

Nos. 08-17094, 08-17115

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MARIA M. GONZALEZ, et al.,	)	On appeal from the United States
	)	District Court for the District of
Plaintiffs-Appellants,	)	Arizona
	)	
v.	)	No. CV06-01268-PHX-ROS
	)	No. CV06-01362-PHX-ROS
STATE OF ARIZONA, et al.,	)	
	)	
Defendants-Appellees.	)	
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	)	
THE INTER TRIBAL COUNCIL	)	
OF ARIZONA	)	<b>Response of the Inter Tribal</b>
	)	<b>Council of Arizona, et al. in</b>
Plaintiffs-Appellants	)	<b>Opposition to Defendants-</b>
	)	<b>Appellees' Motion</b>
v.	)	<b>to Stay Mandate</b>
	)	
KEN BENNETT, in his official	)	
capacity as SECRETARY OF	)	
STATE OF ARIZONA,	)	
	)	
Defendants-Appellees.	)	
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The Inter Tribal Council of Arizona, Inc., et al., oppose Appellees' motion to stay the mandate of this Court for a period of ninety days to allow them to file a petition for writ of certiorari to the United States Supreme Court. Pursuant to Rule 41(d)(2)(A), Fed. R. App. P., the moving party "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Appellees fail to meet this standard.

*Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers.), laid out the four-part test for granting a stay of a lower court decision pending review by the Supreme Court. First, the applicant must establish "that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction." *Id.* at 1308. Second, the applicant must show "that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Id.* Third, "there must be a demonstration that irreparable harm is likely to result from the denial of a stay." *Id.* Fourth, "in a close case it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Id.* This analysis has consistently been applied by the Supreme Court in granting or denying stays of lower court orders. *See, e.g., Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsberg, J., in chambers); *Whalen v. Roe*, 423 U.S. 1313, 1316-17 (1975) (Marshall, J., in chambers); *Graves v.*

*Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers); *Mahan v. Howell*, 404 U.S. 1201, 1202 (1971) (Black, J., in chambers). “The burden is on the applicant to ‘rebut the presumption that the decisions below - both on the merits and on the proper interim disposition of the case - are correct.’” *Planned Parenthood v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (quoting *Rostker*, 448 U.S. at 1308).

Circuit courts have consistently applied the *Rostker* analysis in granting or denying motions to stay a mandate. *See, e.g., Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007); *John Doe I v. Miller*, 418 F.3d 950, 951 (8<sup>th</sup> Cir. 2005); *United States v. Holland*, 1 F.3d 454, 456 (7<sup>th</sup> Cir. 1993); *see also Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (applying a similar four-part analysis); *Khulumani v. Barclay Nat’l Bank Ltd.*, 509 F.3d 148, 153 (2d Cir. 2007) (denying a stay of mandate because applicants had not “demonstrated a likelihood of irreparable injury without a stay”).

As Appellees acknowledge, the majority of the Court held “that the registration provision [Arizona Revised Statutes § 16-166(F)], when applied to the Federal Form, is preempted by the [National Voter Registration Act (NVRA)].” Motion to Stay Mandate, p. 2 (Dkt. #213). Appellees contend, however, that this case presents the far larger issue of “whether the NVRA precludes” states “from addressing voter registration fraud.” Motion to Stay Mandate, p. 2 (Dkt. #213).

To the contrary, nothing in the majority opinion suggests any broader impact beyond the specific provision at issue. The majority opinion held only that Arizona's law requiring "satisfactory evidence" of citizenship, Ariz. Rev. Stat. § 16-166(F), was preempted by § 1973gg-7(b) of the NVRA providing that the Federal Form cannot include "any requirement for notarization or other formal authentication." There is no substantial ground to assert that the NVRA precludes Arizona and other states from taking steps to prevent voter fraud. The NVRA's preemption is limited to laws that conflict with its provisions; with regard to those provisions, as the majority opinion expressly acknowledged, "Congress was well aware of the problem of voter fraud when it passed the act and provided numerous fraud protections in the NVRA." Slip. Op. at 4147.

Appellees further contend that the majority's interpretation of the NVRA presents "both an important and unsettled question of law as demonstrated by both the Court's own opinions in this case and the opinions of other federal appellate courts addressed in the briefs and the Court's opinions." Motion to Stay Mandate, p. 2 (Dkt. #213). To the contrary, none of the cases Appellees cite addressed or decided the narrow preemption issue presented here, *i.e.*, *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6<sup>th</sup> Cir. 2008); *Bell v. Marinko*, 367 F.3d 588 (6<sup>th</sup> Cir. 2004); *McKay v. Thompson*, 226 F.3d 752 (6<sup>th</sup> Cir. 2000). Furthermore, Judge Kozinski's

concurring opinion, which Appellees cite, does not demonstrate that the majority's opinion is an unsettled question of law. Judge Kozinski joined the majority and concluded that "I believe the preemptive reading of the Statute is somewhat better than the alternative." Slip. Op. at 4196. This case does not present a substantial and unsettled question of law justifying a stay of the mandate.

