No. 11A1189

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, et al.
Petitioners

v.

JESUS 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

GONZALEZ RESPONDENTS' OPPOSITION TO ARIZONA'S APPLICATION TO STAY MANDATE

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Introduction

Over the last 20 years, millions of Americans across the country have registered to vote using a simple postcard form, making their participation in our democracy possible. In the last presidential election alone, 28 million citizens used the postcard form to register to vote by mail, in person, or as part of a voter registration drive.[1]

Thousands of local, state, and federal elections have been held in the two decades since the National Voter Registration Act ("NVRA") created the Federal Mail Voter Registration Form ("the Federal Form"). And *not one* of those elections has been found to have been compromised by non-citizens who improperly registered to vote, let alone who registered using the Federal Form. In fact, the Election Assistance Commission ("EAC"), which closely monitors and reports to Congress after every general election on the impact of NVRA on the administration of federal elections, has never reported a single occasion when use of the Federal Form facilitated successful election fraud. Two decades of experience with the NVRA have convincingly demonstrated that the use of the Federal Form poses no threat to the integrity of our elections. Rather, the Federal Form has enabled millions of citizens to easily register and participate in our democracy.

Arizona has applied for a stay claiming the integrity of its elections is at stake, threatened by non-citizen immigrants seeking to commit voter fraud, but that assertion simply does not hold up. The harms that Arizona claims will occur if it must comply with the NVRA—the same law that forty-nine other states have applied without any known injury—are more a product of an active imagination than of actual experience. The best Arizona can do is point to isolated and occasional examples of inadvertent non-citizen registration among a population of more than six million people and more than 3.5 million registered voters. None of these improperly registered voters are known to have used the Federal Form, or to even have registered with the knowledge that they were ineligible. The simple fact is that, notwithstanding Arizona's claims, non-citizens registering and then voting is extremely rare, owing in part to the harsh penalties for fraudulent registration.[2]

So it is no surprise that Arizona cannot provide the Court with evidence of the irreparable harm that it asserts will befall the state unless this emergency stay is granted. As the Ninth Circuit found in its order denying a

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[1] U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey ("ECA Report 2008").

[2] Before the passage of Proposition 200, the Arizona Secretary of State believed that the "strong desire to remain in the United States and fear of deportation outweigh [noncitizens'] desire to deliberately register to vote before obtaining citizenship. Those who are in the county illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation." Letter by Arizona State Elections Director to Rick Cunnington, July 18, 2001 (Tr. Ex. 312).

stay, "Arizona has not provided persuasive evidence that voter fraud in registration is a significant problem in Arizona." Dkt. 232 (Order Denying Stay) at 8. Arizona's speculative theories, reviewed and found wanting by the Ninth Circuit, cannot outweigh the actual, imminent impairment of thousands of voters' fundamental rights to register and to vote in the upcoming federal election.

The Ninth Circuit's decision on the merits addresses a narrow issue with straightforward reasoning that does not contradict any other Circuit. But regardless of whether or not this Court is likely to grant certiorari or reverse, Arizona cannot demonstrate the irreparable harm required that would justify depriving its citizens of voting rights that the Ninth Circuit—acting en banc—determined are protected by federal law. Irreparable harm cannot be a matter of mere speculation. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citing *White v. Florida*, 458 U.S. 1301, 1302 (1982)), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2); *see also Rostker v. Goldberg*, 448 U.S. 1306 (1980).

For these reasons and the reasons below, the Gonzalez Respondents respectfully request that the application for stay be denied.

Background

Congress enacted the National Voter Registration Act (NVRA), 42 U.S.C. §1973gg, pursuant to its powers granted by Article I, section 4 of the Constitution, which confers on Congress a "general supervisory power," *Ex Parte Siebold,* 100 U.S. 371, 387 (1879), to "supplement … state regulations or substitute its own" regulation of federal elections. *Smiley v. Holm,* 285 U.S. 355, 366-67 (1932). Congress chose to exercise this authority and preempt state law because it found that some restrictive state policies on voter registration had a "direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. §1973gg (a)(3).

