No. 11A1189

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, et al.
Petitioners

v.

MIRIAM M. GONZALEZ, et al.
Respondents

and

KEN BENNETT, in his official capacity as Arizona Secretary of State, et al.
Petitioners

v.

INTER TRIBAL COUNCIL OF ARIZONA, et al.
Respondents

RESPONSE OF INTER TRIBAL COUNCIL OF ARIZONA, et al. in OPPOSITION TO APPLICATION TO STAY MANDATE BEFORE THE HONORABLE JUSTICE ANTHONY M. KENNEDY

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SUMMARY OF ARGUMENT

Pursuant to Justice Kennedy's June 14, 2012 Order in this matter, Respondents Inter Tribal Council of Arizona, et al. ("Respondents", "ITCA Respondents", or "ITCA Plaintiffs") file the following opposition in response to Arizona's Application to Stay Mandate (AZ Br.).

This case involves a straightforward issue of statutory interpretation: whether Arizona's rejection of voter registration application from applicants who submit the National Mail Voter Registration Form (the "Federal Form") without providing documentary proof of citizenship violates the requirement under the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, that a state must "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4. In a meticulous opinion written by Judge Ikuta and joined by all but two members of the ten-member *en banc* panel, the Ninth Circuit found that Arizona has violated the NVRA. *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (*en banc*) (*Gonzalez III*).[1] Justice O'Connor reached the same determination when she served on the preceding three-judge panel. *Gonzalez v. Arizona*, 642 F.3d 1162

[1] The opinion in *Gonzalez III*, except for the Appendices, is reprinted in Arizona's Appendix to Petitioners' Application to Stay Mandate Before the Honorable Justice Anthony M. Kennedy (AZ App.) at 1-73. The Appendices to *Gonzalez III* are reprinted in ITCA's Appendix (ITCA App.) at 1-29. The other members of the majority are Chief Judge Kozinski, and Judges Pregerson, Graber, Berzon, Clifton, Bybee, and Murguia. The *Gonzalez III* opinion states that "Judge Rymer participated in the oral argument and deliberations but passed away before joining any opinion." *Gonzalez III*, AZ App. at 5, n.1.

(9th Cir. 2010) (*Gonzalez II*), *reh'g en banc granted & opinion withdrawn*, 649 F.3d 953 (9th Cir. 2011).

In rejecting Arizona's request for a stay of the mandate, the Ninth Circuit carefully and correctly applied a test similar to that which the Supreme Court uses in deciding applications for a stay. The *en banc* Court of Appeals found that Arizona can only satisfy one of the four requirements in that test. *Gonzalez v. Arizona*, No. 08-17094, No. 08-17115 (9th Cir. June 7, 2012) (*en banc*) (*Gonzalez IV*).[2] The Ninth Circuit's decision to deny the motion to stay the mandate merits the heavy weight the Supreme Court usually gives to circuit court denials of stay applications because Arizona cannot satisfy three of the requirements for a stay.

Arizona cannot meet the first two requirements, 1) establishing that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari and 2) that there is a fair prospect that five Justices will conclude the Ninth Circuit erred, because the Ninth Circuit interpreted the language of the NVRA correctly. Arizona's position is further weakened by the fact that there are no particular jurisprudential reasons, such as a potential conflict with a Supreme Court decision or the need to resolve a circuit court split, which would typically compel the Court to grant a writ of certiorari. *See* Sup. Ct. R. 10. Arizona may be able to satisfy the third requirement – that the denial of the stay has the potential to

[2] The opinion in *Gonzalez IV* is reprinted at AZ App. 74-83.

cause irreparable harm to Arizona – but, as the Ninth Circuit found, Arizona cannot satisfy the fourth requirement because the harm to Arizona is outweighed by the irreparable harm to voter registration applicants who seek to exercise their fundamental right to vote in the 2012 elections and the public interest, as expressed through Congress' intent, to have a streamlined voter registration process. Under such circumstances, Arizona cannot meet its heavy burden to show that it is entitled to the extraordinary remedy of a stay.

PROCEDURAL HISTORY

Congress passed the National Voter Registration Act in 1993. As discussed more fully below, one provision of the NVRA provides that the United States Election Assistance Commission ("EAC") "shall develop a mail voter registration form for elections for Federal office" in consultation with the chief election officer of each State. 42 U.S.C. § 1973gg-7(a)(2). A second set of provisions states that "[e]ach State shall accept and use" the Federal Form, and "[i]n addition to accepting and using" the Federal Form, "a State may develop and use" its own voter registration form. 42 U.S.C. § 1973gg-4(a)(1-2) .

