

No. 08-17094, 08-17115

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESUS M. GONZALEZ, *et al.*,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *et al.*,

Defendants-Appellees.

On appeal from the United States
District Court for the District of
Arizona

No. CV-06-01268-PHX-ROS

No. CV-06-01362-PHX-ROS

**APPELLEES' JOINT RESPONSE TO APPELLANTS' EMERGENCY
MOTION UNDER CIRCUIT RULE 27-3**

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Defendants-Appellees State of Arizona, Arizona Secretary of State Ken Bennett (“Secretary”), and election officials from fourteen of Arizona’s fifteen counties request that this Court deny Plaintiffs-Appellants’ emergency motion asking this Court to require county election officials to count the provisional ballots of people who were not properly registered to vote under Arizona law because they failed to provide evidence of citizenship. This relief should be denied because this Court’s October 26, 2010, decision should not apply retroactively to affect this year’s general election for which voter registration closed October 4, 2010. No mandate has issued in this case, and the Secretary will file a petition for rehearing en banc by November 16, 2010. Plaintiffs-Appellants’ late effort to change the election procedures after votes have been cast places an unwarranted and unreasonable burden on election officials and jeopardizes their ability to finish counting provisional ballots within the statutorily required timeframe. The October 26, 2010, panel decision should not affect Arizona’s 2010 elections, and Plaintiffs-Appellants’ emergency motion should be denied.

I. Factual Background.

Since the Department of Justice precleared Arizona’s evidence of citizenship requirement in January 2005, Arizona has been requiring evidence of citizenship from all people registering to vote in this State. (State’s Supplemental Excerpts of Record (“SER”) 22, 25 ¶ 13.) As part of the implementation effort, the Secretary

redesigned the State's voter registration form to instruct voters about the proof of citizenship requirement. (SER 26 ¶ 14.) State voter registration for the 2010 general election closed October 4, 2010. Arizona Revised Statutes ("A.R.S.") § 16-120 (stating that elector may not vote unless county recorder receives registration prior to midnight of the 29th day preceding the date of the election). Early voting for the general election began October 7, 2010, and the general election was November 2, 2010. *See* 2010 Election Important Dates, attached as Exhibit A to Exhibit 1, Declaration of Amy Bjelland ("Bjelland Decl."). Anyone who attempted to register by the October 4, 2010, voter registration deadline but failed to provide evidence of citizenship was not properly registered for the general election.

At the time of the 2010 voter registration deadline, a panel decision from this Court and the district court had rejected Plaintiffs' challenges to Arizona's evidence-of-citizenship requirement. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2007); ITCA Excerpts of Record Vol. I, Tabs 3 and 4 (August 20, 2008, district court order denying permanent injunction and August 28, 2007, order granting summary judgment on National Voter Registration Act ("NVRA") preemption claim). This Court did not issue its decision contradicting the 2007 panel decision and concluding that the NVRA preempted Arizona's evidence of

citizenship requirement until October 26, 2010, more than three weeks after the voter registration deadline and seven days before the general election.

A. Vote Count Deadlines.

The Arizona Legislature has established deadlines to ensure that votes are counted in a timely manner. If a voter attempts to vote and his or her name is not on the precinct register, the person is permitted to cast a provisional ballot following the presentation of acceptable identification. A.R.S. § 16-584(B); Ex. 1, Bjelland Decl., ¶ 3. Before provisional ballots are counted, county election officials must verify that the person is properly registered in the county. A.R.S. § 16-584(E); Ex. 1, Bjelland Decl., ¶ 4. In a federal election, county officials must complete this verification process within ten calendar days following the election. A.R.S. § 16-584(E).

In the November 2, 2010, general election, there were approximately 84,000 provisional ballots cast statewide. Ex. 1, Bjelland Decl, ¶ 3. There were approximately 50,000 provisional ballots cast in Maricopa County and approximately 13,000 cast in Pima County. Exhibit 2, Affidavit of Karen Osborne (“Osborne Aff.”), ¶ 4. To meet the statutory deadline, county officials must complete the verification process by Friday, November 12. Ex. 1, Bjelland Decl, ¶ 2; Ex. 2, Osborne Aff., ¶ 4. A county must then complete its canvass by November 22, 2010, A.R.S. § 16-642(A), and the Secretary of State is to complete

the statewide canvass by the fourth Monday following the general election, A.R.S. § 16-648(A), which is November 29, 2010. Ex. 1, Bjelland Decl., ¶ 2.

