

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
No. CV-16-01065-PHX-DLR

**PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEFING ON
MOOTNESS OF PRELIMINARY INJUNCTION APPEAL**

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**FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE
DISCLOSURE STATEMENT**

Corporate Plaintiffs-Appellants the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America, and Intervenor-Plaintiff/Appellant Bernie 2016, Inc., respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the abovementioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

Since 2006, Arizona has rejected over 121,000 provisional ballots, consistently finding itself at or near the top of the list of states that collect and reject the largest number of provisional ballots each election. ER1763, 704, 257-58. One of the top reasons that ballots are rejected is because they are cast out of precinct (“OOP”). *See, e.g.*, ER1786-88; *see also* 742-43, 710, 716-22. Many of these ballots are cast OOP through no fault of the voters who cast them. ER167-69, 171-73, 175-77, 215-17, 228-30, 177, 664. And, significantly, the State’s refusal to count these ballots has a racially disparate effect. ER7, 1799-1800. The State’s practice of rejecting OOP ballots wholesale violates Section 2 of the Voting Rights Act (“VRA”) and the Fourteenth Amendment, disenfranchising thousands of Arizona voters, including many of Plaintiffs’ members and constituents.

To protect these voters and prevent such harm, Plaintiffs sought a preliminary injunction, asking that the district court enjoin the rejection of OOP ballots. Although the request focused on the impending 2016 General Election, the harm posed by Arizona’s rejection of OOP ballots did not cease on November 8, 2016. Rather, it will persist in every precinct-based election in which Arizona voters must cast a provisional ballot if they vote at the incorrect polling location. While it is too late to protect the voters who were disenfranchised in November 2016, it is not too late for this Court to protect the rights of Arizonans who will be harmed by this practice in elections scheduled to occur before or shortly after the district court issues a final decision on the merits. Thus, this Court can still issue meaningful and effective preliminary relief, and Plaintiffs’ appeal is not moot.

FACTUAL AND PROCEDURAL BACKGROUND

A voter who appears to vote at the wrong precinct is entitled to cast a provisional ballot. 52 U.S.C. § 21082; A.R.S. §§ 16-135, 16-584. Nevertheless, Arizona rejects these ballots in their entirety—that is, not only for local races for which a voter may be ineligible to vote, but also for citywide, countywide, statewide, and federal races for which the voter is eligible. ER451-57; A.R.S. §§ 16-584, 16-452. In 2012 and 2014 alone, Arizona rejected approximately 14,500 OOP ballots. ER1786. And in the 2016 General Election, at least 2,000 OOP ballots were rejected just in Maricopa County. *See* Doc. 54-2, Attach. A to Decl. of S. Almy.¹ Arizona’s rejection of these ballots is by choice. There is nothing preventing the State from counting at least portions of OOP ballots. Around half of other states do so. ER629, 13; *see also* ER3785, 3789, 3791-92 (counting minimally burdensome).

Following limited discovery, Plaintiffs filed for a preliminary injunction on June 10, 2016, seeking to enjoin the State from rejecting OOP ballots wholesale and requesting that OOP ballots be counted for all races for which the voter was eligible to vote.² Over Plaintiffs’ objections, the district court granted Defendants’

¹ Sam Almy’s Declaration is submitted solely to authenticate public documents of which this Court can take judicial notice.

² At the October 26 oral argument before the merits panel, the request for relief was characterized as focusing on the topline candidates, i.e., President and Senate. *See* Video of 16-16865 *Leslie Feldman v. Ariz. Sec’y of St’s. Ofc.*, 33:34 - 33:43, *available at*: <https://www.youtube.com/watch?v=g-NMk3sCtII> (“Oral Argument Video”). While this was certainly a primary focus of Plaintiffs’ requested relief, the full request was not limited to those positions. Plaintiffs sought, and continue to seek, that ballots be counted “for all races in which the voter would have been

request for an extended briefing schedule, and heard oral argument on September 2. ER836, 842, 918. The district court denied Plaintiffs' request for preliminary relief on October 11. ER2. Plaintiffs promptly filed a notice of appeal on October 15, and requested an expedited appeal, which this Court granted. *See* Doc. 4.³ On November 2, a merits panel affirmed the district court's denial of injunctive relief by a 2-1 vote. Doc. 33. On November 4, this Court *sua sponte* ordered the appeal be reheard *en banc*. Doc. 34. That same day, it denied Plaintiffs an injunction pending appeal for the 2016 General Election on *Purcell* grounds, setting oral argument for the *en banc* hearing for January 2017, explaining that the "[e]n banc argument will be confined to the question of whether or not a preliminary injunction should issue as to future elections." Doc. 36.

