

In The Supreme Court of the United States

MARICOPA COUNTY; HELEN PURCELL, Maricopa County Recorder; KAREN OSBORNE, Maricopa County Elections Director; NAVAJO COUNTY; LAURETTE JUSTMAN, Navajo County Recorder; KELLY DASTRUP, Navajo County Elections Director; YAVAPAI COUNTY; ANA WAYMAN-TRUJILLO, Yavapai County Recorder; LYNN A. CONSTABILE, Yavapai Election Director; MOHAVE COUNTY; JOAN MCCALL, Mohave County Recorder; ALLEN TEMPERT, Mohave County Elections Director; COCHISE COUNTY; CHRISTINE RHODES, Cochise County Recorder; and THOMAS SCHELLING, Cochise County Elections Officer

APPLICANTS.

v.

MARIA M. GONZALEZ, ET AL.

RESPONDENTS.

To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit

COCONINO COUNTY OFFICIALS' RESPONSE TO THE APPLICATION FOR AN
EMERGENCY STAY OF THE ORDER OF THE NINTH CIRCUIT
Ninth Circuit Cause Nos. 06-16702 and 06-16706

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THE SUPREME COURT OF THE UNITED STATES

No. _____

MARICOPA COUNTY; HELEN PURCELL , Maricopa County Recorder; KAREN OSBORNE, Maricopa County Elections Director; NAVAJO COUNTY; LAURETTE JUSTMAN, Navajo County Recorder; KELLY DASTRUP, Navajo County Elections Director; YAVAPAI COUNTY; ANA WAYMAN-TRUJILLO, Yavapai County Recorder; LYNN A. CONSTABILE, Yavapai Election Director; MOHAVE COUNTY; JOAN MCCALL, Mohave County Recorder; ALLEN TEMPERT, Mohave County Elections Director; COCHISE COUNTY; CHRISTINE RHODES, Cochise County Recorder; and THOMAS SCHELLING, Cochise County Elections Officer *APPLICANTS*

v.

MARIA M. GONZALEZ, ET AL.

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

Respondent Coconino County Recorder Candace Owens and Elections Administrator Patricia Hansen herewith file this Response to Applicants' request for an emergency stay of the order of the Ninth Circuit enjoining implementation of state laws requiring voter identification at the polls and evidence of citizenship from people registering to vote pending resolution of an appeal from a district court order denying a preliminary injunction against implementation of those state laws.

POSITION OF COCONINO COUNTY RECORDER AND ELECTIONS
ADMINISTRATOR

Although Respondents are named as Defendants in the original complaints filed by Maria Gonzales et al. and the Navajo Nation¹, Candace Owens and Patricia Hansen (referred to in this brief as “Coconino County officials”) fully support the position of the Plaintiffs and other Respondents in seeking to enjoin implementation of state laws and regulations requiring voter registration and voter identification at the polls resulting from Proposition 200.

With respect to the application before the Supreme Court, Coconino County officials oppose the application for a stay of the Ninth Circuit’s order filed by only five of Arizona’s fifteen counties. Coconino County officials therefore consider themselves Respondents.

The Coconino County Recorder’s opposition to Proposition 200 is a matter of record. On September 28, 2005, the Recorder filed an objection with the U.S. Department of Justice to the Arizona Secretary of State’s Procedures for Identification at the Polls.² Coconino County is the second largest county by area in the United States. Approximately one-third of its residents are Native American and most are members of one of the six federally recognized Indian tribes located within the county boundary. These residents include members of the Navajo Nation, and Hopi, Havasupai, Hualapai, Kaibab Paiute, and Southern San Juan Paiute Tribes. Coconino County officials are

¹Now consolidated with a third complaint filed by the Inter-Tribal Council of Arizona under the case name of Gonzales et al. v. State of Arizona et al., No. CV 06-1268-PHX-ROS, U.S. District Court, District of Arizona.

²Coconino Respondent App.Tab A

acutely aware of the obstacles faced by Reservation residents when voting. Those obstacles are not only physical (requiring travel times of 1 ½ hours to reach a polling place), they are logistical (arranging for transportation to reach a polling place and/or a central place where they might receive mail) and linguistic (verbally translating a ballot and voting instructions written in English to a language that traditionally had no written form).