In November 2004, Arizona voters passed Proposition 200. Two provisions within Proposition 200 affect voting. One provision requires the County Recorder to "reject any application for registration that is not accompanied by satisfactory proof of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F). A second

requires voters who vote on Election Day to provide specified forms of identification at the polls. *Id.* In 2005, the United States Department of Justice precleared the voting changes contained within Proposition 200 pursuant to its responsibilities under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[3]

In December 2005, Arizona proposed to the EAC that it be able to apply the proof of citizenship provisions to the Federal Form. On March 6, 2006, the EAC wrote Arizona's Secretary of State to say that "the EAC concludes that the policies you proposed would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4(a))." *Gonzalez III*, ITCA App. at 30. On March 13, 2006, Arizona's Secretary of State wrote the EAC and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote." *Gonzalez III*, ITCA App. at 33.

Shortly thereafter, two sets of plaintiffs filed lawsuits contending that Proposition 200's proof of citizenship and polling place identification requirements

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[3] As Section 5 provides, the Attorney's General's decision not to object to a voting change has no effect on future litigation, such as NVRA ligtation, to enjoin the change: "Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Indeed, the Department of Justice participated in the briefing and oral argument before the Ninth Circuit in *Gonzalez III* on the side of the plaintiffs.

violated various federal constitutional and statutory provisions. Each lawsuit contained the claim that Arizona violated the NVRA. The two lawsuits were consolidated; one set of plaintiffs is the ITCA Plaintiffs and Jesus Gonzalez is the lead plaintiff for the other set. *Gonzalez III*, AZ App. 8-9 & n.3.

The case has been litigated up and down the federal court system for the past six years. The district court denied plaintiffs' applications for a temporary restraining order and motions for preliminary injunction and both sets of plaintiffs appealed the denial of the motion for preliminary injunction. Because the briefing schedule would have extended past the fall 2006 election, both sets of plaintiffs moved the Ninth Circuit for a stay to enjoin Proposition 200's polling place requirements but not the voter registration requirements. After a two judge motions panel granted the motion, Arizona applied to the Supreme Court for a stay to vacate the Ninth Circuit's stay. The Supreme Court granted Arizona's application in a *per curiam* opinion. *Purcell v. Gonzalez*, 549 U.S. 1-6 (2006).

After the 2006 election, the Ninth Circuit heard the appeal of the denial of the preliminary injunction. Because there was no imminent federal election, the appeal focused on the proof of citizenship requirement for voter registration and not the polling place identification requirement. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 1997) (*Gonzalez I*). The Ninth Circuit panel affirmed the district

court's denial of the preliminary injunction in all respects. Two paragraphs of the opinion were devoted to the NVRA claim. *Id.* at 1050-52.

The case proceeded in the district court. Arizona moved for summary judgment that the district court granted in part. Based on the Ninth Circuit's opinion, the district court dismissed the NVRA claim among others. The remaining claims proceeded to trial and the district court resolved the remaining claims in favor of Arizona. *Gonzalez III*, AZ App. at 9-10.

Both sets of plaintiffs appealed. On the NVRA claim, a majority of the Ninth Circuit panel, consisting of Judge Ikuta and Justice O'Connor who sat by designation, found that Arizona's rejection of Federal Form applications that do not include proof of citizenship violated the NVRA because the State was not "accepting and using" the Federal Form. *Gonzalez II*, 642 F.3d at 1171-85. The panel unanimously found against the plaintiffs on the polling place identification claims. Judge Kozinski dissented on the NVRA claim but the focus of his dissent was that the panel never should have considered the NVRA claim on the merits because "the law of the circuit" doctrine precluded it. *Id.* at 1198-99 (Kozinski, C.J., dissenting). Arizona petitioned for rehearing *en banc* and its petition was granted. *Gonzalez v. Arizona*, 649 F.3d 953 (9th Cir. 2011).

