

Appeal No. 08-17094

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ, *ET AL.*,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Case No. CV 06-01268-PHX-ROS

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

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CIRCUIT RULE 27-3 CERTIFICATE

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2. The following are facts showing the existence and nature of the claimed emergency:

On October 26, 2010, this Court declared invalid certain provisions of the State of Arizona's voter registration law. *See Gonzalez v. Arizona*, No. 08-17094, slip op. 17617 (9th Cir. October 26, 2010), attached as Ex. 1. The Court has not yet issued the mandate.

Following release of the panel's Opinion, Arizona counties continued to enforce the invalid legal provisions during the November 2, 2010 General Election. As a result, otherwise qualified individuals have been prevented from having their votes counted in the November 2, 2010 General Election. Provisional ballots submitted by these voters have been segregated and will not be counted absent relief from this Court. Counties will review provisional ballots on November 12, 2010 and the Secretary of State will conduct the official canvass of election results on November 29, 2010. Relief is needed within 21 days. Without a temporary stay of Appellees' action, the ballots at issue will go uncounted and Appellants and the voters who cast the ballots will suffer irreparable harm.

3. Certificate of Conference

On November 4 and 5, 2010, I conferred with counsel for all Appellees in a series of electronic mail messages explaining Appellants' reasons for filing the motion and the grounds for the motion. Navajo County indicated that it would not oppose this motion. Pinal County did not respond to the request to confer. The

remaining thirteen Arizona counties indicated that they oppose the motion. The State of Arizona indicated that that it opposes the motion.

4. Certificate of Service

I hereby certify that on the 5th day of November 2010, I electronically filed this motion with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of this motion by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR
TEMPORARY STAY**

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I. INTRODUCTION

One week prior to the General Election in Arizona, this Court declared invalid the voter registration provisions of the Arizona Taxpayer and Citizen Protection Act (“Proposition 200”). *See* Ex. 1 at 17630 (“We hold that the [National Voter Registration Act] supersedes Proposition 200’s voter registration procedures, and that Arizona’s documentary proof of citizenship requirement for registration is therefore invalid.”).

Following the Court’s decision, Arizona’s counties continued to enforce the invalid provisions to bar otherwise qualified individuals from having their votes counted in the 2010 General Election.

Gonzalez Appellants move the Court for a temporary stay restraining Appellees from continuing to apply the invalid law to prevent certain voters from having their ballots counted in the November 2, 2010 General Election. Appellants further move the Court to determine and fix the terms as to bond, or otherwise, that it considers proper for the security of the rights of the parties. This motion is based on the record and files in this action, 08-17094, and on the argument and authorities presented below.

II. FACTUAL BACKGROUND

Proposition 200 amended two Arizona statutes related to voter registration, providing that county recorders must reject voter registration applications that are

not accompanied by documentary evidence of U.S. citizenship and further providing that applicants for voter registration must provide one of several enumerated documents as evidence of U.S. citizenship. Ex. 1 at 17631.

Proposition 200 precludes state election officials from registering applicants whose voter registration forms are not accompanied by one of the citizenship documents enumerated in the statute. *Id.* at 17654. This Court found that “[i]t is indisputable that by requiring documentary proof of citizenship, Proposition 200 creates an additional state hurdle to registration.” *Id.* at 17655.

On October 26, 2010, this Court declared invalid the voter registration provisions of Arizona’s Proposition 200 because they are inconsistent with the federal National Voter Registration Act (NVRA). *See* Ex. 1. Finding that “the NVRA’s comprehensive regulation of the development of the Federal Form [leaves] no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration for registrants using that form,” this Court concluded: “Proposition 200’s documentary proof of citizenship requirement conflicts with the NVRA’s text, structure, and purpose.” *Id.* at 17651-52.

The Court’s ruling applied to all voter registration in Arizona for federal elections. *Id.* at 17671 n. 20. The Court has not yet issued the mandate.

Following the Court's ruling on October 26, 2010, Arizona county recorders continued to enforce the registration provisions of Proposition 200. As a result, individuals who applied to register to vote prior to the deadline for the 2010 General Election, but whose registrations were rejected for failure to comply with Proposition 200, have been barred from having their ballots counted in the election.