An automatic recount or election contest may not commence until the completion of the canvass. A.R.S. §§ 16-661, -672; Ex. 2, Osborne Aff., ¶ 6. Any delay in the completion of the canvass will result in a delay of an automatic recount or the time for an elector to file an election contest.

B. Procedure for Statewide Voter Registration.

A person qualified to register to vote may do so by mailing in a voter registration form to the county recorder, by submitting a form when applying for a driver's license or renewal, by registering through a public assistance agency, or by registering online through the Arizona EZ voter system. A.R.S. §§ 16-112, -140; Ex. 1, Bjelland Decl., ¶ 2; Ex. 2, Osborne Aff., ¶ 2. A person registering online through the Arizona EZ voter system may only do so by using a driver's license number or nonoperating identification number as proof of citizenship. Ex. 1, Bjelland Decl., ¶ 2. If a number is not submitted for proof of citizenship, or if the number does not match in the MVD database, the person cannot register. Ex. 1, Bjelland Decl., ¶ 2. The EZ voter system keeps record of successful voter registrations. Ex. 1, Bjelland Decl., ¶ 2. The State and the county recorders do not know who may have attempted to register online but was rejected.

For a completed voter registration received by a county recorder, the recorder sends the voter registration form to the Secretary to assign a unique identifying number to any registrant who does not have a driver's license number, nonoperating identification number, or social security number. Ex. 2, Osborne Aff., ¶ 3. The Secretary sends the recorder an exception report to review for items such as duplicate registrations (including when a person is already registered in another county), felony convictions, death records, and processing errors. Ex. 2, Osborne Aff., ¶ 3. That one-day verification process concludes with the county recorder registering the applicant and sending a letter to the registrant to confirm that the information is correct. Ex. 1, Bjelland Decl., ¶ 3; Ex. 2, Osborne Aff., ¶ 3.

C. Provisional Ballot Procedure.

When a person votes on Election Day, he or she goes to a polling place for a particular precinct, and the poll workers check the signature roster (a list of all active and inactive voters registered in that precinct) to locate that person's name. Ex. 1, Bjelland Decl., ¶ 6. If that person's name is not on the roster, and the person has sufficient identification, that person may vote, but must cast a provisional ballot rather than a regular ballot that would be tabulated there at the polling place.¹ Ex. 1, Bjelland Decl., ¶ 6. The provisional ballot is no different from the

¹ A provisional ballot may be cast for a myriad of reasons, including the following: (1) lack of sufficient identification; (2) the voter's name is not on the signature roster and he or she has not moved; (3) the voter has moved within the precinct; (4)

ballots that voters appearing on the signature roster cast; however, the ballot is not tabulated until after the county recorder checks the county voter registration database to ensure the person is registered to vote in the precinct in which the person cast his or her ballot, as well as check to ensure the voter has not already voted elsewhere. Ex. 1, Bjelland Decl., ¶ 6. If a person is not on the precinct signature roster, the person may be registered in another county or may not be registered in Arizona at all. Ex. 1, Bjelland Decl., ¶ 7. It is not discernable from the provisional ballot itself whether the person who voted had his or her registration rejected due to Proposition 200's proof-of-citizenship requirement. Ex. 1, Bjelland Decl., ¶ 7.