The *en banc* panel in *Gonzalez III* reached the same conclusions as the *Gonzalez II* panel on all of the issues. On the NVRA claim, the *en banc* court

ruled 8-2 in favor of plaintiffs/appellants in an opinion by Judge Ikuta. As discussed in greater detail below, the court found that in rejecting Federal Forms that do not provide proof of citizenship, Arizona was not accepting and using the Federal Form. *Gonzalez III*, AZ App. at 11-35. The majority included Judge Kozinski who explained his switch in position as follows:

> The dissent sees some inconsistency between my conclusion today and that in my "well drafted dissent to the original panel opinion." But, as a member of the three-judge panel, I had no occasion to construe the statute de novo because we were bound by law of the circuit and law of the case. . . . As an en banc court, we cannot defer to *Gonzalez I*. Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I believe the preemptive reading of the statute is somewhat better than the alternative.

Gonzalez III, AZ App. at 53 (Kozinski, C.J., concurring) (citations omitted). Judge Rawlinson, joined by Judge Smith, dissented on the NVRA claim. Judge Rawlinson reasoned that, because the NVRA allows a state to "develop and use" a state mail-in form that can have additional requirements extending beyond those of the Federal Form, such as proof of citizenship, Arizona could apply those additional requirements to the Federal Form. *Gonzalez III*, AZ App. at 57-73 (Rawlinson, J., concurring and dissenting).

Arizona promptly moved to stay the mandate and the ITCA Respondents opposed the request. The *en banc* court denied Arizona's motion by a 7-3 vote. *Gonzalez IV*. The court applied the following test:

> Under this test, the stay applicant must show that there is (1) "a reasonable probability that four Members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction," (2) "a significant possibility of reversal of the lower court's decision," and (3) "a likelihood that irreparable harm will result if that decision is not stayed." . . . . In a close case, this court must balance the equities by assessing the harm to each party if a stay is or is not granted.

Gonzalez IV, App. 78-79 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *overruled on other grounds by* 28 U.S.C. § 2253 (c)(2)). The court divided its discussion into merits and equities factors. On the merits, the court stated:

> Applying *Barefoot*, we must first determine whether Arizona has demonstrated a reasonable probability that the Supreme Court will grant certiorari and a significant possibility that the Court will reverse our decision. *Barefoot*, 463 U.S. at 895. We conclude that Arizona has not met this standard. We are particularly mindful that (1) nine out of eleven members of the en banc panel[4] agreed that Proposition 200's registration provision is preempted by the National Voter Registration Act (NVRA); (2) we are not aware of any conflict between our decision and the decisions of other circuits; and (3) the Supreme Court has not yet addressed the legal questions governing this case.

Gonzalez IV, AZ App. 59-60. On the equities, as discussed below, the court found that, although Arizona demonstrated the possibility of some irreparable injury, this possibility is outweighed by the injury to voter registrants whose forms would be rejected, by the potential for voter

[4] The reference to nine members would include Judge Rymer as part of the majority as opposed to a non-vote as stated in the *Gonzalez III* opinion, *see* note 1 *supra*.

confusion, and by the public interest, as determined by Congress, that "streamlined registration procedures are vital to ensure that voters are not frustrated in their ability to vote." *Gonzalez IV*, AZ App. 80-82.

STANDARD OF REVIEW

"'Denial of . . . in-chambers stay applications is the norm; relief is granted only in extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401, 129 S. Ct. 1861 (2009) (Ginsberg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. at 1306, 1308 (1980) (Brennan, J., in chambers). An applicant for a stay "must meet a heavy burden." *Nken v. Holder*, 556 U.S. 418, 439 (2009) (Kennedy, J., concurring) (quoting *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). The Court has set forth the heavy burden the applicant must satisfy as follows:

> The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. [The Circuit Justice] must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief. In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public.

Lucas v. Townsend, 486 U.S. 1301, 1304-05 (1988) (Kennedy, J., in chambers) (citations omitted); *see also, e.g., Conkright*, 129 S. Ct. at 1861-62; *Rostker,* 448

U.S. at 1308 (1980) (Brennan, 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). In deciding whether to stay a circuit court decision, Justices have "'weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.'" *Whalen*, 405 U.S. at 1317 (quoting *Graves*, 405 U.S. at 1203-04).

ARGUMENT

A. Because This Case Involves a Straightforward Issue of Statutory Interpretation of First Impression, Arizona Cannot Satisfy Its Heavy Burden of Demonstrating That the Court is Likely to Accept This Case and Overturn the Ninth Circuit *En Banc* Decision

The first two prongs that an applicant requesting a stay must satisfy relate to the underlying merits of the applicant's case: 1) whether there is a reasonable probability that the Court will grant *certiorari* because at least four Justices will consider the issue sufficiently meritorious and 2) whether there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous.