For example, Jai Nitai Holzman and SevaPriya Barrier, both native-born U.S. citizens, moved to Tucson from Washington, D.C. on September 22-23, 2010. *See* Ex. 2 and 3. As new residents of Arizona, Mr. Holzman and Ms. Barrier located voter registration applications, completed them properly and mailed them to the Pima County Recorder before the registration deadline for the November 2, 2010 General Election. *Id.* Because Mr. Holzman and Ms. Barrier did not also submit documentary evidence of U.S. citizenship with their registration applications, the Pima County Recorder notified them that they would not be added to the voter rolls for the November 2, 2010 General Election.

After learning of the Court's decision in this case, Mr. Holzman and Ms. Barrier sought confirmation that they would be able to vote in the upcoming General Election. They contacted the offices of the Pima County Recorder, the Arizona Secretary of State and the Arizona Attorney General and were told that Proposition 200 was still in effect. On November 2, 2010, Mr. Holzman and Ms.

Barrier went to their polling place. Because their names did not appear on the precinct voter rolls, Mr. Holzman and Ms. Barrier submitted provisional ballots.

Pursuant to the Arizona election code, the ballots submitted by Mr. Holzman and Ms. Barrier have been sealed in envelopes and segregated from the regular ballots cast on Election Day. Ariz. Rev. Stat. §16-584 (B). The ballots were not included in the tally of votes on election night. Ariz. Rev. Stat. §16-584 (D). Within ten calendar days of the election, Pima County is required to review the ballots and determine whether they may be counted. Ariz. Rev. Stat. §16-584 (E). On the fourth Monday following the General Election, the Arizona Secretary of State will conduct the canvass of votes for the federal and statewide races. Ariz. Rev. Stat. §16-648.

Mr. Holzman and Ms. Barrier are qualified to register to vote and made timely applications to register to vote in Arizona. But for the continued application of the invalid provisions of Proposition 200, they would have been added to the voter rolls, cast regular ballots on Election Day and had those ballots counted in the election. The denial of the opportunity to vote, for Mr. Holzman, Ms. Barrier and other voter applicants in the same position, causes them irreparable harm and causes Gonzalez Appellants irreparable harm by continuing to consume their resources. *See* Ex. 4.

III. ARGUMENT

A temporary stay is warranted in this case to prevent continued application of an invalid law in the November 2, 2010 election. Because the decision of the Court was announced one week before the General Election, and the mandate has not yet issued, a temporary stay by this Court is the only means by which to avoid irreparable harm to Gonzalez Appellants and the affected voters in the November 2, 2010 election.

The unique posture of this request, following a decision in favor of Gonzalez Appellants, weighs in favor of granting a temporary stay:

When deciding whether to issue a stay, including a stay of a state action that the district court has declined to enjoin, we consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

California Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 849-850 (9th Cir. 2009) (stay of state action by court of appeals was appropriate in preemption case where district court had failed to grant preliminary injunction and necessary factors were present) (citing *Humane Soc'y of U.S. v. Gutierrez*, 527 F.3d 788, 789-90 (9th Cir. 2008)).

Gonzalez Appellants have already prevailed on the merits of their claim before a three-judge panel of the Court. The October 26, 2010 ruling more than

satisfies the requirement that Gonzalez Appellants demonstrate a strong likelihood of success on the merits, even if the case is reheard *en banc*.

Gonzalez Appellants will be irreparably injured without a stay of the continued application of Proposition 200's registration provisions. There are two distinct types of irreparable harm confronting Appellants and the Arizona voters at issue here.

First, application of a state law that is preempted by federal law constitutes irreparable harm. *See Indep. Living Ctr v. Shewry (ILC)*, 543 F.3d 1050, 1058 (9th Cir. 2008) (“[A] plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created ‘right,’ in the sense that term has recently been used in suits brought under § 1983, but need only satisfy traditional standing requirements.”).¹

Second, continued application of Proposition 200 thwarts the fundamental right to vote. The threatened deprivation of a fundamental right by itself constitutes a threat of irreparable injury. *See, e.g., Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (“alleged constitutional infringement will often alone constitute irreparable harm”); 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (Civil 2d ed. 1995)

¹ As the court explained in *California Pharmacists*, “A cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights-based.” 563 F.3d at 851.

(“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). The right to vote is fundamental and preservative of all other rights. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (illegal impediments to the right to vote, as guaranteed by the U.S. Constitution or statute, by their nature constitute irreparable injury).