Notably, only five of the other fourteen counties' election officials filed the application. The position of the remaining nine counties' election officials is unknown. For the first time, five county governments appear as applicants. Prior to this application, the county governments were not named as parties in any of the complaints or subsequently joined.

RESPONSE TO APPLICANT'S ARGUMENTS

1. An Injunction Will Not Cause Irreparable Harm to the Citizens of Arizona, County Defendants, or to the Public Interest.

In their application, the five counties refer to the “serious nature of the problem experienced in such Counties as Maricopa, with voter fraud, and illegal immigration...” The only evidence of voter fraud presented by Maricopa County and the State of Arizona is a statement that fifteen individuals have been prosecuted for voter fraud. Applicants fail to mention that those fifteen cases occurred over a period of ten years. And, of those fifteen, only two cases involved convictions of non-citizens. Applicants grossly exaggerate the problem of voter fraud and attempt to relate it to a different problem faced by border states, that of illegal immigration.

Coconino County has experienced no cases of voter fraud by non-citizens.

Applicants assert that Proposition 200 was passed “largely in response to a

growing concern, both in Arizona and nationally, regarding election fraud and a wave of unlawful immigration leading to such abuses.” While the citizens of Arizona may have had “growing concern” about election fraud and unlawful immigration, the paucity of evidence of actual fraud by illegal immigrants strongly suggests that Proposition 200 was passed in reaction to the fear, not the reality, of elections being taken over by illegal immigrants. Proposition 200 is an ill-conceived citizens’ initiative fueled by bigotry and racism.

Prior to the passage of Proposition 200 and the adoption of regulations implementing the voter identification requirements by the Secretary of State, there were adequate protections in place to catch attempts by felons and non-citizens to register and to vote. In Coconino County, the Clerk of the Superior Court immediately sends a written communication to the County Recorder whenever a person has been convicted of a felony.³ That information is then entered into the county and state voter registration data base and the felon is removed from the rolls. In other counties, if there have been felons who remained registered and voted, the appropriate communication was not made from the court clerk to the county recorder. Ironically, requiring a person to present a photo identification or two other forms of identification will not prevent felons from *registering or voting* any more than the system that was in place, if used properly, prior to Proposition 200.

Applicants refer to the pre-Proposition 200 voter registration method as an “honor system.” Prior to Proposition 200, a person could register by filling out the voter registration which included, among other things, a sworn statement that he/she is a United States Citizen, not convicted of treason or a felony, and a resident of the state and

³This process is required by A.R.S. 16-165 in all Arizona counties.

the county. This requirement remains in effect after Proposition 200. If a person signs this statement and any part of it is not true, the person is subject to prosecution for executing a false registration, punishable as a class 6 felony.⁴ An alternative method of registering to vote through the Arizona Department of Transportation, upon obtaining or renewing a driver's license, also requires the applicant to make a sworn statement attesting to his/her citizenship status and other eligibility requirements.⁵ Similarly, this statement is made under penalty of perjury. Coconino County officials believe the statutory requirements for voter registration prior to Proposition 200 are far stronger than a mere "honor system;" the requirements had consequences subjecting the violator to felony prosecution.

At the polls, prior to Proposition 200, voters had to sign the roster and verify their address before being handed a ballot; they did not have to show any form of identification. As long as the voter's name was on the roster he/she could vote. If their address did not match that shown on the roster, they would be given a provisional ballot which would be subject to verification for proper registration before being counted.⁶ Any voter could be challenged at the polling place by any other voter or poll worker who questioned the voter's true identity.⁷ With the exception of the few cases over a ten year period noted by Applicants, this system worked well to prevent fraudulent voting at the polls. Applicant's contention that these few instances of voter fraud are "only a small fraction of the voter fraud that actually existed in Arizona under the old statutory

⁴A.R.S. §16-152.

⁵A.R.S. 16-112.

⁶A.R.S. 16-584E.

⁷A.R.S. 16-592.

scheme” is pure speculation, unsupported by any evidence.

There is no evidence that the injunction would cause irreparable harm.

