No. 16-16865

In the United States Court of Appeals
For the Ninth Circuit

LESLIE FELDMAN, *et al.*,
Plaintiffs/Appellants,

and

BERNIE 2016, INC.,
Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,
Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,
Defendant-Intervenors/Appellees.

On Appeal from the United States District Court for the District of Arizona
Cause No. CV-16-01065-PHX-DLR

STATE AND COUNTY DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF

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Pursuant to this Court's November 21, 2016 Order (Doc. 43), Defendants/Appellees the Arizona Secretary of State's Office, Secretary of State Michele Reagan, and Attorney General Mark Brnovich (collectively, the "State Defendants") and the Maricopa County Board of Supervisors, Denny Barney, Steve Chucri, Andy Kunasek, Clint Hickman, Steve Gallardo, the Maricopa County Recorder and Elections Department, Maricopa County Recorder Helen Purcell, and Maricopa County Elections Director Karen Osborne (collectively, the "County Defendants") submit this Supplemental Brief. Because the preliminary injunction appeal is moot and a further appeal, if any, will arise on a different record, this Court should vacate the Order to rehear this case en banc (Doc. 34) and should remand to the district court.

INTRODUCTION

The Democratic National Committee, the Democratic Senatorial Campaign Committee, the Arizona Democratic Party, Hillary for America, Kirkpatrick for Senate, individual voters, and Intervenor Bernie 2016, Inc. (collectively, "Plaintiffs") sought "emergency" relief from the four-decades-old practice of not counting votes cast out of precinct ("OOP"). Plaintiffs asked the district court to order county elections officials (many of whom are not parties to this case) to count all races for which the voter was eligible to vote in the 2016 general election. Because Plaintiffs' requested relief is inextricably linked to the completed 2016 election, this appeal should be dismissed as moot and remanded to the district court for the development of a full record and a ruling on the merits.

FACTUAL AND PROCEDURAL BACKROUND

On June 10, 2016, the Plaintiffs moved for a preliminary injunction of various Arizona election laws and practices, including Arizona's longstanding practice of not counting provisional ballots cast in a precinct other than the one to which the voter is assigned. (ER4076-77 (the "OOP PI Motion")).[1] Arizona law has required that in-person election day voters cast a ballot in their assigned precinct since at least 1970. (ER0002); A.R.S. § 16-122.

The purpose of Arizona's law is straightforward: the offices and issues for which a voter is entitled to vote are tied to the voter's residential address. A.R.S. §§ 16-122, -584; (ER2382 at 7-25; ER2201-02, ¶¶ 7-8). Most Arizona counties use a precinct-based model of voting. (ER2325, ER2327). In those counties, voters who vote in person on election day must vote in their assigned precinct to ensure that they receive the correct ballot listing the races and issues for which they are qualified to vote. (*Id*.); *see Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 567 (6th Cir. 2004) ("[I]n almost every state [ ]voters are required to vote in a particular precinct."). Only those ballots cast in the correct precinct are counted. A.R.S. § 16-122; (ER2979 ¶ 16).

Like Arizona, at least two dozen states enforce the precinct-based system by only counting ballots cast in the correct precincts. (ER2176). Arizona has

[1] Plaintiffs did not include their OOP PI Motion in the Excerpts of Record. For the Court's convenience, the State Defendants are submitting a copy of the PI Motion and the accompanying proposed order as supplemental excerpts of record (ER4076-83), filed contemporaneously herewith.

enforced this requirement for more than forty years. (ER0002). Thus, dozens of statewide elections have occurred in which OOP ballots were not counted, but Plaintiffs did not challenge this aspect of election administration until just a few months before the 2016 general election.

On October 11, 2016, the district court denied Plaintiffs' request to require the Defendants to partially count OOP ballots because it found that they did not show a likelihood of success on their claims that the State's longstanding practice of not counting OOP ballots violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301, or the Fourteenth Amendment. (ER0010, 13-14, 16-17). On October 19, 2016, this Court ordered the Defendants to (1) respond to Plaintiffs' request for an injunction pending appeal by 9:00 am on Friday, October 21, 2016, and (2) brief the merits of Plaintiffs' appeal of the district court's order by 5:00 pm on Monday, October 24, 2016. (Doc. 4). The Court heard oral argument in Pasadena on October 26, 2016. On November 2, 2016, a panel of this Court affirmed the district court. (Doc. 33-1, at 29).