In arguing that it has satisfied these prongs, Arizona contends that the Ninth Circuit's opinion "cast aside this Court's long-standing precedent interpreting the Elections Clause and interpreted the NVRA fundamentally at odds with that Act's stated purpose and express language as well as that of other federal election provisions." AZ Br. at 6. To the contrary, the eight-member majority applied the Elections Clause faithfully in finding that Congress has the authority to supersede state law regarding voter registration for federal elections; applied the express language of the NVRA in finding that Arizona is not accepting and using the Federal Form when it rejected forms that do not also include proof of citizenship; and properly examined whether its interpretation was consistent with the purposes of the NVRA.

Arizona does not dispute that the NVRA was enacted pursuant to Congress' Elections Clause authority. Article I, Section 4, Clause 1 of the United States Constitution states: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators." U.S. Const. art. I, § 4, cl. 1. The majority opinion includes an exhaustive analysis of the scope of Congress' Elections Clause authority, *Gonzalez III*, AZ App. 11-16, that does not require repeating here. However, there are some points worth noting.

The first is that the Elections Clause gives Congress the authority to supersede any state laws relating to the Time, Place, and Manner of federal elections, including voter registration. In *Smiley v. Holm*, 285 U.S. 355, 366 (1932), the Court explained the extent of the authority as follows:

> The subject matter is the "times, places and manner of holding elections for senators and representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns – in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.

In its most recent decision addressing the Elections Clause, where the sole issue was whether a state regulation violated that Clause, the Court referenced "the ample limits of the Elections Clause's grant of authority to Congress" and stated that the "Clause gives Congress 'comprehensive' authority to regulate the details of elections." *Foster v. Love*, 522 U.S. 67, 71 & n.2 (1997). Neither Arizona nor the two dissenting Ninth Circuit judges appear to dispute that Congress has the authority to require Arizona to accept the Federal Form – regardless of whether a voter registration applicant provides proof of citizenship.

Second, the *en banc* majority found that preemption under the Elections Clause functions differently than it does under the Supremacy Clause because the Supremacy Clause "addresses preemption in areas within the states' historic police powers" whereas "the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." *Gonzalez III*, AZ App. at 15. As a result, Supremacy Clause concepts – such as maintaining the "delicate balance" between States and the Federal Government, the presumption against preemption, and the "plain statement" rule which holds that the preemption only applies when it is the "clear and manifest" purpose of Congress to do so – do not apply to Elections Clause cases. *Id.* at 14-15. The dissent does not argue that the Supremacy Clause preemption standards should apply to an Elections Clause case, *id.* at 58, and Arizona does not appear to make that argument either.

At its foundation, Arizona's argument, which largely takes its cues from the dissent in *Gonzalez III*, is that Arizona's rejection of Federal Forms lacking proof of citizenship does not conflict with the NVRA and that Arizona's proof of citizenship requirement furthers the purposes of the NVRA. Not only did the majority's detailed analysis reject both of these issues persuasively, but this case also does not present the type of jurisprudential issue – such as a circuit split – that usually drives Court review.

Regarding the first argument, it is important to discuss the language of the NVRA, as well as the language of Proposition 200 and Arizona's procedures for implementing Proposition 200, which the majority discussed in detail. *Gonzalez III*, AZ App. 18-25. A few points are worth highlighting in particular. The first purpose Congress identified in passing the NVRA was "to establish procedures that will increase the number of citizens who register to vote in elections for Federal office." 42 U.S.C. § 1973gg(b)(1). In addition to voter registration methods that are provided for in state law, the NVRA sets forth three federally-required methods for registering voters for federal elections, one of which is by-mail using the Federal Form created by the EAC. 42 U.S.C. § 1973gg-2.

The NVRA states that the EAC "shall develop a mail voter registration application form for elections for Federal office" in consultation with the States' chief election officers. 42 U.S.C. § 1973gg-4(a). The statute provides for the following with respect to the Federal Form and any State mail-in form:

> (a) Form
>
> (1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for the registration of voters in elections for Federal office.
>
> (2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

42 U.S.C. § 1973gg-7(a)(2).

Among other things, the Federal Form asks voters the question: "Are you a citizen of the United States of America?" with a check box to answer yes or no. Applicants who check "no" are instructed not to complete the form. In addition, the applicant must attest that he or she is a citizen and that the information is "true to the best of [the applicant's] knowledge under penalty of perjury." The Form does not provide for any additional proof of citizenship. ITCA App. at 1-25.[5] Arizona's Voter Registration Form states that "[a] complete voter registration form must also contain proof of citizenship or the form will be rejected." *Id.* at 26 (emphasis in original). The Arizona form describes the ways an applicant can fulfill the proof of citizenship requirement. *Id.* at 29.