2. Removing the Injunction Will Cause Irreparable Harm to Voters of Coconino County.

If the Supreme Court removes the injunction ordered by the Ninth Circuit, a significant number of voters in Coconino County will be disenfranchised. The voter identification requirements imposed on voters who vote at the polls have limited the ability of Navajos to exercise their right to vote to a much greater degree than these requirements have limited voting by non-Indian voters. The results of the September 2006 Primary Election establish this disparate impact.

Voting data from the three Arizona counties whose boundaries encompass the Navajo Nation reservation shows that 188 voters on the Navajo Reservation were required to cast conditional ballots, but that only 17 of those conditional ballots were counted.⁸ Conditional ballots are offered to voters who do not present the proper forms of identification at the polls in accordance with the Arizona Secretary of State’s regulations. Therefore, application of the voter identification requirements effectively deprived 177 Navajo voters of their right to vote. In contrast to conditional ballots cast from off-reservation precincts, 34% of off-reservation conditional ballots were counted whereas, only 9% of on-reservation conditional ballots were counted.

This data does not reflect the number of people who left the polling place without voting any type of ballot because they did not have any of the required forms of identification. Observations by six Coconino County poll workers, specifically hired and trained to check identification, were that an uncounted number of people left the polling

⁸Coconino Respondents App. Tab B.

places without casting a ballot.⁹

This data is from a Primary election which typically draws a lower voter turnout. In Coconino County, the September Primary election turnout was only 25%. In contrast, the voter turnout for the last General election (November 2004) was 73.04% in Coconino County. It is anticipated that the voter turnout for the 2006 General election will be significantly higher, especially at the Navajo reservation precincts. There are several reasons for the higher voter turnout. First, the November 7th General election ballot has nineteen (19) ballot propositions, several state and congressional offices, as well as local ballot issues and candidates. Second, the Navajo Nation is holding its presidential election on the same day. Third, the three counties—Coconino, Navajo, and Apache—will use the same polling places as those used by the Navajo Nation for their election. Fourth, voting at the polls is strongly favored by Native Americans as opposed to voting by mailed early ballot. For example, in the 2004 General election in Coconino County, 91% of the votes cast from reservation precincts were cast at the polling place, whereas only 9% voted by early ballot. Of the votes cast from off-reservation precincts 64% voted at the polling places and 36% voted by early ballot.¹⁰

Based on Coconino County's experience, county officials anticipate that at least 7,000 Native American voters will come to the polls in Coconino County. At least 2% (140), possibly more, of those ballots will be conditional ballots due to lack of proper identification, and at least 91% (127) of those conditional ballots will be rejected. These estimates are for Coconino County alone. Higher proportions are likely to occur in Navajo and Apache Counties which have higher proportions of Navajo voters.

⁹Coconino Respondent App. Tab C

¹⁰Coconino Respondent App. Tab D

The disparate effect of the voter identification requirements at the polling place is undeniable.

3. Retaining the “Status Quo” Cannot Justify Depriving Citizens of their Right to Vote.

Applicants rest heavily on the argument that Proposition 200 is justifiable because it is the “will of the people.” If the “will of the people”, as expressed through citizens’ initiatives on the ballot, can trump the Constitution, why then does the judicial system exist? Doesn’t the Constitution exist to protect the poor and the weak from the tyranny of the majority?

The real threat posed by Proposition 200 is that it has and will disenfranchise hundreds, possibly thousands, of United States citizens who were registered to vote prior to Proposition 200 and who actively participated in past elections. The Plaintiffs in the three consolidated cases represent a variety of those citizens. Coconino County is most familiar with the Native American citizens. It is appalling to Coconino County officials that the State and five Counties can claim that the balance of harms tips in favor of taking away the rights of established United States citizens based on the fear that non-citizens may attempt to register to vote and to cast a ballot. All Indians born within the territorial limits of the United States were made citizens by the Citizenship Act of 1924.¹¹ Now, those same citizens stand to lose one of the most precious rights of citizenship—the right to vote.

Applicants’ logic that Proposition 200 must remain in place because it is the “status quo” and has been the law in Arizona since January 2005 is also flawed.