On November 8, 2016 the General Election took place. On November 21, this Court ordered the parties to submit supplemental briefing addressing: (1) whether the completion of the 2016 general election moots Plaintiffs' appeal; (2) what relief is available if Plaintiffs' appeal is not moot; and (3) whether this Court should stay its proceedings pending the district court's entry of judgment on Plaintiffs' request for permanent injunctive relief. Doc. 43. Plaintiffs respectfully submit this brief in response to the Court's Order.

eligible to vote had the voter cast a regular ballot in his or her assigned precinct." *Feldman, et al. v. Ariz. Sec'y of St., et al.*, Case No. 16-1065 (D. Ariz.), Mot. for Preliminary Inj. at 2, Doc. 72. This relief would also encompass down-ballot items, such as county or citywide elected officials or initiatives.

³ Unless otherwise noted, all ECF Citations refer to the docket in the instant appeal, *Feldman, et al. v. Arizona Secretary of State, et al.*, No. 16-16865.

ARGUMENT

I. Plaintiffs’ Appeal Of The District Court’s Denial Of Its Motion For Preliminary Injunction Is Not Moot

The completion of the 2016 General Election does not moot Plaintiffs’ appeal. Elections in Arizona are certain to take place in the future and are highly likely to take place prior to the district court’s issuance of a final determination. Consequently, Plaintiffs, their members and constituents, and Arizona voters remain in danger of suffering irreparable harm due to Arizona’s refusal to count OOP ballots. Because this harm remains a live threat, this Court can fashion meaningful and effective relief: an order preliminarily enjoining the State from rejecting OOP ballots for races in which voters are eligible to vote until the district court’s final determination on the merits. Thus, this appeal is not moot.

“An interlocutory appeal of the denial of a preliminary injunction is moot when a court can no longer grant any effective relief sought in the injunction request.” *Akina v. Hawaii*, 835 F.3d 1003, 1009–10 (9th Cir. 2016). As this Court has explained, mootness “is a flexible justiciability doctrine that allows review if there are present effects that are legally significant.” *Flint v. Dennison*, 488 F.3d 816, 823 (9th Cir. 2007) (quotation marks omitted); *see also U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (mootness doctrine of “flexible character”). “[T]he question is not whether the precise relief sought at the time of the application for an injunction was filed is still available. The question is whether there can be any effective relief.” *Amerco v. N.L.R.B.*, 458 F.3d 883, 886 (9th Cir. 2006) (quotation marks omitted). “Where a court retains the ability to fashion some

form of meaningful relief between the parties, an appeal is not moot, and the court retains jurisdiction.” *Flint*, 488 F.3d at 823 (internal quotation marks omitted).

Here, even though the 2016 General Election has passed, as this Court has already recognized, the Court can still provide Plaintiffs with meaningful and effective relief by enjoining Defendants from rejecting OOP ballots for elections in which a voter is eligible to vote in future elections until the issuance of a final decision by the district court.⁴ *See* Doc. 36 (noting that even after the November 2016 election, a live question remained as to relief for future elections). The need for such interim relief is clear. Elections will occur in 2017 that threaten the same type of OOP injury. Historically, counties and cities across Arizona have held multiple elections in non-presidential years. In 2015 alone, Maricopa County

⁴ It is inconsequential that Plaintiffs’ requested relief in the preliminary injunction motion focused on the impending general election. The harm that Plaintiffs suffer is not limited to one election, but is the type that will occur in every election taking place under a precinct-based voting system prior to a final decision on the merits. Thus, this request for relief is akin to election cases that are ‘capable of repetition yet evading review,’ which are consistently found to be justiciable. *See, e.g., Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 779-80 (9th Cir. 2006) (the 2002 election did not render plaintiffs’ suit moot where there was sufficient likelihood that plaintiff would again be required to comply with the challenged law); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003) (same); *Porter v. Jones*, 319 F.3d 483, 489-90 (9th Cir. 2003) (“Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws—including the one under consideration here—could never reach appellate review.”) (citation omitted). *Cf. Akina*, 835 F.3d at 1009–10 (finding appeal of denial of preliminary injunction moot where request for relief was limited to an election that had been cancelled and there was no argument that similar elections would occur in the future).

oversaw elections in March, August, and November.⁵ These elections employed precinct-based voting systems, requiring voters to vote in their assigned locations to have their vote counted.⁶ Voters who voted in the incorrect precincts were disenfranchised, their OOP ballots were rejected in their entirety.