Appellees further argue that a stay of the mandate is necessary to avoid "unnecessary confusion and complication" among voters and election administrators. Motion to Stay Mandate, p. 4 (Dkt. #213). If the mandate is stayed, however, those who will be "confused" and directly injured will be those who would seek to register, or have actually registered, using the Federal Form. Their injuries, including vote denial, would far outweigh any administrative inconvenience imposed upon Appellees. *See In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (a court should look to see if the applicant demonstrates "irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted"). In addition, both the Supreme Court and the Ninth Circuit have rejected the argument that administrative convenience justifies the denial of protected voting rights. *See, e.g., Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217-18 (1986) ("administrative convenience" was not a sufficient basis to justify a heavy burden on First Amendment rights); *Nader v. Brewer*, 531 F.3d 1028, 1040 (9<sup>th</sup> Cir. 2008) (same); *Sampson v. Murray*, 415 U.S. 61, 88

(1974) (“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.”).

Appellees also claim that the majority opinion imposes “a risk of voter fraud.” Motion to Stay Mandate, p. 4 (Dkt. #213). However, there is no evidence that use of the Federal Form for voter registration has caused any voter fraud. In addition, injunctive relief “will not be granted against something merely feared as liable to occur at some indefinite time in the future.” *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). An injury justifying injunctive relief “must be both certain and great; it must be actual and not theoretical.” *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Finally, Appellees claim that “conflicting actions among the district court and the U.S. Supreme Court risk unnecessarily confusing voters,” Motion to Stay Mandate, p. 4 (Dkt. #213), but they cite no decisions in which conflicting opinions were rendered on the narrow preemption issue the en banc court decided here. Denial of Appellees’ motion will not pose a risk of unnecessarily confusing voters. On the other hand, if a stay of the mandate is granted, there will be a substantial risk of confusing voters and denying them the right to register to vote using the Federal Form, and to vote in upcoming elections.

ITCA, its Member Tribes, and other Appellants are conducting training for persons who will assist Indians and other citizen residents of Arizona to register to

vote in the November 2012 federal election. Issuing the mandate will provide confidence and certainty that use of the Federal Form to register will qualify an eligible person to vote. Granting Arizona's Motion to Stay the Mandate will introduce the uncertainty into the registration process that Congress sought to avoid with the use of a nationwide voter registration form through the enactment of the NVRA.

It is highly unlikely that the Supreme Court would grant certiorari. The decision of the Court, en banc, was not closely divided, and the judge who dissented from the earlier panel opinion in fact concurred with the majority en banc opinion. The decision turns upon a relatively narrow question of statutory interpretation, as Congress' Elections Clause authority is not open to serious question. There is no need for an immediate definitive interpretation of this NVRA provision as it has been implemented for nearly two decades, and no circuit split has developed on any question that reasonably could be presented in the State's petition. Because only a handful of other states have adopted comparable provisions, the potential reach of the decision beyond Arizona is limited. The State's motion has not otherwise made a persuasive case that the factors typically leading to a grant of certiorari are present here.

The equities also favor denial of the Appellees' motion. The Court determined that the implementation of Proposition 200 conflicts with a federal law

already in effect – the NVRA – that was designed to provide a nationally uniform system of voter registration. Proposition 200 purported to alter that status quo ante, and accordingly it has been void from the outset and should not be afforded greater deference than the strong federal interest in restoring the voter registration opportunities that Congress intended to be available during the upcoming election cycle.

Appellees have not met the standards set out in *Rostker* for a stay of the mandate. They have not established that there is a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to grant certiorari. They have not shown that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. They have not demonstrated that irreparable harm is likely to result from the denial of a stay. And a “balance of the equities” shows substantial harm to Appellants, as well as the interests of the public at large, if a stay of the mandate is granted.

**Conclusion**

For the above and foregoing reasons, Appellees' Motion To Stay Mandate should be denied.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE FOR CASE NO. 08-17115**

I hereby certify that the Response of the Inter Tribal Council of Arizona, et al. in Opposition to Defendants-Appellees' Motion to Stay Mandate, complies with the page limitation of Fed. R. App. P. 27(d)(2) because it is less than 20 pages. I further certify that the foregoing Response to Motion complies with the type style and typeface requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionately spaced typeface using MS Word in 14-point Times New Roman.

Dated this 4th day of May, 2012.

s/ Robert A. Kengle  
Attorney for ITCA Appellants

## CERTIFICATE OF SERVICE

I hereby certify that on this 4th 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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