¹¹8 U.S.C.A. §1401(a)(2).

Continuing a wrong simply because it has been put into practice for twenty months clearly does not right the wrong. The broad sweep of Proposition 200 impermissibly denies some citizens the right to vote. Clearly, what is needed now is a much more carefully crafted law that accomplishes the stated objective of preventing voter fraud and ensuring that only U.S. citizens are eligible to vote, without depriving even a small handful of citizens their right to vote.

Applicants also rest heavily on the “investment” in training and materials made by the counties and the pre-clearance by the Department of Justice of voter identification procedures. None of these “investments” can justify taking away a citizen’s right to vote. Moreover, as Applicants recognize, the election materials that were used prior to Proposition 200 were also pre-cleared by the Department of Justice. Coconino County officials contend that different materials and documents are not required to be put into place for the General election should this Court uphold the Ninth Circuit’s Injunction. The same registration form (asking for proof of citizenship) was in fact used prior to the Injunction as well as during the Injunction (simply leaving certain boxes blank). Instructions to poll workers can be easily changed by inserting a new page of instructions in the poll worker instruction book and by informing the poll workers that no identification is required—even if voters come to the polls with an identification document. The election process will occur just as it has for decades. In Coconino County, most poll workers are familiar with the process in effect prior to Proposition 200. The Injunction simply means returning to the old familiar way of conducting an election.

4. The Injunction Will not Cause “Mass Confusion” on Election Day.

Applicants use extreme language to describe the speculative impact of changing the rules three weeks before the election. While the Secretary of State and county

election officials have conducted election training throughout the state, most of the training was devoted to routine matters relating to the conduct of elections at polling places. In fact, the voter identification requirements comprise only a small portion of the total training topics. As previously stated, it is a simple matter to instruct poll workers that identification is not required for this election. Contrary to what Applicants state, it is not necessary to re-educate every voter. If the voter comes to the polls with identification, he/she will still be given a ballot provided all other requirements are met.

If the injunction remains in effect, the task of the pollworkers will be considerably simpler. As Coconino County officials learned, the new voter identification requirements created noticeable anger, confusion, and frustration among the voters who appeared at the polls during the Primary election.¹² Ironically, confusion already exists as a result of the new voter identification requirements. Eliminating those requirements would eliminate some confusion.

Moreover, eliminating the voter identification requirements for the General election is a much different situation than the 2003 California recall election cited by County Applicants on page 20.¹³ In the present case, eliminating the voter identification requirements at the polls would remove an added layer of complication. Investing public resources in publicity campaigns and materials hardly justifies the disenfranchisement of United States citizens.

¹²Coconino Respondent App. Tab C

¹³Applicants cited *Southwest Voter Registration Educ. Project v. Shelley*, 344 F3d.914, 919 (9th Cir.2003) (*en banc*) for the proposition that the public interest would be affected by delaying an election because a significant amount of time and money had already been expended.

CONCLUSION

Based on the experience of Coconino County in the Primary election, if the injunction is lifted, significant numbers of United States citizens will be disenfranchised. This experience now demonstrates that the voter identification requirements of Proposition 200 have an impermissible disparate impact on Native American voters. The “harm” alleged by the Applicants of having to re-train poll workers and change materials is minimal compared to the deprivation of rights that will certainly occur on election day. Coconino County officials respectfully request that this Court allow the Injunction to remain in effect for the November 7, 2006 general election and pending disposition of the merits of these cases.

RESPECTFULLY SUBMITTED this 16th day of October, 2006.

COCONINO COUNTY RESPONDENTS

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CERTIFICATE OF SERVICE
Pursuant to Rule 29(5) and 29(5)(b) of the
Rules of the Supreme Court of the United States

I hereby certify that I caused a copy of the Coconino County Officials' Response to the Application for an Emergency Stay of the Order of the Ninth Circuit to be served on October 16, 2006, by mailing it with the United States Parcel Service via first class mail, postage pre-paid, and by email, to the attorneys of record for the parties, as follows:

ORIGINAL and TWO COPIES mailed by overnight mail
this 16th day of October, 2006, to:

Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

COPY emailed to: dbickell@sc-us.gov
this 16th day of October, 2006

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