On Friday, November 4, 2016, this Court, *sua sponte*, ordered that the case be reheard en banc. (Doc. 34, at 2). The en banc Court, however, declined to enter an injunction pending appeal. (Doc. 36, at 3). The Court stated that "[e]n banc argument will be confined to the question of whether or not a preliminary injunction should issue as to future elections." (*Id*.) Significantly, the next statewide election likely to use precinct-based voting will not occur until August 28, 2018. *See* A.R.S. § 16-206(A).

ARGUMENT

I. Plaintiffs' Emergency Request for Preliminary Injunctive Relief Should Be Denied as Moot Now that the 2016 Election Cycle Is Over.

The relief Plaintiffs sought in their OOP PI Motion was solely related to the impending 2016 general election. They requested an order enjoining "Defendants from continuing their practice of not counting provisional ballots cast out of precinct in jurisdictions that opt to hold the General Election under a precinct-based rather than vote center-based model, requiring that the State count such ballots for all races in which the voter would have been eligible to vote had the voter cast a regular ballot in his or her assigned precinct." (ER4077). In their OOP PI Motion, "General Election" is a defined term meaning "the upcoming November 2016 General Election." (*Id*.)

An appeal is moot, and must be dismissed, if events have occurred that prevent a court from fashioning effective relief. *Mills v. Green*, 159 U.S. 651, 653 (1895); *Nakano v. United States*, 698 F.2d 1059, 1060 (9th Cir. 1983). The relief that Plaintiffs sought related to OOP voting was solely for the now-completed 2016 general election. The next statewide election that may use precinct-based voting will not occur until 2018. Accordingly, Plaintiffs' OOP PI Motion is moot. *Canez v. Guerrero*, 707 F.2d 443, 446 (9th Cir. 1983) ("This case has been mooted by the election. The injunctions from which appellants seek relief were limited by their terms to the conduct of the election.").

Furthermore, because the en banc decision would arise from an interlocutory appeal, declining to rehear the case now does not create a problem that is "capable

of repetition, yet evading review." *Schaefer v. Townsend*, 215 F.3d 1031, 34 (9th Cir. 2000). There are no statewide elections that will be governed by the OOP restriction until 2018, before which the parties will have had the opportunity to fully develop a factual record and obtain a final decision on the merits from the district court. The unsuccessful party will then have the opportunity to seek this Court's review, with a full record for it to consider. For these reasons, this Court should dismiss Plaintiffs' appeal as moot and remand for merits adjudication.

II. The Interests of Justice Favor Dismissal and Remand.

Remand is also appropriate because it will further the interests of justice. Despite the voluminous excerpts of record submitted to this Court, the record related to Plaintiffs' OOP claim was created on an extremely abbreviated schedule. Plaintiffs supported their PI Motion with the reports of four experts, as well as declarations from more than a dozen lay witnesses. (*See* ER0126-0835, ER0912-17). After completion of briefing and argument on Plaintiffs' separate Motion for Preliminary Injunction regarding H.B. 2023, Defendants had only four weeks to depose Plaintiffs' remaining OOP expert, obtain a rebuttal expert opinion, and respond to the OOP PI Motion. (*See* ER2147-433). In addition, three days before the district court heard oral argument, Plaintiffs submitted a supplemental expert report and additional documentary evidence with their reply. (*See* ER3601-803). Because of the extremely short time table and because the district court did not conduct an evidentiary hearing, Defendants were not able to respond to these additional submissions.

In short, the factual record for the OOP PI Motion has not been fully

developed due to the compressed time frame. The interests of justice counsel remand, so that the parties can be provided an adequate opportunity to develop the factual record and arguments necessary to a just disposition of Plaintiffs' claims. *See, e.g.*, *United States v. Mageno*, 762 F.3d 933, 955 (9th Cir. 2014), *opinion vacated on reh'g*, 786 F.3d 768 (9th Cir. 2015) (noting that courts of appeal should "encourage parties to raise issues before district judges, who have greater competence to find facts, which allows us to rule on a complete record."); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1114 (9th Cir. 1989) (explaining that "the interests of justice would be served by remanding this claim to the district courts for further consideration[,]" because "the factual record is insufficiently developed for us").

III. The En Banc Court Should Not Stay Proceedings Pending Entry of Judgment on the Request for Permanent Injunctive Relief.