In Maricopa County, voters cast more than 50,000 provisional ballots in the November 2, 2010, general election. Ex. 2, Osborne Aff., ¶ 4. Those 50,000 provisional ballot envelopes must be compared against the county's current voter registration system by Friday, November 12, 2010. Ex. 2, Osborne Aff., ¶ 4. To ensure that the provisional ballots are processed by this deadline, the Maricopa County Recorder has approximately 90 permanent and temporary staff working 7:00 a.m. to 10:00 p.m. (except for Sunday when employees work until 6:00 p.m.). Ex. 2, Osborne Aff., ¶ 7. The initial review of provisional ballots is expected to be

the voter has moved to a new precinct in the county; (5) the voter has been issued an early ballot; (6) the voter has changed his or her name; and (7) the voter is challenged at the polling place. Ex. 1, Bjelland Decl., ¶ 5.

completed by the end of the day, Wednesday, November 10, 2010. Ex. 2, Osborne Aff., ¶ 7. On Thursday, November 11, 2010, the provisional ballots will be segregated into one of the 1,142 voting precincts. The elections staff will then segregate the provisional ballots that should be counted and those ballots will be gathered for transport to the tabulation center for counting. Ex. 2, Osborne Aff., ¶ 7.

If the Court were to order Maricopa County to determine whether any of the rejected provisional ballots were cast by individuals that attempted to register to vote between July 5, 2010, to October 4, 2010, but were rejected because of Proposition 200's proof-of-citizenship requirement, the staff would have to go back to the provisional ballots divided into each of the 1,142 voting precincts to determine if the provisional ballot was rejected because the individual had cast an early ballot that had been tabulated, the individual voted in the wrong precinct, or the individual was not registered to vote in the county. Ex. 2, Osborne Aff., ¶ 8; *see also* Ex. 1, Bjelland Decl., ¶ 8. For those provisional ballots cast by individuals not registered to vote in the county, those ballot envelopes would have to be gathered and compared to the voter registration forms rejected from July 5, 2010, to October 4, 2010, for a lack of proof of citizenship. Ex. 2, Osborne Aff., ¶ 9; *see also* Ex. 1, Bjelland Decl., ¶ 8.

In that timeframe, Maricopa County rejected 1,964 registration forms that had no proof of citizenship. Ex. 2, Osborne Aff., ¶ 9. Those forms and the names of the individuals are not kept in any database, but are kept in date order in boxes. Ex. 2, Osborne Aff., ¶ 9. To compare the names of the rejected provisional ballots against the names of the rejected voter registration forms, the county would have to divert staff from processing the ballots to begin data entry of those rejected registrations. Ex. 2, Osborne Aff., ¶ 9. Once that data is entered, the staff could compare the rejected provisional ballot list to the rejected voter registrations list. Ex. 2, Osborne Aff., ¶ 9.

After this task is completed, the county would send the voter registration information to the Secretary of State's Office, which would check the names against the statewide voter registration database to ensure that the person is not registered in another county. Ex. 1, Bjelland Decl., ¶ 9; Ex. 2, Osborne Aff., ¶ 9. After the Secretary completes that process, the county would then have to retrieve the provisional ballot from the appropriate voting precinct bin, separate the envelope and the ballot, and tabulate the ballot. Ex. 2, Osborne Aff., ¶ 9.

Pima County's provisional ballot process is similar to Maricopa County's, and Pima County would have to take the same steps as Maricopa County if the Court were to order the relief requested by the Plaintiffs-Appellants. Exhibit 3, Declaration of F. Ann Rodriguez ("Rodriguez Decl.").

Moreover, Pinal and Coconino counties concur in the arguments concerning delay and the position set forth herein. Although smaller counties have fewer ballots to count, the process would be substantially the same, requiring hand counting of provisional ballots, and interfering with the completion of the election canvass by the statutory deadline.

II. Plaintiffs Are Not Likely to Succeed in Their Effort to Apply the Panel Decision Retroactively to Change the Voter Registration Rolls for Arizona's 2010 General Election.

“[I]nterference with an election after voting has begun is unprecedented.” *Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004) (quoting *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc)). Plaintiffs not only try to change the rules for the 2010 election after voting started; they seek to change the rules after voting has ended. This Court should reject this “unprecedented” effort to apply the October 26 panel decision retroactively to modify the voter registration rolls for the 2010 general election after voting has ended.

Although they purport to request a “temporary stay,” Plaintiffs-Appellants’ proposed relief is not really a stay at all. They do not seek to stay any court order. Rather, they want this Court to mandate an affirmative action by local election officials by requiring that they count votes of voters who were not properly registered under state law by the October 4 deadline. Plaintiffs-Appellants seek a

mandatory injunction, which is “particularly disfavored.” *N.D. ex rel parents action as guardian ad litem v. Hawaii Dep’t of Education*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010) (quoting *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994)). The facts and the law must “clearly favor” such relief, *Stanley*, 13 F.3d at 1320, and Plaintiffs-Appellants cannot meet this burden.