The mail registration provisions of the NVRA, which are at issue in this case, were modeled on postcard registration programs then existing in approximately half of the states, covering well more than half of the nation's population. The provisions created a uniform national voter registration card that would be made widely available and could be used to register a voter anywhere. The NVRA placed particular emphasis on making the card available to organized voter registration programs. 42 U.S.C. § 1973gg-4(b). The card also states very prominently that it is only for U.S. citizens and asks the applicant to indicate whether he or she is a U.S. citizen in the first

box of the form. The applicant then must separately swear or affirm U.S. citizenship when signing the form. The Federal Form can be mailed to the appropriate election official or entrusted to a sponsor of a voter registration drive for delivery to the election official.[3]

During debate over the NVRA, some in Congress objected that postcard registration and other provisions facilitating easier registration would open the door to fraud. Congress considered those objections and modeled each of the provisions of the NVRA after registration practices that had been proven to be sound, effective, and well tested in the states. Congress also included additional safeguards, including a new criminal offense that severely punished voter registration fraud, 42 U.S.C. § 1973gg-10, and requirements that states establish procedures to maintain the accuracy of their voter registration rolls, 42 U.S.C. §1973gg-6.

For some Members of Congress those protections were still insufficient to protect against the possibility that a non-citizen might register to vote. Members in both Houses proposed amendments that would expressly allow states to require that an individual provide additional

[3] The NVRA's provisions related to the Federal Form are similar to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. 1973ff *et seq.*, which permits men and women in the military serving overseas to register to vote with a postcard application. Since implementing the law at issue here (Proposition 200), Arizona has treated UOCAVA forms from overseas military the same as NVRA postcards and rejected them when they do not include the required documentary proof of citizenship.

documentation of his or her citizenship before being allowed to register. But those efforts were defeated in the House and in the Senate precisely *because* they made registration too difficult and thus undermined the central purpose of the NVRA. *See Gonzalez v. Arizona ("Gonzalez III")*, 677 F.3d 383, 403 n.29 (9th Cir. 2012) (explaining that the Conference Report indicates "Congress rejected an amendment to the NVRA which would have provided that 'nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration' because it was not 'consistent with the purposes of; the NVRA and 'could effectively eliminate or seriously interfere with the mail registration program of the Act.'") (*quoting* H.R.Rep. No. 103–66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148).

The Arizona law at issue here, A.R.S. § 16-166(F), imposes just the type of citizenship documentation requirements discussed and rejected by Congress. Pursuant to Proposition 200, all voter registration forms, including the Federal Form, must be accompanied by proof of citizenship. Arizona residents who secured driver's licenses after October 1, 1996, and were U.S. citizens at the time they obtained their licenses, can provide that driver's license number to satisfy the Arizona law. But for the many citizens who have a driver's license issued before October 1, 1996 (such as those over age

32), do not have a current Arizona license (such as students, the disabled, the elderly, and new state residents), or who, unbeknownst to them, have a license with a database code of "Foreign" because it was issued before they became naturalized citizens, compliance is far more complicated. These citizens must include with their registration—which otherwise can be a stand-alone postcard—a copy of their U.S. birth certificate or passport, or must travel to the County Recorder's office to present their naturalization papers. Numerous methods of "proof" of citizenship listed in the Proposition 200 statute—tribal identification, naturalization certificate number, out of state driver's license—either do not exist or do not establish citizenship, and thus cannot be used to fulfill the documentation requirements.

Because the burdens these requirements place on registration flatly contradicted the NVRA, Respondents challenged this and other parts of Proposition 200 in 2006. The district court denied Respondents a preliminary injunction, and in the Ninth Circuit's review of that decision, it found, briefly, that the language of the NVRA did not prohibit Arizona's proof of citizenship requirements. *Gonzalez v. Arizona ("Gonzalez I")*, 485 F.3d 1041, 1050–51 (9th Cir. 2007). The case went back before the district court on the merits, and the district court granted summary judgment to Arizona on the NVRA issue based entirely on the Ninth Circuit's finding of

law. Dkt. 330 (Order Granting Summary Judgment) at 2–3. After trial on the remaining issues, a new panel of the Ninth Circuit took up the entire case and found the earlier decision regarding the NVRA to be "clear error." This panel, and later the Ninth Circuit en banc, held that Arizona's requirements are preempted by the NVRA. *Gonzalez v. Arizona ("Gonzalez II")*, 624 F.3d 1162, 1188 (9th Cir. 2010), *Gonzalez III*, 677 F.3d at 404. Following the en banc decision, Arizona asked the Ninth Circuit to stay its own mandate. The Ninth Circuit properly refused, as it is unnecessary and unlikely that this Court will take the case, and because Arizona failed to demonstrate the necessary irreparable harm. Order Denying Stay at 7, 8.