Regarding Proposition 200, its registration provision states: "[t]he county recorder shall reject *any* application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F) (emphasis added). The statute goes on to define what documentation is required to prove citizenship. *Id.* The Arizona Election Procedures Manual, which

[5] Although the Federal Form and the Arizona Voter Registration Form were Appendix A and Appendix B, respectively, to the opinion in *Gonzalez III*, AZ App. 21-22, Arizona did not include them in its Appendix. As a result, ITCA has done so in its Appendix.

has the force and effect of law, Ariz. Rev. Stat. Ann. § 16-452, provides that any applicant whose application is rejected because she or he did not provide proof of citizenship must submit an entirely new registration form to order to attempt to register in the future. Arizona Secretary of State Procedures Manual (Oct. 2007). *Gonzalez III*, AZ App. at 25.

After Proposition 200 was enacted, Arizona requested that the EAC modify the Federal Form to require applicants to provide documentary proof of citizenship. After the EAC rejected the State's request, Arizona proceeded to apply the documentary proof of citizenship requirement to all Federal Form applications anyway. *Gonzalez III*, AZ App. 29, 35 n.28; ITCA App. at 30-34.

The Ninth Circuit performed a detailed analysis in reaching its conclusion that Arizona's actions violated the NVRA. *Gonzalez III*, AZ App. 25-35. The essence of that analysis is relatively straightforward and is based on the express language of the NVRA and Proposition 200; the NVRA specifies that "[e]ach State shall accept and use" the Federal Form, 42 U.S.C. § 1973gg-4(a)(1), whereas Proposition 200 states that a "county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. Ann. § 16-166(F). The conflict in the statutory language ("accept and use" vs. "reject") could not be clearer.

Because Arizona's arguments as to how this straightforward analysis is erroneous are basically a reiteration of arguments made by the two dissenters in *Gonzalez III*, Arizona's arguments have already been addressed by the *Gonzalez III* majority that persuasively rejected them. The "plain language" argument made by Arizona is that, because the NVRA allows states to "develop and use" their own form which may include additional requirements not included in the Federal Form, Congress' intent was to allow states to reject Federal Forms that did not comply with those additional requirements. AZ Br. at 21-22. This argument clearly misreads the statutory language. As pointed out by the *Gonzalez III* majority, States are required to accept and use the Federal Form, and "*in addition*", may develop and use their own form. States cannot develop and use the state form "*instead of*" accepting and using the Federal Form. Moreover, there is nothing illogical or inconsistent in requiring states to accept the Federal Form that satisfies Federal requirements even when States may have additional requirements on their own form. *Gonzalez III*, AZ App. at 28 (emphasis added).

Arizona makes the related argument that the *Gonzalez III* majority "broadened the scope of the NVRA to create a conflict where none existed." AZ Br. at 18. The *Gonzalez III* majority hardly manufactured a conflict. As discussed above, the express language demonstrates that there is a conflict. Furthermore, the statute expressly delegates authority to the EAC to determine the contents of the

Federal Form (acting in consultation with the States). 42 U.S.C. § 1973gg-7(a)(2). The EAC declined Arizona's request to provide for a documentary proof of citizenship requirement on the Federal Form and, in doing so, stated that "[t]he Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of further proof." ITCA App. at 32. In response, Arizona's Secretary of State called the EAC's decision "completely inconsistent, unlawful, and without merit" and stated that she "will instruct Arizona's county recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. 16-166(F)." ITCA App. at 33. Arizona's actions created the express conflict that exists here.

In addition, Arizona contends that the *Gonzalez III* majority's opinion leads to "absurd results" because the "NVRA by its terms is designed to enhance the integrity of elections." AZ Br. at 20. To support this point, Arizona also cites some decisions involving the NVRA: *Young v. Fordice*, 520 U.S. 273, 286 (1997); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373 (6th Cir. 2008); *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000); AZ Br. at 20-21.