A threshold problem with Plaintiffs’ motion is that this case is not over. The mandate has not issued, and “[a]n appellate court’s decision is not final until its mandate issues.” *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (quoting *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988)). The Secretary will file a Petition for Rehearing En Banc by November 16, 2010, and the mandate will not issue at least until this Court takes action on that Petition.² Fed. R. App. P. 41(b). This case fits easily within the standards for en banc review. En banc review ensures “uniformity of the court’s decisions” and “involves a question of exceptional importance.” Fed. R. App. P. 35(A). There is now a direct conflict between two panel decisions in this Circuit concerning whether federal law preempts a State from requiring evidence of citizenship from people registering to vote. Because there is now a division between panel decisions in this Circuit and for the reasons set forth in Judge Kozinski’s dissenting

² Petitioners received a 7-day extension of the time to file a Petition for Rehearing. Dkt 013 (10/29/10 Clerk’s Order granting extension).

opinion from the panel decision, there is a significant likelihood that the Secretary will prevail on the Petition for Rehearing En Banc.

Even if the October 26 panel decision becomes the law in this Circuit at some point in the future, Plaintiffs provide no legal basis for applying that decision retroactively now to change voter registration for the recently-completed 2010 general election. Voter registration for the general election closed three weeks before the October 26 panel decision, and state laws governing elections necessarily require stringent timeframes for processing votes in any election.

III. The Balance of Harms and the Public Interest Favor Denying the Motion for Injunctive Relief.

County election officials have only ten calendar days to finish counting all provisional ballots cast in the general election. By the time Plaintiffs filed their emergency motion after the close of business November 5, 2010, officials had only seven calendar days to complete this work. Requiring county officials to determine if any of the provisional ballots were cast by a person who was not registered solely because he or she failed to present evidence of citizenship imposes a significant burden on those election officials that jeopardizes their ability to comply with the statutory deadlines for process provisional ballots and completing the canvass.

As set forth in Karen Osborne's affidavit attached to this Response, it is doubtful that Maricopa County, the largest county in the State, would be able to

meet the provisional ballot counting deadline—November 12, 2010—or the county canvass deadline—November 22, 2010³—if the Court orders the relief sought by Plaintiffs-Appellants. Ex. 2, Osborne Aff., ¶ 10. At this point, Maricopa County is employing approximately 90 permanent and temporary staff working 7:00 a.m. to 10:00 p.m. (except for Sundays, when employees work until 6:00 p.m.) to tabulate votes. Ex. 2, Osborne Aff., ¶ 7. As of this filing, Maricopa County expects to begin segregating each provisional ballot into one of the 1,142 voting precincts in the county on Thursday, November 11, 2010. Ex. 2, Osborne Aff., ¶ 7. After that, the county will segregate those provisional ballots that should be counted and they will be transported to the tabulation center for counting. Ex. 2, Osborne Aff., ¶ 7. Thus, even on its normal post-election schedule, Maricopa County will be pressing up against the November 12, 2010, deadline for counting provisional ballots. If the Court were to order Maricopa County to provide the relief that Plaintiffs-Appellants seek, it is highly likely the deadline will be missed. Ex. 2, Osborne Aff., ¶¶ 8-9. By how many days that deadline will be missed, no one is certain.

This harm to the election process and election officials outweighs the harm to Plaintiffs-Appellants. The motion seeks relief for third parties who failed to comply with Arizona's evidence of citizenship requirement that has been the law

³ Because the November 22, 2010, date for the counties' canvass falls on a Monday, Maricopa County plans to have its tabulation finished and the canvass ready to be issued by close of business Friday, November 19, 2010.

in this State for more than five years. Although their votes will not count in this election, these people could have avoided that result by complying with Arizona law and properly registering to vote by the voter registration deadline. The electoral process should not be burdened by now trying to count votes of an unknown number of people who were not properly registered when voter registration closed because they failed to present evidence of citizenship.