Argument

The standard for granting a stay is well-established. There must be a 1) a reasonable probability that at least four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will conclude the decision below was erroneous; (3) a demonstration that irreparable harm is likely to result absent a stay; and (4) a finding that the relative harms to the applicant and respondent, as well as to the public at large, weigh in favor of the applicant. *Rostker*, 448 U.S. at 1308. The standard is far from satisfied here.

A. It Is Unlikely This Court Will Grant Certiorari or Reverse the Ninth Circuit's en Banc Judgment.

Arizona failed to show that the Ninth Circuit's mandate should be stayed in that court pending the State's anticipated petition for certiorari, and it likewise fails to make the required showing in this Court. *See Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers) ("Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal . . . ."). There simply is no "reasonable probability" this Court would grant certiorari, and even if it did, there is not a "significant possibility of reversal." *Barefoot*, 463 U.S. at 895-96 (citation and quotations omitted).

Arizona's stay application shows that its anticipated certiorari petition lacks "compelling reasons" for the Court to consider whether the Ninth Circuit wrongly determined that the NVRA, and specifically the provision establishing the Federal Form, preempts Proposition 200's registration provision. *See* S. Ct. R. 10. First, the lack of any circuit court of appeal decision that conflicts with the Ninth Circuit's decision in this case weighs against a grant of certiorari. *Id.*; Order Denying Stay at 7 ("we are not aware of any conflict between our decision and the decision of other circuits").

Moreover, the State has not argued that the NVRA preemption issue is an important, unsettled question of federal law, which also makes certiorari

less likely. *See* S. Ct. R. 10(c). And although two other states have passed laws similar to Arizona's, the State has not cited to any cases in which a court considered the narrow issue addressed by the Ninth Circuit here. Even if the laws of these states are eventually contested, there is no need for an immediate definitive interpretation of this NVRA provision, nor is there any reason to believe any court considering the challenge would decide the preemption issue differently. The Ninth Circuit's decision is well reasoned and commanded the en banc panel. Arizona's contention that this Court must resolve an issue on which there has been no conflict among lower courts is premature at best.

Further, Arizona's argument that the Ninth Circuit's decision is erroneous and conflicts with relevant decisions of this Court lacks merit. *Id.* The Ninth Circuit's en banc decision was not closely divided; eight of the ten judges on the panel found that the NVRA provision requiring states to "accept and use" the Federal Form preempted Proposition 200's additional registration requirements in instances where the applicant submitted the Federal Form to register to vote. In doing so, the Court carefully analyzed the Elections Clause and this Court's related jurisprudence, focusing primarily on cases in which this Court decided issues relating to Election

Clause preemption., *Ex Parte Siebold,* 100 U.S. 371 (1879) and *Foster v. Love,* 522 U.S. 67 (1997).

In applying *Love* and *Siebold* to the NVRA, the Ninth Circuit correctly determined that Proposition 200's registration requirements directly conflict with the NVRA. *Gonzales III*, 677 F.3d at 398. Primarily, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it was not supplemented with additional documentation. *Id.* at 400. Arizona's rejection of the Federal Form due to lack of additional documentation is also incompatible with the NVRA's delegation of authority to the EAC. *Id.* at 400. Indeed, it undermines the very purpose of the Act, which was to "streamline[e] the registration process." *Id.* at 401–02 (citing cases). Unable to establish any conflict with Supreme Court precedent, Arizona's contentions amount to nothing more than an argument that the Ninth Circuit misapplied "a properly stated rule of law," an alleged error for which "a writ of certiorari is rarely granted." Sup. Ct. R. 10.

Similarly, the State's argument that the Ninth Circuit's decision frustrates enforcement of the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301 to 15545, (or any other law and regulation with respect to voter verification) is decidedly wrong. HAVA's drafters anticipated that the

statute might intersect with other related laws. The State simply cannot avoid the HAVA's express language providing that HAVA does not "supersede, restrict or limit the application of NVRA." *Gonzales III*, 677 F.3d at 402 (quotations omitted) (citing 42 U.S.C. § 15545(a)). To the extent Arizona suggests that HAVA reconsidered or superseded Congress's decision to allow a voter to register with the Federal Form without documentation of citizenship, the express language of the Act provides otherwise. Thus, review or reversal on these grounds is highly unlikely.