Likewise, Tucson held a primary and general election for its mayor and several city council seats in 2015.⁷ Provisional ballots were cast in that election and, pursuant to the State's OOP requirement, ballots cast OOP would not have been counted.⁸ In 2017, elections are already scheduled for March, May, August, and, if needed, November in Maricopa and Pima County.⁹ Moreover, special

⁵ See Election Results Archives, 2015, Maricopa County Recorder's Office, <http://recorder.maricopa.gov/electionresults/archivedelectionresults.aspx> (last visited Dec. 5, 2016).

⁶ See, e.g., Board Worker Training Manual, November 3, 2015 Jurisdictional Elections at 39, available at: <https://recorder.maricopa.gov/pdf/BWTrainingManual2015.pdf> (discussing the process for voting a provisional ballot when the voter is at the incorrect precinct) (last visited Dec. 5, 2016).

⁷ See Consolidated Election, City of Tucson Jurisdiction Wide Results, November 3, 2015, available at: https://www.tucsonaz.gov/files/clerks/2015_General_Election_Canvass.pdf.

⁸ See *id.*

⁹ Not all of these elections will utilize a precinct based voting system. The August Tucson and Phoenix elections are likely to use vote by mail and voting centers. However, if there is a general election in Tucson in November, the city may contract with the county as it did in 2015. That election would then be precinct-based. Similarly, while Phoenix primarily holds its election at voting centers, in 2016, for example, it held its election under a precinct-based model. See *Special Council Election*, City of Phoenix, <https://www.phoenix.gov/cityclerksite/Pages/2016-Special-Council-Election.aspx> (last visited Dec. 5, 2016).

elections may be called at any time in the event of a vacancy, withdrawal, or death and history demonstrates that it is almost certain to occur in 2017. For example, on June 15, 2016, the Phoenix City Council called for a special election in short order to fill a City Council vacancy to be held within five months.¹⁰ Likewise, special elections were held in 2010, 2011, 2012, and 2016 for a myriad of reasons ranging from statewide recalls, to election of congressional members, to ballot measures.¹¹

Given the historical frequency of elections in Arizona, it is virtually certain that precinct-based elections will occur in Arizona before the issuance of a final ruling by the district court and that—absent a reversal of the district court’s denial of Plaintiffs’ motion for preliminary injunction—the State’s OOP policy will continue to disenfranchise voters prior to the district court’s final determination.

In particular, the history of this case demonstrates that it would be nearly impossible for the district court to issue a permanent injunction before the scheduled Arizona elections in 2017. *See Feldman, et al. v. Ariz. Sec’y of St., et al.*, No. 16-16698, Plfs.’-Appellants’ Suppl. Br. on Mootness at Section I, Doc. 85 (“HB2023 Br.”). Moreover, as this Court is aware, *see* Doc. 36, the *Purcell* doctrine often prevents the issuance of any relief close to an election. Thus, waiting

¹⁰ *See* City of Phoenix Ordinance S-42631, <https://apps-secure.phoenix.gov/PublicRecordsSearch/Home/RenderPDF/?id=rcifb7s71z8EfxnVO1z5PAV5P2GdiU8yxfH5pJCyM2E=> (last visited Dec. 5, 2016).

¹¹ *See, e.g.,* Ariz. Sec’y of St., <http://apps.azsos.gov/election/2011/recall/electioninformation.htm> (2011 Special Election); <http://apps.azsos.gov/election/2012/Info/ElectionInformation.htm> (2012 Elections) (last visited Dec. 5, 2016); *March 9, 2010 Ballot Measures in Arizona*, Ballotpedia, https://ballotpedia.org/March_9,_2010_ballot_measures_in_Arizona (last visited Dec. 5, 2016).

to see if the district court issues its final order prior to any of the scheduled elections or one of the special elections that invariably will be scheduled would again leave Plaintiffs without recourse. Throughout the course of this appeal, Defendants have argued vigorously that implementing a practice which would allow OOP ballots to be counted could take anywhere from several weeks to ninety days to complete.¹² *See, e.g.*, Oral Argument Video at 25:21-27:59, 29:00-30:00, 35:27-36:59, 42:47-43:24. Thus, waiting to issue preliminary relief until an election is closer would result in exactly the same scenario as occurred in the 2016 General Election—a ruling on *Purcell* grounds that relief cannot be issued—and the further deprivation of Plaintiffs’ rights. *See* Doc. 36. This Court can ensure that history does not repeat itself by vacating and reversing the district court’s order, and enjoining Defendants from rejecting OOP ballots wholesale until the district court’s final determination. Accordingly, it can plainly provide Plaintiffs with “some form of meaningful relief,” *Flint*, 488 F.3d at 823, and Plaintiffs’ appeal is not moot.

