

No. 06-16521, 06-16702, and 06-16706

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

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

v.

STATE OF ARIZONA; et al.,
Defendants,

and

YES ON PROPOSITION 200,
Defendant-Intervenor-Appellant.

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

and

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

v.

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

and

YES ON PROPOSIITON 200,
Defendant-Intervenor,

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

No. CV-06-01268 PHX ROS

DEFENDANTS'/APPELLEES' ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Plaintiffs' Statement of Jurisdiction accurately describes the Court's jurisdiction in this case.

ISSUES PRESENTED FOR REVIEW

Did the district court abuse its discretion when it denied a preliminary injunction that would have prevented Arizona's election officials from continuing to require that people present satisfactory evidence of citizenship when registering to vote and, specifically,

1. Did the district court err in concluding that Plaintiffs were not likely to prevail on their claims that Arizona's law requiring people to provide evidence of citizenship when registering to vote creates a poll tax that violates the Twenty-fourth Amendment of the United States Constitution?
2. Did the district court err in concluding that Plaintiffs were not likely to prevail on their claims that Arizona's law requiring people to provide evidence of citizenship unduly burdens their right to vote?
3. Did the district court err in rejecting Plaintiffs' claim that Proposition 200 discriminates against naturalized citizens when the law applies equally to all voter registration applicants?
4. Did the district court err in concluding that Plaintiffs were not likely to prevail on their claim that the National Voter Registration Act of 1993 ("NVRA") preempts States from requiring people to provide evidence of citizenship when registering to vote?

5. Did the district court abuse its discretion in concluding that the balance of harms favored denying the preliminary injunction in light of the proximity to Arizona's statewide elections, the training and education the election officials had conducted regarding the voting requirements, and the potential for voter confusion if the procedures were changed while Plaintiffs' lawsuit is pending?

STATEMENT OF THE CASE

In May and June of 2006, three lawsuits were filed challenging the election provisions of Proposition 200, a citizen's initiative approved by Arizona voters in 2004. (CR 1, 20-21, 33, 142.) Proposition 200 established two new requirements that affect voting in Arizona. It required that people provide evidence of citizenship when registering to vote and identification when they vote at the polls. Two groups of Plaintiffs who are Appellants in this case¹ challenged both identification at the polls and evidence of citizenship. The third group of Plaintiffs, the Navajo Nation and a member of the Navajo Nation ("Navajo Plaintiffs"), challenged only identification at the polls. All three actions were consolidated below. (CR 33, 142.)

The Gonzalez and ITCA Plaintiffs initially sought a temporary restraining order to prohibit Arizona election officials from requiring evidence of citizenship from people completing the federal voter registration form developed by the

¹ These two groups of Plaintiffs are referred to as the Gonzalez Plaintiffs and the Intertribal Council of Arizona or "ITCA" Plaintiffs.

Election Assistance Commission ("EAC"). (CR 3, 13, 21.) The district court denied this relief on June 19, 2006, concluding that federal law did not prohibit States from requiring evidence of citizenship from people registering to vote. (CR 68.)

When they filed their complaint in May, the Gonzalez Plaintiffs had also moved for a preliminary injunction to prevent Arizona election officials from requiring identification from voters at the polls and evidence of citizenship from people registering to vote. (CR 7.) They challenged these State laws based on a variety of legal theories, including arguments that these laws created poll taxes, violated equal protection, and unduly burdened the right to vote. *Id.* In its June 19 decision denying the temporary restraining order, the district court set a briefing schedule that included a two-day preliminary injunction hearing beginning on July 19, 2006. (CR 68 at 14.) Plaintiffs asked for an extension to permit limited discovery (CR82), and the district court subsequently modified the schedule so the preliminary injunction hearing began on August 30, 2006 (CR 101.). Following a two-day preliminary injunction hearing, the court denied the preliminary injunction on September 11, 2006, the day before Arizona's statewide primary election. (CR 183.) The Gonzalez and ITCA Plaintiffs timely appealed. (CR 184, 189.)

Plaintiffs filed a motion seeking an injunction pending appeal on October 8, and this Court granted that motion. The State and four counties subsequently

appealed that ruling to the United States Supreme Court. While the matter was pending before the Supreme Court, the district court issued findings of fact and conclusions of law supporting the denial of the preliminary injunction. (CR 219.) The Supreme Court subsequently vacated the Ninth Circuit order enjoining implementation of Proposition 200 while the appeal of the denial of the preliminary injunction is pending. *Purcell v. Gonzalez*, No. 06A375 (06-532) & 06A379 (06-533), 1275 S.Ct. 5, 2006 WL 2988365 (U.S. Oct. 20, 2006).