In sum, the State has failed to show that there is a reasonable probability that this Court will grant its anticipated petition for certiorari, nor has it shown that there is a significant probability of reversal should the petition be granted. As such, the State's stay application must be denied.

B. Arizona Establishes No Actual or Imminent Harm from the Enforcement of the NVRA.

Even were it likely that this Court would reverse the Ninth Circuit's en banc decision, a stay may only issue if the applicant can make a showing of irreparable harm. Arizona's claim of irreparable harm is unsupported by evidence and flies in the face of over two decades of common practice across the country.

Preserving the integrity of the electoral process is one of the stated purposes of the NVRA, and by all indications it has succeeded in fulfilling

that purpose. *Gonzalez III*, 677 F.3d at 402 & n.28 (citing 42 U.S.C. § 1973gg(b)(3)). The Federal Form has been used to register millions of voters nationwide over two decades without the alleged voter fraud problem its detractors feared ever coming to pass. Although Arizona notes that it also has "a compelling interest in preserving the integrity of its election process," that assertion begs the question whether Arizona has provided any evidence that use of the Federal Form in the upcoming election will cause any actual, imminent harm to the integrity of the process. *See* App. to Stay Mandate, at 24 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal citation omitted)). Arizona has presented no such evidence, and twenty years of experience demonstrates that no such threat exists.

The EAC is statutorily required to report on the impact of the NVRA every two years and, in the two decades since enactment of the NVRA, it has not identified any election related fraud associated with the Federal Form. In addition, there is not single reported case in any state or federal court—in Arizona or anywhere else—where an election was alleged to be compromised by non-citizens improperly registering and voting under the Act. As the Ninth Circuit observed below, the NVRA contains numerous safeguards against fraud. *Id.* (citing various provisions of 42 U.S.C. § 1973gg). *See also,* U.S. Election Assistance Commission, *The Impact of the*

National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010, A Report to the 112th Congress, June 30, 2011 ("ECA Report 2009-2010") (most recent periodic EAC report describing state-by-state registration and measures to maintain accuracy of voter rolls, and reporting no cases of fraud).

Against the empirical record of secure use of the Federal Form for twenty years, the State of Arizona would have the Court believe that it battles a wave of non-citizens attempting to register to vote with Proposition 200 as the State's only weapon. Yet the State cites no case in which it successfully prosecuted a non-citizen for fraudulently registering to vote (regardless of form of registration), much less for actually voting. Arizona merely cites (at 25-26) the same evidence that the Ninth Circuit reviewed in concluding that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona." Order Denying Stay at 8.[4]

First, the State cites testimony from Maricopa County Elections Director Karen Osborne and county recorders across the state that some non-citizens registered to vote fraudulently, but the record demonstrates that the registrations were not fraudulent – rather the applicants misunderstood their

eligibility to register to vote. In the matters referred by the Maricopa County Recorder to the county attorney seven years ago, no more than four of the alleged non-citizens actually voted. Additionally, the Pima County matters relied upon by Arizona involved nothing more than attempted registration by less than a handful of alleged non-citizens. Of the prospective jurors who claimed not to be citizens (thereby avoiding jury duty) and had their registrations canceled, it is unknown whether any of them were actually non-citizens or if they voted. These scattered instances fail to establish any pattern of actual voter fraud in Arizona, much less that use of the Federal Form has any relationship to voter fraud in the state.

Presumably if there had been a significant problem with voter fraud before Proposition 200, the State would have pursued criminal charges against more than the five Arizonans so far prosecuted for illegal non-citizen voter registration. Arizona nonetheless uses these few incidents to support its wholly unrealistic assumption that droves of non-citizens want to commit the crime of voter fraud and are using the Federal Form to accomplish that objective. Not only is this assumption unsupported by any evidence, the District Court found that the documentation requirements of Prop 200 had

[4] While the majority in *Gonzalez III* recognized Arizona's *concern* about fraudulent voter registration, it found that that Arizona had failed to actually show that any such fraud ever occurred.

their greatest negative effect on individuals who were born in the United States. *See* Dkt. 1041 (District Court Order; Findings of Fact and Conclusions of Law) at 13-14.