This Court touched on both the issue of preemption, and the fundamental nature of voting in its October 26 opinion:

Congress enacted the NVRA to increase federal registration by streamlining the registration process and eliminating complicated state-imposed hurdles to registration, which it determined were driving down voter turnout rates. Proposition 200 imposes such a hurdle. In light of Congress’s paramount authority to “make or alter” state procedures for federal elections, *see Foster*, 522 U.S. at 69; *Siebold*, 100 U.S. at 371, we hold that the NVRA’s comprehensive regulation of federal election registration supersedes Arizona’s documentary proof of citizenship requirement[.]”

Id. at 17671.

Appellees have continued to enforce federally-preempted provisions of Proposition 200 to deny certain voters the opportunity to have their ballots counted in the November 2 election. These harms cannot be compensated with money damages or through the later opportunity to vote in a subsequent election.

Furthermore, the public interest plainly will be furthered by enjoining the continued enforcement of Proposition 200's registration requirements, where as here they deny some citizens the opportunity to participate equally in the electoral

process. *See Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 438 (E.D. Mich. 2004) (“The public interest is served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted. . . . The public interest is served when a federally granted right is enforced uniformly and voters are not disenfranchised.”) (citations omitted); *U.S. v. Berks County, Pa.*, 250 F.Supp.2d 525, 541 (E.D. Pa. 2003) (“‘[U]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.’ Ordering Defendants to conduct elections in compliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.”) (citations omitted); *Murphree v. Winter*, 589 F.Supp. 374, 382 (S.D. Miss. 1984) (“Clearly, the granting of this preliminary injunction will not disserve the public interest. The fundamental right to vote is one of the cornerstones of our democratic society. The threatened deprivation of this fundamental right can never be tolerated.”); *see also Sammartano v. First Judicial Dist. Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (noting “it is always in the public interest to prevent the violation of a party's constitutional rights”).

Finally, the balance of equities tips heavily in favor of Gonzalez Appellants. Appellants seek to enforce the supremacy of federal law and protect the interests of qualified voters who will never again have the opportunity to participate in the

November 2010 General Election. “[I]t is clear that it would not be equitable or in the public's interest to allow the state to continue to violate the requirements of federal law, especially when there are no adequate remedies available to compensate [Appellants] for the irreparable harm that would be caused by the continuing violation. In such circumstances, the interest of preserving the Supremacy Clause is paramount.” *California Pharmacists*, 563 F.3d at 852-853 (citing *Am. Trucking Ass'n v. City of Los Angeles*, 559 F.3d 1046, 1059-60 (9th Cir. 2009) (considering the public interest represented by “the Constitution's declaration that federal law is to be supreme”)).

On the other side of the balance of equities, Defendants can offer no significant reason to continue to implement registration requirements that have been declared invalid and inevitably will deprive individuals of the fundamental right to vote. Defendants' purported interest in preventing voter fraud cannot justify Proposition 200's unfair and inflexible registration requirements. There is no evidence that failure to enforce Proposition 200 with respect to the voters at issue will result in massive voter fraud – as Proposition 200 was purportedly designed to address.

IV. Request for Temporary Injunction

Although issuance of a mandate “is a ministerial act,” because “[f]or most purposes, the entry of judgment, rather than the issuance of mandate, marks the

effective end to a controversy on appeal,” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (citation omitted), Gonzalez Appellants are aware that Appellees plan to seek rehearing en banc and a mandate may be delayed as a result. For this reason, and to permit an orderly process for the Court’s consideration whether to grant en banc review, Plaintiffs Appellants seek a temporary stay from the Court with respect to the November 2, 2010 election.

IV. REQUEST FOR RELIEF

Gonzalez Appellants request that the Court enter a temporary and limited stay to restrain Arizona counties from enforcing Proposition 200’s registration provisions with respect to provisional ballots submitted in the November 2, 2010 General Election. Specifically, Gonzalez Appellants request that the Court order Arizona counties to review the provisional ballots cast in the November 2, 2010 General Election and count the ballots that were submitted by individuals who applied to register to vote between July 5, 2010 and October 4, 2010 but who were not added to the voter rolls because of Proposition 200’s registration provisions.

Gonzalez Appellants request that the Court enter its stay prior to either November 12, when provisional ballots are reviewed, or prior to November 29, 2010 when the Secretary of State conducts the official canvass of election results.

V. CONCLUSION

For the reasons set out above, Appellants seek a stay from this Court requiring Arizona counties to accept and count the provisional ballots submitted in the 2010 General Election by individuals who recently applied to register to vote for this election, but who have been barred from having their votes counted through the continued application of the Proposition 200 voter registration provisions declared invalid by this Court.

Dated: November 5, 2010

Respectfully Submitted,

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