FILED

JUN 07 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs - Appellants,

v.

STATE OF ARIZONA; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director;

No. 08-17094

D.C. Nos. 2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

ORDER

KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder; KEN BENNETT,

Defendants - Appellees.

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL;

No. 08-17115

D.C. No. 2:06-cv-01268-ROS

PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs - Appellants,

v.

STATE OF ARIZONA; KEN BENNETT; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; PATTY HANSEN, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder;

CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants - Appellees.

Before: KOZINSKI, Chief Judge, PREGERSON, RYMER, GRABER, BERZON, RAWLINSON, CLIFTON, BYBEE, IKUTA, N.R. SMITH, and MURGUIA, Circuit Judges.[1]

The State of Arizona moves to stay the mandate for a period of 90 days pending the filing of its petition for certiorari. A party moving to stay the mandate "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).[2]

[1]Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion.

[2]Ninth Circuit Rule 41-1 provides that a stay "will not be granted as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1; *see also United States v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008).

In determining whether there is "good cause for a stay" under Rule 41(d)(2)(A), we apply the three-part test laid out in *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) (order) (citing Supreme Court cases vacating stays of the mandate pending certiorari where the courts of appeals failed to apply the three-part test required by *Barefoot*). 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." *Barefoot*, 463 U.S. at 895 (internal quotation marks omitted); *see also Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (holding that in order to show "good cause for a stay" under Rule 41(d)(2)(A), the applicant must show "(1) a reasonable probability that the Supreme Court will grant *certiorari*; (2) a reasonable possibility that at least five Justices would vote to reverse this Court's judgment; and (3) a likelihood of irreparable injury absent a stay"); *Doe v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005) (same); *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers) (same). 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. *See Wilson*, 122 F.3d at 719 (balancing the equities and determining that a stay would cause irreparable harm to the party opposing the stay); *see also Nara*, 494 F.3d at 1133; *Miller*, 418 F.3d at 951, 953; *Books*, 239 F.3d at 828–29.

We have held that "[o]rdinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay," and that the "matter is entrusted to the circuit court's sound discretion." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). A stay in this case, however, raises unusual factors, because it has the potential to affect the upcoming federal elections in Arizona. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam) (noting the importance and sensitivity of the election context in this very case). If Arizona files a petition for certiorari in the next 90 days, the stay will continue until the Supreme Court either denies certiorari or grants certiorari and resolves the case. *See* Fed R. App. P. 41(d)(2)(B). These actions will likely occur in close proximity to the November elections. In light of the potential effect of our decision on an upcoming election, we must undertake a more searching inquiry in exercising our discretion to grant or deny a stay.

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 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. *See Wilson*, 122 F.3d at 719 (considering similar factors); *see also Miller*, 418 F.3d at 952 (finding little probability of further review by the Supreme Court where the issue was one of first impression and there was no inter-circuit conflict).

Second, we consider the equities. On the one hand, Arizona has "demonstrated the clear possibility of irreparable injury to its citizens" if a stay is not granted because "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Wilson*, 122 F.3d at 719 (citing *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Moreover, Arizona "'has a compelling interest in preserving the integrity of its election process.'" *Purcell*, 549 U.S. at 4 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). If we deny the stay and the Supreme Court ultimately grants certiorari and reverses

our en banc decision, the effect of our denial will be that Arizona must register applicants who use the Federal Form, but who would otherwise be ineligible to register to vote under Proposition 200 because they do not have the required forms of identification. Arizona stresses its concern that applicants using the Federal Form may in fact be ineligible to vote and argues that the additional forms of identification required by Proposition 200 will prevent potential voter fraud. We note, however, 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. *See* 42 U.S.C. §§ 1973gg-3(c)(2)(C), 1973gg-7(b)(2); *Gonzalez v. Arizona*, ---F.3d---, No. 09-17094, 2012 WL 1293149, at *12 (9th Cir. Apr. 17, 2012).

On the other hand, "[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*, 549 U.S. at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). If the Supreme Court ultimately denies certiorari or grants certiorari and affirms, the effect of the stay will be that Arizona may reject the registration forms of applicants who are eligible to vote, and who would otherwise be able to register using the Federal Form, but do not possess the forms of identification required by Proposition 200. Such applicants may be

denied their fundamental political right to vote in the 2012 federal elections if the Supreme Court does not resolve the case by November. Applicants whose Federal Forms are rejected may be discouraged from registering to vote even if they have, or could obtain, the forms of identification required by Proposition 200. Even if the Court denies certiorari in time for the November elections, a decision to stay the mandate could itself "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Congress's determination that streamlined registration procedures are vital to ensure that voters are not frustrated in their ability to vote, *see Gonzalez*, ---F.3d---, 2012 WL 1293149, at *10, weighs heavily in favor of denying a stay. In light of these factors, including the public interest as determined by Congress, we deem the equities to weigh in favor of the appellants.

Accordingly, because Arizona has not demonstrated a reasonable probability that the Supreme Court will grant certiorari or a reasonable possibility that the Supreme Court would reverse, and because the equities do not weigh in favor of granting a stay, we conclude that Arizona has not made an adequate showing of "good cause" under Rule 41(d)(2)(A). We therefore exercise our discretion to deny the stay. As always, Arizona is free to renew its motion for a stay before the Supreme Court. *See* 28 U.S.C. § 2101(f); Sup. Ct. R. 23.

DENIED.

Chief Judge Kozinski and Judges Rawlinson and N.R. Smith voted to grant the stay.