¹² Plaintiffs contend that such relief could be accomplished in a much shorter timeframe. Nevertheless, if past is prologue, Defendants will continue to make this argument each time an election approaches, invoking *Purcell* as shield against any substantive relief to Plaintiffs and Arizona voters impacted by the State’s policy. Defendants must be held to the representations they made to this Court, and should not be permitted to delay the proceedings and then use *Purcell* to block timely relief.

II. The Proper Relief Is To Reverse And Vacate The District Court's Order, And Remand With Instructions To Enjoin Wholesale Rejection Of OOP Ballots Until A Decision On The Merits Issues

As explained in Plaintiffs' HB2023 brief, and for the same reasons stated therein, the applicable and proper remedy in the instant case is to reverse the district court's order and remand the case to the district court for issuance of a preliminary injunction. *See* HB2023 Br. at Section II; *see also* Doc. 33-2 (Dissent) (premising the reversal of the district court's decision solely on legal errors, not factual errors). Further, given the fundamental rights at stake, and the need to prevent imminent and irreparable injury, instruction to the district court to issue an injunction will expedite relief—both on a preliminary and permanent basis—by allowing the district court to focus wholly on the underlying merits determination rather than engaging in additional analysis of preliminary issues.¹³

¹³ While it is Plaintiffs' position that this appeal is not moot, if this Court were to find to the contrary, because the appeal would be mooted by a circumstance beyond the parties' control, the proper course of action would be to remand the case to the district court with instructions to vacate the October 11, 2016 order. *See, e.g., United States v. Munsingwear*, 340 U.S. 36, 39 (1950) (“The established practice of the Court [where a case] has become moot while . . . pending our decision . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.”); *accord, e.g., IBTCWHA Local Union No. 2702 v. Western Air Lines, Inc., et al.*, 854 F.2d 1178, 1178 (9th Cir. 1988) (dismissing an appeal from denial of an injunction prohibiting merger of two airlines where the merger occurred while appeal was pending); *Local No. 44 of Int'l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada v. Int'l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada*, 886 F.2d 1320 (9th Cir. 1989) (dismissing appeal from granting of preliminary injunction as moot and remanding to with instructions to vacate).

III. A Stay Of This Court's Proceedings Until The District Court's Issuance Of A Permanent Injunction Is Not Warranted And Would Result In Irreparable Harm To Plaintiffs

As discussed *supra*, absent relief ordered by this Court, Plaintiffs, their members and constituents, and Arizona voters are at imminent risk of being disenfranchised before a permanent injunction can be issued by the district court. Moreover, even if a favorable decision were to be issued on the merits, given the *Purcell* doctrine, and Defendants' position that the implementation of the Court's remedy would take months to effectuate, *see* discussion *supra* at 7-8, the only way to ensure that Plaintiffs' rights are protected is for the Court to order that preliminary relief be put into place. As such, this Court should not stay this appeal until the issuance of the district court's permanent injunction but, rather, it should hear this appeal and issue a preliminary injunction protecting Plaintiffs from further irreparable harm.

CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court find that Plaintiffs' appeal is not moot. Further, Plaintiffs respectfully request that this Court hear Plaintiffs' appeal and, ultimately, issue an order reversing and vacating the district court's denial of a preliminary injunction, and remanding the case back to the district court with instructions to enjoin the State from rejecting OOP ballots for elections in which voters are otherwise eligible to vote until the district court concludes permanent injunction proceedings and issues a final decision on the merits.

RESPECTFULLY SUBMITTED this 5th day of December, 2016.

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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 system.

s/ Sarah R. Gonski

STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs hereby inform the Court that they have also appealed an order issued by the district court on September 23, 2016, denying Plaintiffs' motion for preliminary injunction on HB2023, a law criminalizing ballot collection. That appeal is currently pending before this Court under Case No. 16-16698.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Plaintiffs, certifies that this brief complies with the length limits permitted by the Clerk's Order at Doc. 77, and is jointly filed by separately represented parties. The brief contains 2,957 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Amanda R. Callais