The *Gonzalez III* majority not only recognized that one purpose of the NVRA was "to protect the integrity of the electoral process," 42 U.S.C. § 1973gg(b)(3), but it also "recognize[d] Arizona's concern about fraudulent voter

registration." *Gonzalez III*, AZ App. at 34. However, as the *Gonzalez III* court pointed out, the "Elections Clause gives Congress the last word on how this concern will be addressed in the context of federal elections" and "Congress was well aware of the problem of voter fraud when it passed the act and provided for numerous protections."[6]

In terms of the NVRA cases cited by Arizona, the State argued before the Ninth Circuit that *McKay* supported its position and the *Gonzalez III* majority analyzed why Arizona was incorrect. *Gonzalez III*, Az. App. at 29 n.26. In *McKay*, 226 F. 3d at 255-256, the Sixth Circuit held that Tennessee did not violate the NVRA by refusing to register an individual who did not provide his Social

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[6] The *Gonzalez III* majority set forth the numerous anti-voter fraud protections contained in the NVRA:

> These safeguards include the NVRA's requirement that the Federal Form, the State Forms, and the Motor Voter Forms contain an attestation clause that sets out the requirements for voter eligibility. *Id.* §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury, *id.* §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C), and persons who knowingly and willfully engage in fraudulent registration practices are subject to criminal penalties, *id.* § 1973gg-10(2). In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. *See id.* § 1973gg-4(c). Finally, section 1973gg-6 requires states to give notice to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations. *See id.* § 1973gg-6(a)(2).

Gonzalez III, AZ App. at 34 n.28.

Security number. *McKay* does not support Arizona's position because the Federal Form permits states to ask for a Social Security number and provides specific instructions to Tennessee applicants regarding the need to provide their full Social Security number. ITCA App. 3-4, 22.

It is surprising that Arizona cites *U.S. Student Ass'n* because the holding of the decision was to deny Michigan's request for a stay pending the resolution of the appeal, and in doing so, the court declined to apply a state law definition to the NVRA. 546 F.3d at 379. In *U.S. Student Ass'n*, the district court had granted a preliminary injunction that Michigan had violated the NVRA. *Id.* at 375-76. In rejecting the request for a stay, the Sixth Circuit rejected Michigan's argument that the state law definition of "registrant" applied to the NVRA:

> Defendants' entire argument is based on their assertion that the state-law definition of 'registrant' must apply to the NVRA. However, as we explained above, this cannot be the case. While state law is vital in determining when a person becomes actually eligible to vote, the labels that state law places on individuals are not binding for purposes of the NVRA.

Id. at 383.

In *Young*, the central issue was whether voting changes that Mississippi made to implement under the NVRA needed to be precleared under Section 5 of Voting Rights Act. 520 U.S. at 275. The Court held that aspects of Mississippi's NVRA implementation program required preclearance because they "reflected policy choice and discretion by Mississippi officials." *Id.* at 285. At the same

time, the Court "recognize[d] that the NVRA imposes certain mandates on the states, describing those mandates in detail." *Id.* at 286. Though the Court did not specifically address whether the "accept and use" provision was mandatory or discretionary, the language that "[e]ach State shall accept and use" the Federal Form is mandatory – not discretionary – language.

Arizona also contends that barring Arizona from rejecting Federal Forms that lack documentary proof of citizenship would be inconsistent with the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* According to Arizona, this is because the Help America Vote Act ("HAVA") includes a number of mandates on the states related to voter registration and maintaining a statewide voter registration database and HAVA provides that it "was not intended to prevent States from establishing election technology and administrative requirements that are 'more strict' if those requirements are not inconsistent with federal law." AZ Br. 22-24. Arizona made the same basic argument in the Ninth Circuit and the *Gonzalez III* majority properly rejected it. *Gonzalez III*, AZ App. at 32-34. As Arizona's brief implicitly acknowledges, no provision of HAVA amended the NVRA to specify that the Federal Form must contain a proof of citizenship requirement. Moreover, HAVA contains a "savings clause," which states that "nothing in this Act may be construed to authorize or require conduct prohibited under [the NVRA or five other federal statutes], or to supersede, restrict, or limit

the application of such laws." 42 U.S.C. § 15545(a).[7] Thus, nothing in HAVA supersedes or is inconsistent with the *Gonzalez III* court's determination that Proposition 200 violates the requirement under the NVRA that states "accept and use" the Federal Form.[8]

