

Nos. 08-17094, 08-17115

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

MARIA M. GONZALEZ, et al.,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA, et al.,
Defendants-Appellees.

THE INTER TRIBAL COUNCIL OF
ARIZONA, INC., et al.,

Plaintiffs-Appellants,

v.

KEN BENNETT, in his official capacity
as SECRETARY OF STATE OF
ARIZONA.

Defendant-Appellee.

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

No. CV06-01268-PHX-ROS
CV06-01362-PHX-ROS

**REPLY IN SUPPORT OF
MOTION TO STAY MANDATE**

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In urging the Court to deny Defendants' Motion to Stay the Mandate, Intertribal Council of Arizona, Inc., et al. (ITCA) acknowledges the appropriate standard under Rule 41(d)(2)(A) of the Federal Rules of Appellate Procedure but incorrectly argues that Defendants fail to meet that standard. Because the certiorari petition will present a substantial question and there is good cause for a stay, Defendants request that the Court stay the mandate pending the filing of their certiorari petition.

This Court, of course, has a general practice against issuing the mandate forthwith when it renders an opinion. Ninth Cir. General Order 4.6(a). Rather, "time should be allowed after the entry of judgment for the filing of a . . . petition for certiorari." *Id.* Consequently, "a party seeking a stay of the mandate following this court's judgment need not demonstrate exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989). Instead, under the Court's General Orders, issuing the mandate forthwith is appropriate "where it appears from the record that a petition . . . would be legally frivolous," where an attempt is made to defeat a "just result" by "interposing delaying tactics," or where an emergency requires the mandate to issue. The ITCA's Response does not

establish that any of these factors applies.

Indeed, the certiorari petition will present a substantial question—that is, whether the Majority Opinion correctly determined the scope of Congress’s authority under the Elections Clause in holding that the National Voter Registration Act (NVRA) preempts Arizona Revised Statute (A.R.S.) § 16-166(F)’s requirement that persons registering to vote show proof of citizenship. The certiorari petition will argue that the Majority Opinion is inconsistent with *Ex Parte Siebold*, 100 U.S. 371 (1879), and *Foster v. Love*, 522 U.S. 67 (1997), to the extent that it holds that the NVRA preempts A.R.S. § 16-166(F) even though the requirements of both “may be met without conflict” and therefore “can easily co-exist under the Election Clause.” *Gonzalez v. Arizona*, Nos. 08-17094, 08-17115, 2012 WL 1293149, at *31 (9th Cir. Apr. 17, 2012) (*Gonzalez III*) (Rawlinson, J., concurring in part and dissenting in part). Thus, the certiorari petition will meet the criteria in Supreme Court Rule 10(c): the Majority Opinion “has decided an important federal question in a way that conflicts with relevant decisions of this Court.”

The ITCA argues that the majority's interpretation of the NVRA does not present an unsettled, important question of law. Response at 5. However, as the Sixth Circuit explained in *McKay v. Thompson*, no violation of the NVRA arose where a person refused to provide a social security number required by the state because the NVRA contained no express prohibition. 226 F.3d 752, 755-56 (6th Cir. 2000). In contrast, the NVRA specifically forbids the requirement of notarization, which provides a "strong indication that other prohibitions weren't intended." *Gonzalez v. Arizona*, 624 F.3d 1162, 1207 (9th Cir. 2010)(Kosinski, J., concurring in part and dissenting in part), *reh'g en banc granted & opinion withdrawn*, 649 F.3d 953 (9th Cir. 2011)(*Gonzalez II*). Thus, circuit court judges both within and without the Ninth Circuit continue to interpret the NVRA differently.

Furthermore, the ITCA's assertion flies in the face of the history of this litigation, which in and of itself demonstrates the importance and unsettled nature of the presented question. As outlined below, this case has resulted in five published opinions thus far—one in the district court, three in this Court, and one in the Supreme Court—and this Court has consistently recognized that the voter registration issue is important and unresolved.

In a published opinion, the district court denied Plaintiffs' request for a preliminary injunction to prevent Arizona officials from enforcing the proof-of-citizenship requirement in A.R.S. § 16-166(F), among other provisions. *Gonzalez v. Arizona*, 435 F. Supp. 2d 997 (D. Ariz. 2006). A two-judge motions panel of this Court believed the issues to be sufficiently important to warrant an order granting Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006). And the Supreme Court considered the consequences of this Court's interlocutory injunction of sufficient importance to grant the State's petition for certiorari and vacate this Court's order. *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 this Court 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*).