There are some 3.5 million registered voters in Arizona. ECA Report 2009-2010, at 13. In a voting population of that size, isolated instances of registration irregularities—not even alleged to be *intentional* voter misconduct—over a period of years do not establish any imminent harm to the integrity of the upcoming state and federal elections in Arizona. A showing of irreparable and imminent harm sufficient to justify a stay of mandate cannot be purely speculative. *See, e.g., White v. Florida*, 458 U.S. 1301, 1302 (1982) (denying stay because, although applicant "establishe[d] that he may suffer irreparable harm at some point in the future, there [was] no indication that the harm [was] imminent"). Therefore, Arizona has failed outright to establish any irreparable harm that would justify a stay. *See Barefoot*, 463 U.S. at 895-96; *Rostker*, 448 U.S. at 1308.

Further, Arizona's alleged interest in continuing to use Proposition 200 to deny thousands of registration applications does not trump the public's and Respondents' interest in respecting the will of the people who, through their representatives, enacted the NVRA two decades ago. "Federal courts . . . have the power to enjoin state actions, in part, because those

actions sometimes offend federal law provisions, which, like state statutes, are themselves 'enactment[s] of its people or their representatives.'" *Indep. Living Ctr. of S. Calif., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) *vacated and remanded sub nom. Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204 (2012) (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997)). Arizona's request for a stay effectively asks the Court to elevate Proposition 200 above a duly enacted and longstanding federal law. App. to Stay Mandate, at 24 (citing dicta in *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., Circuit Justice)). Arizona's mere concern about voter fraud, no matter how sincerely held, lacks any factual foundation, and is therefore not a basis for thwarting the national will duly enacted into law.

To the extent that prohibiting Arizona from enforcing a state law that violates federal law constitutes an "irreparable harm," the Court must balance the equities. *See Coal. for Econ. Equit.*, 122 F.3d at 719 (balancing equities and denying stay of mandate allowing state law to take effect); *cf. Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24–26 (2008) (in considering the "extraordinary remedy" of a preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief") (citation

and internal quotation omitted). As detailed below, the ongoing deprivation of the fundamental right to vote of thousands of voters is an actual and imminent injury that constitutes a far greater harm than Arizona's speculation about alleged voter fraud.

C. Actual Harm to the Fundamental Right to Vote of Thousands of Voters Will Result if a Stay Issues.

Even if Arizona had offered more than speculation in support of its claim that it will be tangibly harmed by issuance of the mandate, "[c]ountering the State's compelling interest in preventing voter fraud is the plaintiffs' strong interest in exercising the 'fundamental political right' to vote." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). The balance of the equities clearly tips against Arizona, further supporting denial of the stay.

If this Court stays the mandate of the Ninth Circuit, Arizona will reject voter registration applications submitted on the Federal Form that fail to comply with its additional documentation requirements. U.S. citizens attempting to register using the Federal Form, but lacking easy access to (or information about) documents required by Arizona's law will be denied registration, and thus the right to vote. *See Gonzalez II*, 624 F.3d at 1182 ("It is indisputable that by requiring documentary proof of citizenship, Proposition 200 creates an additional state hurdle to registration.")

The district court found that, in the two and a half years after Proposition 200 went into effect, Arizona counties rejected over 31,500 applications for failure to provide proof of citizenship. *See* Dkt. 1041 (Findings of Fact) at 13.[5] And it is easy to see why.

First, regardless whether one possesses the required documents, Arizona's requirements combined with the Federal Form are confusing, opaque, and defeat the very purpose of postcard registration. One of the reasons the Ninth Circuit found that the NVRA preempts the state's requirement to provide documentary proof of citizenship was that such requirements contradict the NVRA's goal of streamlining the registration process by making postcard registration difficult, if not impossible:

> While the EAC chose to design the Federal Form as a postcard, which could be easily filled out and mailed on its own, Proposition 200's registration provision makes the Federal Form much more difficult to use. For example, nothing on the face of the Federal Form or in the state-specific instructions for Arizona indicates that some applicants may need to provide a full social security number, a tribal identification number, or an alien registration number, as Proposition 200 requires. Nor does the Federal Form instruct that additional documents, such as birth certificates or passports, must be provided by some applicants. Even if an applicant were aware of Arizona's requirement to provide documentary proof of citizenship with the Federal Form, the applicant would have to locate the