Another reason why this case is not a good vehicle for Supreme Court review is that there is no circuit split. The most Arizona can say is that other states have passed proof of citizenship laws. AZ Br. at 24. However, there is no ongoing litigation in those states, let alone an opinion that conflicts with the *Gonzalez III* opinion. This does not provide a compelling reason to accept this case. Indeed, previous litigation under the NVRA provides an illustrative example that issues can be resolved at the circuit level. After the NVRA was enacted, a number of states challenged its constitutionality. Three circuit courts ruled that the NVRA was a constitutional use of Congress' Elections Clause authority and the Supreme Court denied a writ of *certiorari* in the only case where it was sought. *Wilson v.*

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[7] The one exception to the savings clause, which is not applicable to this case, is that HAVA amended the NVRA to the extent that first time voters who registered by mail are required to provide a form of identification before they can vote. 42 U.S.C. §§ 15545(a), 15483 (b).

[8] Arizona cites *Crawford v. Marion County Board of Elections*, 553 U.S.181, 196-97 (2008), for the proposition that the Supreme Court acknowledged the consistent intent of HAVA and the NVRA. *Id.* at 23-24. Arizona's point is perplexing because neither the *Gonzalez III* majority nor the ITCA Respondents has stated that HAVA and the NVRA are inconsistent and the language Arizona quotes from *Crawford* involves identification requirements at the polls which are not at issue at this stage in the case.

Voting Rights Coal., 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093; *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Ass'n of Cmty. Organizations for Reform Now v. Edgar*, 56 F.3d 791 (7th Cir. 1995). Arizona expresses concern "that the Ninth Circuit's published opinion, and no doubt its reasoning, will likely have a significant effect on other States' laws." AZ Br. at 24. If the *Gonzalez III* opinion is correct, as ITCA Respondents believe that it is, the opinion should have a significant effect on how a court would analyze a challenge to a proof of citizenship requirement in another state and the issue will be resolved without the Supreme Court needing to act. Should a circuit court in a future case reach a different conclusion, then the Supreme Court's guidance may be needed.

In sum, Arizona has failed to satisfy its heavy burden of showing why the Supreme Court would review this case and find the *Gonzalez III* opinion erroneous.

B. The Equities Favor Denying the Application for Stay

Because Arizona cannot meet its burden regarding the likelihood the Court will grant a writ of certiorari and find the *Gonzalez III* decision erroneous, the weighing of the equities has less significance. Nonetheless, as the Ninth Circuit found, the balancing of 1) the irreparable injury that would be caused by granting

the stay, 2) the irreparable injury that would be caused by denying the stay, and 3) the public interest, weighs in favor denying the stay.

Arizona essentially makes the same argument it made to the Ninth Circuit when it requested a stay of the mandate: Arizona would be irreparably harmed by the possibility that one or more non-citizens might register to vote between now and the time when the merits of this case are resolved and that ineligible individuals who registered to vote and then voted would otherwise go undetected. AZ Br. at 23-25.[9]

The Ninth Circuit recognized that Arizona demonstrated the clear possibility of irreparable injury if a stay was not granted. At the same time, it noted that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing voter fraud." *Gonzalez IV*, AZ App. at 81.

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[9] The information Arizona provided in its Appendix demonstrate the various means by which counties can detect that non-citizens have registered to vote such as an Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services) requirement that an individual who seeks to become a citizen must obtain a letter from county election officials saying that the individual had never registered to vote or voted; the issuing of juror summons; and self-reporting. AZ App. at 170-178. The information also demonstrates how few alleged non-citizens actually voted: Arizona's lead example in its brief of non-citizen voter fraud is that "in 2005, the Maricopa County Recorder referred 159 matters to the county attorney based on evidence demonstrating that non-U.S. citizens had registered to vote." AZ Br. at 25. The brief fails to mention that only ten of those individuals were charged with a crime and only four had ever voted. AZ App. at 174.

