Conclusion

For the forgoing reasons, the State respectfully requests that its application for a stay of the mandate of the Ninth Circuit Court of Appeals be granted pending the filing and resolution of the State's petition for certiorari.

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 20, 2012, with:

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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 20, 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 20th day of June, 2012.

/s/ David R. Cole
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