

Enhanced Requirements for Registering and Voting in Arizona

González v. Arizona (2:06-cv-1268), Inter Tribal Council of Arizona v. Brewer (3:06-cv-1362), and Navajo Nation v. Brewer (3:06-cv-1575) (Roslyn O. Silver, D. Ariz.)

Four months before Arizona’s 2006 primary election, a federal complaint challenged proposition 200, a 2004 initiative that enhanced requirements for proof of citizenship for voter registration and proof of identity and residence for voting. The district court acted quickly on the plaintiffs’ motions for a temporary restraining order but denied injunctive relief. In 2012, the court of appeals determined en banc that the proof of citizenship procedure for registration is superseded by the National Voter Registration Act but the identification requirement for voting is not. The Supreme Court agreed that the required federal registration form did not permit additional evidence of citizenship.

Subject: Registration procedures. *Topics:* Citizenship; voter identification; registration procedures; National Voter Registration Act; interlocutory appeal; recusal; section 5 preclearance; primary election.

On May 9, 2006, four months before Arizona’s primary election, five citizens and five organizations filed a federal challenge in the District of Arizona’s Phoenix courthouse to Arizona’s 2004 revision of its voter-registration-and-identification law resulting from the passage of proposition 200.¹ Proposition 200’s revision received preclearance from the Justice Department pursuant to section 5 of the Voting Rights Act on May 6, 2005.²

The plaintiffs objected to the procedural specifics of proof of citizenship for registration and proof of identity and residence for voting.³ With their

1. Complaint, *González v. Arizona*, No. 2:06-cv-1268 (D. Ariz. May 9, 2006), D.E. 1 [hereinafter *González Complaint*]; *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006); *González v. Arizona*, 435 F. Supp. 2d 997, 999 (D. Ariz. 2006); see *Lawsuit Questions Legality of ID Rules*, Ariz. Republic, May 10, 2006, at B1; Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065, 1087 (2007) [hereinafter *Judicial Intervention*]; see also Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 Wm. & Mary Bill Rts. J. 453, 491 (2008) [hereinafter *Reform*] (describing the proposition as “[p]robably the most onerous recent registration requirement”).

2. *Purcell*, 549 U.S. at 3; see Pub. L. No. 89-110, § 5 (1965), 79 Stat. 437, 439, as amended, 52 U.S.C. § 10304 (requiring preclearance of changes to voting procedures in jurisdictions with a certified history of discrimination).

On June 25, 2013, the Supreme Court declined to hold section 5 unconstitutional, but the Court did hold unconstitutional the criteria for which jurisdictions require section 5 preclearance. *Shelby County v. Holder*, 570 U.S. 529 (2013).

3. *González Complaint*, *supra* note 1.

complaint, the plaintiffs filed an application for a temporary restraining order⁴ and a motion for a preliminary injunction.⁵

The court originally assigned the case to Judge Neil V. Wake, but he recused himself, so the case was randomly reassigned to Judge Roslyn O. Silver.⁶ At a hearing in court on May 12, Judge Silver declined to issue a temporary restraining order and set another hearing for May 17.⁷ On May 16, the plaintiffs filed a second temporary-restraining-order motion.⁸ On May 17, Judge Silver set argument on the second motion for June 9.⁹ On June 19, she denied immediate injunctive relief, holding that Arizona's new proof of citizenship requirements did not violate the National Voter Registration Act (NVRA):¹⁰ "there is no indication in the language of the NVRA itself that states are prohibited from requiring additional information, such as proof-of-citizenship, when processing voter registration forms."¹¹

On May 24, six organizations and a member of Arizona's house of representatives filed a similar complaint in the Prescott courthouse.¹² Granting the plaintiffs' motion,¹³ Judge Silver consolidated this action with the first one on May 31.¹⁴ On June 20, the Navajo Nation and one of its members filed a third similar complaint in Prescott.¹⁵ On August 4, Judge Silver consolidated this case with the other two¹⁶ on Arizona's motion.¹⁷

4. Temporary-Restraining-Order Application, *González*, No. 2:06-cv-1268 (D. Ariz. May 9, 2006), D.E. 3.

5. Preliminary-Injunction Motion, *id.* (May 9, 2006), D.E. 7.

6. Reassignment Order, *id.* (May 11, 2006), D.E. 10.

For this report, Tim Reagan interviewed Judge Silver and her law clerk Mike Newman by telephone on September 11, 2012.

7. Minutes, *González*, No. 2:06-cv-1268 (D. Ariz. May 12, 2006), D.E. 16.

8. Temporary-Restraining-Order Motion, *id.* (May 16, 2006), D.E. 13.

9. Minutes, *id.* (May 17, 2006), D.E. 26; *see* Minutes, *id.* (June 9, 2006), D.E. 64; *see also* *Voter Sign-Up Rules Assailed*, Ariz. Republic, June 10, 2006, at B9.

10. Pub. L. No. 103-31, 107 Stat. 77 (1993), *as amended*, 52 U.S.C. §§ 20501–20511; *see* Robert Timothy Reagan, *Motor Voter: The National Voter Registration Act* (Federal Judicial Center 2014).

11. *González v. Arizona*, 435 F. Supp. 2d 997, 1001 (D. Ariz. 2006); *see Request to Halt ID Rules Rejected*, Ariz. Republic, June 20, 2006, at B1; Tokaji, *Reform*, *supra* note 1, at 492 (determining that "the district court's analysis is in error").

12. Complaint, *Inter Tribal Council of Ariz. v. Brewer*, No. 3:06-cv-1362 (D. Ariz. May 24, 2006), D.E. 1; *see Another Group Challenging Prop. 200 Voting Provisions*, Ariz. Republic, May 25, 2006, at B3.