[5] This number presumably includes both state and Federal Forms, but, as described below, the Federal Form lacks instructions on Arizona's requirements that appear on the state form and is thus presumably more likely to be rejected. No separate evidence on the Federal Form was presented at trial because the District Court disposed of the NVRA claim on summary judgment, basing its decision on statements in *Gonzalez I*, 485 F.3d at 1050–51. That decision, based on preliminary injunction briefing alone, was deemed "clear error" and rejected by the Ninth Circuit in *Gonzalez II*, 624 F.3d at 1188.

> required document, photocopy it, and enclose the photocopy with the form in an envelope for mailing.

Gonzalez III, 677 F.3d at 401. A necessary consequence of imposing these obstacles is that many Federal Forms are rejected, including many from citizens eligible to vote and who could comply with the requirements, but who were simply unaware of them.

Second, there are numerous legitimate reasons why eligible voters may be without a recent Arizona driver's license and easy access (or any access) to the required substitute documents. For instance, students may have no need to drive, and would likely leave their birth certificates with family; military servicemen and women face similar difficulty. Recently naturalized citizens may have obtained their driver's licenses before they were citizens (and thus have driver's licenses coded as "Foreign" in the Motor Vehicles Division database). The elderly who no longer drive may lack, or simply have lost, birth certificates. Those who move to Arizona just before the registration deadline may not have found the time to obtain a driver's license yet.[6] Disabled individuals, who often lack driver's licenses, may have real difficulty in locating and copying the documents necessary to

[6] Several such cases were brought to the attention of the Ninth Circuit after *Gonzalez II*, which was issued just a week before the 2010 general election. Those native-born U.S. citizens had registered to vote in late September immediately after moving from out of state, but had had their registrations rejected for failure to provide proof of citizenship. Although they cast provisional ballots, their ballots were never counted. *See* Dkts. 105-1, 105-2, 105-3 and 114.

register. Thousands of citizens in Arizona fall into one or another of the above classes of voters that have benefited from the ease of registration provided by the NVRA.

Also lost are registrations facilitated by community organizations during voter registration drives when otherwise eligible voters must be turned away because volunteers do not have a copy machine, and the potential voters are not carrying their birth certificates or naturalization papers on their persons. In fact, figures from Maricopa County were submitted at trial showing a precipitous decline in registrations from voter registration drives—from 25,000 and 47,000 registrations in the two non-presidential years preceding Proposition 200, to 9,000 and 19,000 in the two years following.

While for some citizens these barriers may be surmountable with time and effort, Congress created streamlined registration through the NVRA to remove just these types of obstacles and protect the voting rights of all citizens. Congress recognized that, in busy everyday lives, such seemingly minor obstacles effectively prevent millions from successfully registering to vote, and intentionally designed a system without them—thus demonstrating their clear view of the equities in this matter. *See* Order Denying Stay at 9 ("Congress's determination that streamlined registration procedures are vital

to ensure that voters are not frustrated in their ability to vote weighs heavily in favor of denying a stay." (citing *Gonzalez III*, ---F.3d---, 2012 WL 1293149, at *10)).

These entirely predictable and avoidable injuries far outweigh any unsubstantiated threat of voter fraud, and thus weigh heavily in favor of rejecting its application for stay. *See Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002) (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, to the extent that Arizona is concerned about changes to its registration procedures, 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 Conn.,* 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 (9th Cir. 2008) (same); *Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.") (citation and quotation omitted).

The balance of equities here tips sharply against Arizona. For this and the other reasons discussed above, the stay should be denied.

Conclusion

For the reasons explained above, Gonzalez Respondents ask that Arizona's request to stay the mandate of the Ninth Circuit be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Original and two copies of Gonzalez Respondents' Opposition to Arizona's Application to Stay Mandate before Honorable Anthony M. Kennedy were filed on June 18, 2012 with:

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I certify that, pursuant to Rule 29, one copy of Respondents' Brief in Opposition to Arizona's Application to Stay Mandate before Honorable 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, Karl J. Sandstrom, declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of June, 2012.