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' MOTION TO TAKE JUDICIAL NOTICE

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Plaintiffs-Appellants' Leslie Feldman, Luz Magallanes, Mercedez Hymes, Julio Morera, Cleo Ovalle, Former Chairman and First President of the Navajo Nation Peterson Zah, the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America and Plaintiff-Intervenor Appellant Bernie, Inc. ("Plaintiffs") respectfully request under Federal Rule of Evidence 201, and in connection with Plaintiffs-Appellants' Supplemental Brief on Mootness of Preliminary Injunction Appeal, ECF. No. 52-1, that this Court take judicial notice of two documents filed herewith: the Declaration of Sam Almy in Support of Plaintiffs-Appellants' Supplemental Brief ("Almy Declaration"), annexed hereto as Exhibit 1, and the Maricopa County Recorder's Information Systems Center Provisionals Summary Report, attachment A to the Almy Declaration.

1. On November 21, 2016, after the completion of the 2016 General Election, this Court ordered Plaintiffs to submit supplemental briefing explaining whether the passage of the 2016 General Election mooted Plaintiffs' appeal of the district court's denial of its request for a preliminary injunction on Plaintiffs' out-of-precinct ("OOP") provisional ballot claim. ECF. No. 43.

2. In response to that Order, on December 5, 2016, Plaintiffs submitted a supplemental brief on mootness, ECF. No. 52-1, which addresses the questions posed by this Court. On page 2 of that brief, Plaintiffs stated the number of OOP

provisional ballots recorded as being cast in Maricopa County in the 2016 General Election. To support that statement of fact, Plaintiffs provided a citation to Exhibit 1, the Almy Declaration, and Attachment A thereto, the Maricopa County Recorder's Information Systems Center Provisionals Summary Report, which provides the number of out of precinct provisional ballots recorded, to date, as being cast in Maricopa County in the 2016 General Election.

3. The Almy Declaration is provided solely to authenticate Attachment A thereto, explaining to the Court that Attachment A is a true and correct copy of the Maricopa County Recorder's Information Systems Center Provisionals Summary Report, which contains final counts and descriptions for provisional ballots cast in Maricopa County in the 2016 General Election.

4. As noted, Attachment A to the Almy Declaration, *i.e.*, the Maricopa County Recorder's Information Systems Center Provisionals Summary Report, provides the number of OOP provisional ballots recorded as being cast, to date, in the 2016 General Election. These documents are provided solely to support the reference to this fact in Plaintiffs' supplemental brief and, as such, are relevant to Plaintiffs' supplemental briefing.

5. Pursuant to Federal Rule of Evidence 201, a "court may judicially notice a fact that is not subject to reasonable dispute because it: . . . can be accurately and readily determined from sources whose accuracy cannot reasonably

be questioned." "The court may take judicial notice at any stage of the proceeding," including on appeal. Fed. R. Evid. 201; *see Bryant v. Carleson*, 444 F.2d 353, 357 (9th Cir. 1971). In the instant case, Plaintiffs seek judicial notice of the number of individuals recorded, to date, as having cast OOP provisional ballots in Maricopa County in the 2016 General Election. This fact can be readily determined from Attachment A to the Almy Declaration, and the accuracy of Attachment A—a document created by a Defendant in this appeal and properly authenticated by the Almy Declaration—cannot be reasonably questioned.

6. Accordingly, Plaintiffs respectfully request that this Court take judicial notice of the documents discussed herein and attached hereto as Exhibit 1. In the alternative, Plaintiffs request that this Court grant leave to supplement the Record on Appeal with those documents.

7. Plaintiffs have conferred with Counsel for the Maricopa County Defendant-Appellee and the Intervenor-Defendants/Appellees. They do not object to this motion. Plaintiffs have also conferred with Counsel for the State Defendant-Appellee. The State Defendant-Appellee does not anticipate filing an objection to this motion.

RESPECTFULLY SUBMITTED this 6th day of December, 2016.

s/ *Amanda R. Callais*

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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 6, 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*

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 579 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*

Exhibit 1

No. 16-16865

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DECLARATION OF SAM ALMY IN SUPPORT OF PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

Pursuant to 28 U.S.C. § 1746, I, Sam Almy, declare as follows:

1. My name is Sam Almy. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I am the Data Director of the Arizona Democratic Party ("ADP"). ADP is a Plaintiff-Appellant in *Feldman, et al. v. Arizona Secretary of State's Office, et al.*, which currently has appeals pending in this Court under Case Nos. 16-16865 and 16-16698.

3. As Data Director, among other things, I collect and process data from county recorders including the county's voter file, vote history, and provisional ballot data.

4. Attached as Attachment A is a true and correct copy of the Maricopa County 2016 General Election Provisionals Summary Report. ADP obtained this report from Maricopa County on December 2, 2016, via email and secured login page. This report provides the final counts for the 2016 General Election in Maricopa County, including the number of ballots that were recorded as being cast out of precinct. Statistics that pertain specifically to out-of-precinct provisionals are highlighted in yellow for ease of reference.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: December 5, 2016

By: _____
Sam Almy

Attachment A

PROVF

MARICOPA COUNTY

2016-11-21

RECORDER'S INFORMATION SYSTEMS CENTER

15:37:32

PROVISIONALS SUMMARY REPORT

ELECTION: 1301 - MARICOPA COUNTY 2016 GENERAL ELECTION

Code	Reason Description	Total
A1	NEW RESIDENT BALLOT	24,221
A2	EARLY BALLOT REQUESTED AND NOT RETURNED	2,248
A3	OFFICE ERROR OCCURRED	53
A4	HARASSMENT CODED VOTER	99
A5	REGISTRATION RECEIVED TOO LATE TO BE PRINTED ON SIGNATURE ROSTER	2,182
A6	NAME CHANGE	587
A7	ID ADDRESS DOESN'T MATCH SIGNATURE ROSTER	7,533
	Total Valid Ballots:	**36,923**
B10	YOU ARE NOT REGISTERED TO VOTE	8,594
B11	INCOMPLETE INFORMATION GIVEN ON YOUR PROVISIONAL BALLOT FORM.	863
B12	YOU WERE NOT ELIGIBLE TO VOTE IN THIS ELECTION.	2,901
B13	YOUR EARLY BALLOT WAS SENT, RETURNED AND COUNTED	388
B14	YOU WENT TO THE WRONG POLLING PLACE FOR THIS ELECTION.	2,197
B15	THE SIGNATURE ON YOUR PROVISIONAL BALLOT DID NOT MATCH THE SIGNATURE ON YOU	0
B17	INSUFFICIENT IDENTIFICATION PROVIDED AFTER ELECTION DAY	307
	Total Invalid Ballots:	**15,250**

Total Ballots: 52,173