Drawing heavily on the Supreme Court's earlier ruling in this case in *Purcell*, the Ninth Circuit then analyzed 1) the injury that would be caused by granting the stay and 2) the public interest. It noted "'the plaintiffs' strong interest in exercising the fundamental right to vote.'" *Gonzalez IV*, AZ App. at 81 (*quoting* Purcell, 549 U.S. at 4). The court found that the effect of the stay would be to deny the "fundamental political right to vote in the 2012 federal elections" for voter registration applicants who do not have proof of citizenship. Additionally, it found that applicants whose applications are rejected because they did not provide proof of citizenship may be discouraged from registering to vote even if they have, or could obtain, proof of citizenship. *Id.* at 81-82. The Ninth Circuit's points are supported by the district court's findings that, of the 31,550 applicants whose forms were rejected between January 2005 and September 2007, more than 20,000 did not subsequently register to vote. *Gonzalez v. Arizona*, No, CV-06-1268 (D. Az. Order Aug. 20, 2008), AZ App. 96-97. The Ninth Circuit also found that "a decision to stay the mandate could itself 'result in voter confusion and consequent incentive to remain away from the polls.'" *Gonzalez IV*, AZ App. at 82 (quoting *Purcell*, 549 U.S. at 9). Moreover, the Ninth Circuit found that Congress had determined that "streamlined registration procedures are vital to ensure that voters are not frustrated in their ability to vote" and so the public interest "weighed heavily" in favor of denying the stay. *Gonzalez IV*, AZ App. at 82. Based on the

foregoing analysis, the Ninth Circuit "deem[ed] the equities to weigh in favor" of denying the stay. *Id.*

In addition to the points made by the Ninth Circuit, there are additional reasons why the equities favor denying the stay. ITCA, its Member Tribes, and other ITCA Respondents 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. Denying the stay will provide confidence and certainty that use of the Federal Form to register will qualify an eligible person to vote. This is especially important for members of Indian tribes, particularly the elderly, many of whom do not have birth certificates and cannot easily obtain them. ITCA App. at 35.[10]

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. Accordingly, the equities favor ITCA Respondents.

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[10] Though Proposition 200 states that an "applicant's bureau of Indian Affairs card number, tribal treaty cards, and tribal enrollment number" can serve as proof of citizenship, Ariz. Rev. Stat. Ann. § 16-166(F)(6), these numbers or cards either do not exist or are not used as identification. ITCA App. at 35-36.

At an earlier stage in this case, the Supreme Court granted Arizona's request for stay in 2006 in *Purcell*. 549 U.S. at 6. The difference between the current circumstances and those in *Purcell* illustrate why the Court should not grant a stay this time. In *Purcell*, the exigencies of an upcoming election created challenges. In a four sentence order, two judges serving on a motions panel enjoined the polling place provisions of Proposition 200 pending full briefing of the plaintiffs' appeal of the district court's denial of a motion for preliminary injunction. The panel did not have the benefit of the reasoning of the district court's decision because the district court had not issued its findings of fact or conclusions of law. The panel also did not have the benefit of oral argument. *Id.* at 3-4. The underlying legal issue, whether the polling place identification provisions violated the fundamental right to vote under the Fourteenth Amendment, was one where lower courts were divided. *Common Cause v. Billups*, 439 F. Supp. 2d 1294, 1351 (N.D. Ga. 2006) (district court preliminarily enjoined Georgia voter identification law in part on grounds that it violates the fundamental right to vote); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (district court granted summary judgment in favor of defendants in fundamental right to vote challenge to Indiana photo identification law).

Though it is the same case, the extraordinary circumstances that existed in *Purcell* simply do not exist here. Since the beginning of 2009, the issue at hand

has been briefed and argued extensively, first before a Ninth Circuit panel and then before the Ninth Circuit *en banc*. The *Gonzalez III* opinion is lengthy and detailed and was signed by eight judges. Justice O'Connor reached the same conclusion when she served on the prior panel. The underlying legal issue is one of statutory construction, not constitutional interpretation, and there is no split among the lower courts. Nothing about the current situation calls out for the extraordinary action of granting a stay.

CONCLUSION

For the foregoing reasons, ITCA Respondents respectfully request that the Court deny Arizona's Application to Stay Mandate.

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CERTIFICATE OF SERVICE

The original and two copies of Response of Inter Tribal Council of Arizona, et al. in Opposition to Application to Stay Mandate before the Honorable Justice Anthony M. Kennedy were filed on June 18, 2012 with:

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I certify that, pursuant to Rule 29, one copy of Response of Inter Tribal Council of Arizona, et al. in Opposition to Application to Stay Mandate before the Honorable Justice Anthony M. Kennedy was served on each party to the above proceeding or that party's counsel, and on every other person required to be served, via U.S. mail on June 18, 2012. The names and addresses of those served are as follows:

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I, Jon M. Greenbaum, declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of June, 2012.

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