Although Plaintiffs initially appealed the district court's order denying the preliminary injunction regarding identification at the polls and evidence of citizenship when registering to vote, the Plaintiffs now limit this appeal to the evidence of citizenship requirement when registering to vote. (OB at 5.)

STATEMENT OF FACTS

In 2004, Arizona voters approved Proposition 200, which, among other things, amended Arizona's election laws to require (1) evidence of citizenship from people registering to vote, and (2) identification from voters at the polls. (ER 51.)

The voter registration provisions of Proposition 200 amended Arizona Revised Statutes (A.R.S.) § 16-166 to instruct the recorders of Arizona's fifteen counties to refuse an application for voter registration that does not include

satisfactory evidence of U.S. citizenship. Satisfactory evidence of U.S. citizenship includes:

- 1) the number of an Arizona driver's or nonoperating identification license issued after October 1, 1996;²
- 2) the number of a driver's or nonoperating identification license issued in another state, if it indicates that the applicant provided satisfactory proof of U.S. citizenship;
- 3) a copy of a birth certificate;
- 4) U.S. naturalization documents or the number of an applicant's certificate of naturalization; and
- 5) a Bureau of Indian Affairs card number, Tribal Treaty card number, or enrollment number.

A.R.S. § 16-166(F).

In most circumstances, the document itself need not be provided with the voter registration form—the number is sufficient. For example, only a driver's license number is needed. A.R.S. § 16-166 (F)(1). In addition, only a number on a certificate of naturalization is necessary. *Id.* at (F)(4). Under Proposition 200,

² Since 2000, the Arizona Motor Vehicle Division ("MVD") has assigned a specific designation to licenses issued to non-citizens of the United States. A person may not use a license with this designation to register to vote. (ER 216 at 3.)

voters who move from one county to another within the state or who register for the first time must present proof of citizenship; all other registered voters are grandfathered in. A.R.S. § 16-166(G).

Because Arizona is subject to Section 5 of the Voting Rights Act, Arizona could not implement Proposition 200 until the Department of Justice ("DOJ") precleared it. 42 U.S.C. § 1973c. On January 24, 2005, DOJ precleared Proposition 200 and Arizona began implementing these new laws after that date. The Secretary also subsequently revised the Arizona Voter Registration Form (the "state form") to incorporate Proposition 200's requirements. (Supp. ER 1, Kanefield aff. ¶ 14, 2, Osborne aff. ¶6.)

A. Voter Registration in Arizona.

In Arizona, individuals may register to vote using the "federal form" developed by the EAC or a state form. (Supp. ER 1, Kanefield Aff. ¶ 2). In addition, a person may register to vote by mail, in-person or on-line. (ER 4 at 14.) Regardless of which method a person chooses to use, anyone registering to vote must provide evidence of citizenship, as required by A.R.S. § 16-166.

Applicants who attempt to register without providing satisfactory evidence of citizenship do not forfeit the opportunity to register at a later time. Immediately after DOJ precleared Proposition 200, the Secretary of State's office sent a letter to county election officials recommending that applicants who do not provide proof

of citizenship be notified of the new requirement and provided with information to comply with State law using procedures provided in A.R.S. § 16-134(B). (Supp. ER 1, Kanefield Aff. ¶ 13.)

In Maricopa County, which accounts for more than fifty-eight percent of all registered voters in Arizona,³ when a registration is rejected for failure to provide proof of citizenship, the county recorder immediately notifies the applicant by letter that the application has been refused. (ER 30 at 3, ¶ 7.) The recorder provides the applicant with information necessary to comply with Proposition 200, and supplies a new voter registration form in a business reply envelope. (*Id.*)

B. Arizona's Experience with Requiring Evidence of Citizenship.

As the district court noted, the vast majority of Arizona citizens already have the information needed to satisfy the registration requirements of Proposition 200. (CR 219 at 9.) In Maricopa County, an overwhelming number of applications—ninety-one percent in 2006—provide the number of a driver's or nonoperating identification license as the means of establishing citizenship. (ER 30 at 4, ¶ 10.) Even the expert for the Plaintiffs estimated that approximately ninety-eight percent of Arizonans have all that they need to comply.⁴ (ER 21 at 2.) Of those who do

³ ER 30 at 4, ¶ 9.

⁴ The district court indicated that it had "reservations regarding the reliability of these statistics," but noted that "no other reliable evidence was presented regarding the number, if any, of eligible individuals that wish to register to vote and must obtain new forms of identification." (CR 219 at 9.)