Plaintiffs arbitrarily ask this Court to require election officials to count any ballots cast by people who tried to register to vote by July 5 but who failed to provide evidence of citizenship. All of these people would have received notice of the need to provide evidence of citizenship by 29 days before the general election to properly register to vote. Any harm to them could have been avoided if they provided such evidence in a timely manner.

The only evidence of “harm” that Plaintiffs present is the time Plaintiff Southwest Voter Registration Education Project’s staff spent assisting the declarants Mr. Holzman and Ms. Barrier with their voter registration issues. Ex. 4 to Plaintiffs-Appellants’ Motion, ¶ 6. These activities, however, are consistent with the purpose of Southwest Voter Registration and are not a harm that justifies a mandatory injunction to require the votes of people who are not properly registered to be counted.

The timeliness of Plaintiffs' attempt to bypass the evidence of citizenship requirement also weighs against the relief that they seek. Plaintiffs failed to make any effort to raise their concern about voter registration for the 2010 election to this Court in a timely manner. This appeal has been pending since September 2008, and they never made any effort to get the issues resolved before the October 4, 2010, voter registration deadline. Even after this Court's October 26 panel decision, they waited another ten days before filing their emergency motion after the close of business Friday, November 5. These delays prejudice election officials by imposing unnecessary burdens on them should relief be granted.

Under these circumstances, the balance of harms and the public interest support denying the relief that Plaintiffs seek through their emergency motion. Election officials should not be required to count provisional ballots cast by people who were not properly registered under Arizona law by the October 4 voter registration deadline.

IV. Plaintiffs-Appellants' Motion Is Untimely and Their Delay in Seeking Relief Will Disrupt Administration of the Election.

Timing alone justifies denying Plaintiffs-Appellants' emergency motion. In election matters, courts regularly deny relief when a party has unreasonably delayed filing an action. *See, e.g., Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 15, 973 P.2d 1166, 1169 (1998) ("Delay and untimeliness may render an action moot."); *Fulani v. Hogsett*, 621 F.2d 1028, 1031 (7th Cir. 1990) (laches applied where

plaintiff waited until two weeks after receiving actual notice to file election challenge); *McCarthy v. Briscoe*, 539 F.2d 1353, 1354-55 (5th Cir. 1976) (denying application for injunctive relief where the entire election process would be disrupted by a lawsuit filed on July 30, seeking ballot access to the November presidential election); *Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (laches applied where candidate waited three weeks before filing suit).

In order to establish laches, a plaintiff's delay must be unwarranted and prejudicial. *Harris*, 193 Ariz. at 412, ¶ 16, 973 P.2d at 1169; *see also Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (applying laches in non-election context). Here, Plaintiffs-Appellants have filed this emergency motion 10 days after the Court's opinion was issued and just five business days before the provisional ballot counting must be completed. There is no justification for the delay. Plaintiffs-Appellants could have filed immediately after the issuance of the Court's opinion on October 26, 2010, to petition for an order requiring the State and its counties to add to the statewide voter registration database those persons whose voter registration forms were rejected due to lack of proof of citizenship. By their delay, Plaintiffs-Appellants have ambushed the Court and Defendants-Appellees to the detriment of all those involved in the administration of the election. The late filing prompts a question about whether other individuals who attempted to register, but had not proved their citizenship, would have cast a

provisional ballot in the November 2, 2010, general election had they known it was possible their votes would be counted. Moreover, as set forth in section III *supra*, and in the declarations and affidavit attached to this Response, Appellees will be prejudiced if this Court orders them to retroactively add these voters to the rolls.

Voter registration is designed to ensure that only eligible persons vote and that they vote only once, thereby safeguarding against electoral fraud. Registration cutoffs are administratively necessary to permit preparation of accurate voting lists. *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973); *Marston v. Lewis*, 410 U.S. 679, 681 (1973). Without a suitable method to prepare an authentic list of qualified voters in advance of Election Day, Plaintiffs-Appellants are seeking to contrive a new voter registration system in just the last few days of the ballot counting.

Conclusion

For these reasons, Plaintiffs-Appellants emergency motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November 2010, I electronically filed the foregoing document 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 foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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