13. Consolidation Motion, *Inter Tribal Council of Ariz.*, No. 3:06-cv-1362 (D. Ariz. May 30, 2006), D.E. 4.

14. Consolidation Order, *González*, No. 2:06-cv-1268 (D. Ariz. June 1, 2006), D.E. 28; *González*, 435 F. Supp. 2d at 999 n.3.

15. Complaint, *Navajo Nation v. Brewer*, No. 3:06-cv-1575 (D. Ariz. June 20, 2006), D.E. 1.

16. Consolidation Order, *González*, No. 2:06-cv-1268 (D. Ariz. Aug. 4, 2006), D.E. 142, 2006 WL 2246365.

17. Consolidation Motion, *id.* (June 30, 2006), D.E. 92.

On September 11, Judge Silver declined to interfere with the next day's primary election and denied the plaintiffs a preliminary injunction.¹⁸ She issued findings of fact and conclusions of law on October 12.¹⁹ On interlocutory appeal, however, a motions panel of the court of appeals enjoined application of proposition 200 on October 5.²⁰ The Supreme Court vacated the injunction on October 20.²¹ In its per curiam opinion, the Supreme Court scolded the district court for not providing the court of appeals with findings of fact and conclusions of law more promptly: "These findings were important because resolution of legal questions in the Court of Appeals required evaluation of underlying factual issues."²²

Following a tradition in the Ninth Circuit, where district judges were encouraged to bring misunderstandings to the attention of appellate judges, Judge Silver wrote the Chief Justice in an effort to explain the difficulties of striking a balance between quick action and a complete record.²³

Although rulings by the Supreme Court and Judge Silver resulted in proposition 200's applying to the 2006 election, when Judge Silver offered to present identification at her polling place she was told that the poll workers would not be enforcing proposition 200 at that location.²⁴

On April 17, 2012, the court of appeals determined en banc that the proof-of-citizenship procedure for registration was superseded by the NVRA, but the identification requirement for voting was not inconsistent with federal law.²⁵

On June 17, 2013, the Supreme Court agreed that "the fairest reading of the statute is that a state-imposed requirement of evidence of citizenship not

18. Findings of Fact and Conclusions of Law, *id.* (Oct. 12, 2006), D.E. 219, 2006 WL 3627297; Order, *id.* (Sept. 11, 2006), D.E. 183; *see Tokaji, supra* note 1, at 1087.

19. Findings of Fact and Conclusions of Law, *supra* note 18; *see Tokaji, Judicial Intervention, supra* note 1, at 1087.

20. Docket Sheet, Nos. 06-16702 and 06-16706 (9th Cir. Oct. 5, 2006); Order, *id.* (Oct. 9, 2006), *filed as* Order, *González*, No. 2:06-cv-1268 (D. Ariz. Oct. 16, 2006), D.E. 221 (denying reconsideration); *see Tokaji, Judicial Intervention, supra* note 1, at 1087.

21. *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *see* Edward B. Foley, *The Future of Bush v. Gore?*, 68 Ohio St. L.J. 925, 995–96 (2007); Daniel P. Tokaji, *Election Law in a Nutshell* 163–64, 195 (2013); *see also* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 Stan. L. Rev. 1 (2007); Tokaji, *Judicial Intervention, supra* note 1, at 1067 ("an opinion that demonstrated a failure to think carefully through the appropriate role of the federal judiciary in election administration and threatens to distort equal protection analysis of claims in the area"); *id.* at 1088–91. *See generally* Stephen Vladeck, *The Shadow Docket* 204–09 (2023).

22. *Purcell*, 549 U.S. at 3; *see* Richard L. Hasen, *Reining in the Purcell Principle*, 43 Fla. State Univ. L. Rev. 427, 428 (2016) (observing that eight years later the Supreme Court decided emergency election cases without providing reasons); *see also id.* at 461 (extolling the virtues of issuing reasons "weeks or months after the Court issues an emergency order").

23. Interview with Hon. Roslyn O. Silver and her law clerk Mike Newman, Sept. 11, 2012.

24. *Id.*

25. *González v. Arizona*, 677 F.3d 383 (9th Cir. 2012); *see Court Strikes Down Part of Voter-ID Law*, *Ariz. Republic*, Apr. 18, 2012, at B1; *see* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 451–52, 454–55 (2015); Daniel P. Tokaji, *HAVA in Court: A Summary and Analysis of Litigation*, 12 Election L.J. 203, 211 (2013).

required by the Federal Form is inconsistent with the NVRA's mandate that States accept and use the Federal Form."²⁶ Arizona decided, therefore, to apply its enhanced registration requirements only to state and local elections.²⁷

26. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013) (quotation marks omitted); *see id.* at 19 (noting that "a State may request that the [Election Assistance Commission] alter the Federal Form to include information the State deems necessary to determine eligibility"); *see also* Robert Barnes, *Justices Reject Ariz. Law on Voting*, Wash. Post, June 18, 2013, at A1; Adam Liptak, *State Can't Ask Voters for Proof of Citizenship*, N.Y. Times, June 18, 2013, at A1.

27. *See Re Voter Registration*, Ariz. Att'y Gen. Op. No. I13-011 (Oct. 7, 2013); *Ballots Will Have Two-Track System*, N.Y. Times, Oct. 8, 2013, at A14; Cindy Carcamo, *New Voting Rules Planned*, L.A. Times, Oct. 8, 2013, at 2; Fernanda Santos & John Eligon, *2 States Plan 2-Tier System for Balloting*, N.Y. Times, Oct. 12, 2013, at A1 (reporting that Kansas and Arizona would adopt separate voter registrations for federal and state elections).