On remand, the district court granted Defendants' motion for summary judgment, relying on *Gonzalez I* to find that Arizona's proof-of-citizenship requirement did not conflict with the NVRA. (Dkt. 330.) On appeal, a panel majority held in a published opinion that the *Gonzalez I*

panel had incorrectly decided the NVRA issue and that because the NVRA superseded Arizona's registration procedures, its proof-of-citizenship requirement was invalid. *Gonzalez II* 624 F.3d at 1169 (9th Cir. 2010). Chief Judge Kosinski dissented because he agreed with the determination in *Gonzalez I* that there was not a conflict between the NVRA and Arizona's proof-of-citizenship requirement. *Id.* at 1199 (Kozinski, C.J., dissenting).

Although a majority of the en banc panel held that the NVRA preempts Arizona's proof-of-citizenship requirement, the Majority Opinion's lengthy, in-depth analysis of the Elections Clause and the NVRA addresses the issue as important and unresolved. *Gonzalez III*, at *2-*13. And Chief Judge Kosinski finds this a "difficult and perplexing case" because the language of the NVRA is "readily susceptible to the interpretation of the majority, but also that of the dissent." *Id.* at *18 (Kosinski, C.J., concurring). Finally, the Dissenting Opinion's carefully reasoned analysis of the Election Clause and the NVRA and its conclusion that Arizona's proof-of-citizenship requirement does not conflict with the NVRA demonstrates that the presented issue is important and unsettled. *Id.* at *23-*31 (Rawlinson, J., concurring in part and dissenting in part); *see also Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) (granting certiorari because Court agreed with members of the circuit court dissenting

from denial of en banc review that issues were important). Thus, the history of this litigation demonstrates that the presented issue meets the criteria of Supreme Court Rule 10(c): the Majority Opinion “decided an important question of federal law that has not been, but should be, settled by” the Supreme Court.¹

Contrary to ITCA’s contention (Response at 6-9), the Defendants have demonstrated good cause for staying the mandate. The ITCA assumes without any evidence that there will be voters who wish to use the federal form and that their interests would “far outweigh any administrative inconvenience imposed upon Appellees.” *Id.* at 6. The ITCA erroneously equates the right to use the federal form for registration with First Amendment voting rights. Furthermore, the Supreme Court has recognized the state interest in avoiding unnecessary confusion and complication among voters and election administrators. *See Crawford*, 553 U.S. at 196-97 (“the

¹ Indeed, several of other States have enacted provisions that are similar to A.R.S. § 16-166(F). *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 Majority Opinion’s ruling, and no doubt its reasoning, will likely have a significant effect on other states’ laws. *See Winn v. Ariz. Christian Sch. Tuition Org.*, 586 F.3d 649, 659 (9th Cir. 2009) (O’Scannlain, J., dissenting from denial of rehearing en banc) (dissenting because the panel’s holding cast a pall over comparable educational tax-credit schemes in other states and could “derail legislative efforts in four states within [the Ninth] circuit”). The Supreme Court granted certiorari, *Ariz. Christian Sch. Tuition Org v. Winn*, 130 S.Ct. 3324 (2010), and reversed the panel decision, 131 S.Ct. 1436 (2011).

interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process,” while “public confidence in the integrity of the election process has independent significance, because it encourages citizen participation in the democratic process”). The Dissenting Opinion noted the burden imposed upon States that “desire a proof -of-citizenship on their state forms”: They “would be forced to track whether their residents are registered to vote for federal elections, state elections, or both.” *Gonzalez III*, at *28 (Rawlinson, J., concurring in part and dissenting in part).

The ITCA also fails to recognize that its request that the Court deny Defendants’ stay request in effect requests it to allow the district court to enjoin A.R.S. § 16-166(F) pending the filing of a certiorari petition and that this will cause irreparable injury. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (“It also seems to me that 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.”) ; *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (“[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.”).

CONCLUSION

Because the Defendants have demonstrated that their certiorari petition would present a substantial question and that there is good cause for staying the mandate, they request the Court grant their Motion to Stay Mandate.

Respectfully submitted this 15th day of May,

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2012, 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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