Many of the reasons that warrant this Court declining to rehear this case en banc now also support vacating the en banc Order, instead of staying it. "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Indeed, en banc review in the Ninth Circuit is markedly more limited than review allowed under Rule 35 because the Ninth Circuit Rules require that the panel decision "directly conflicts with an existing opinion by another court of appeals *and* substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir.

R. 35-1 (emphasis added). In other words, the Ninth Circuit exercises its discretion to rehear a case en banc if the decision both creates an intra- or inter-circuit split and raises a pressing national issue. These factors are not present here.

Neither the Plaintiffs nor this Court have identified any decision of this Court or any other circuit court that conflicts with the panel decision in this case. Indeed, for its § 2 analysis, the panel majority relied on this Court's 2012 en banc opinion in *Gonzalez*, as well as recent opinions from the Fourth, Fifth, and Sixth Circuits. (Doc. 33-1, at 9, 11, 16). The panel relied on the well-established *Anderson-Burdick* framework and this Court's recent en banc opinion in *Public Integrity Alliance, Inc. v. City of Tucson*, 2016 WL 4578366, at *3 (9th Cir. Sep. 2, 2016), for its Fourteenth Amendment analysis. (*Id.* at 22); *see United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (vacating order for rehearing en banc as improvidently granted after determining that two decisions of the Circuit were not in conflict).

The district court's decision on Plaintiffs' OOP claims was based on a hastily developed factual record. Indeed, due to the short time between the filing of the OOP PI Motion and the 2016 elections, little formal discovery occurred. This Court has stated that "[b]ecause a § 2 analysis requires the district court to engage in a 'searching practical evaluation of the past and present reality,' a district court's examination in such a case is 'intensely fact-based and localized.'" *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc) (quoting *Thornburgh v. Gingles*, 478 U.S. 30, 45 (1986) and *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (some

internal quotation marks omitted)); *see also Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (noting the importance of a full factual record on which to consider a Fourteenth Amendment challenge to voting regulation) (Stevens, J., concurring). The same considerations apply here. To rule on Plaintiffs' claim for permanent injunctive relief, the district court will need a fully developed factual record upon which to conduct the required "intensely fact-based" inquiry.

Notably, after the parties stipulated to a schedule for further proceedings in the district court, the court consulted with the parties, then entered a stay of proceedings pending this Court's en banc rehearing and decision. (ER4087-88, Doc. 225). Vacating the order granting rehearing en banc will permit the parties to conduct discovery and present the merits of the case to the district court for trial, if necessary, and a ruling on the request for permanent injunctive relief. Indeed, for the 2016 general election, the County Defendants implemented several new procedures, including using new electronic poll books, that appear to have led to a substantial reduction in OOP ballots in Maricopa County. Information regarding OOP ballots in the 2016 elections will be available to the district court when it considers the merits of Plaintiffs' OOP claims.

The district court's ruling on permanent injunctive relief will be based on a different factual record than this Court considered in October. If the unsuccessful party appeals that ruling, this Court will need to consider the new record. As such, staying proceedings in this Court will have little effect. *See Sports Form. Inc. v. United Press Intern., Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) (stating that disposition of a preliminary injunction appeal often provides little guidance due to

the materially different record developed during the merits phase). If there is an appeal following the district court's ruling on a permanent injunction, the issues presented could be different from those raised on the preliminary injunction. In the event the members of this Court disagree with a future panel's decision on those future issues, the Court can vote to rehear the case en banc then.

CONCLUSION

For the foregoing reasons, this Court should vacate the Order to rehear this case en banc and remand to the district court for further proceedings.[2]

RESPECTFULLY SUBMITTED this 5th day of December, 2016.

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[2] To the extent that this Court is concerned about the effect of reinstating the panel decision, it may deem that opinion the "law of the case but otherwise nonprecedential." *N. Arapaho Tribe v. Wyoming*, 429 F.3d 934, 935 (10th Cir. 2005) (vacating order granting rehearing en banc as improvidently granted).

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by this Court's November 21, 2016 Order (Doc. 43). The Brief contains 2,319 words, does not exceed ten pages, excluding the portions exempted by Fed. R. App. P. 32(f), and conforms to the requirements of 9th Circuit Rule 32-3(2). The Brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Karen J. Hartman-Tellez

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 5, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF.

s/ Maureen Riordan

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