No. 13-16978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD HAROLD SCHAD

Plaintiff-Appellant,

and

ROBERT GLEN JONES, JR.,

Intervenor-Plaintiff,

v.

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; et al.

Defendants-Appellees.

On appeal from the United States District Court for the District of Arizona

No. 2:13-cv-01962-ROS

ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over claims under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion when it denied Appellants' request for a Temporary Restraining Order (TRO)?

STATEMENT OF THE CASE

This is an appeal of the district court's denial of Appellants' Motion for TRO requesting a stay of their clemency hearings. (Dkt. 35.)[1] On September 26, 2013, Appellants filed a civil rights complaint under 42 U.S.C. §1983 alleging they cannot get fair clemency hearings. (Dkt. 1.) On September 27, 2013, Appellants filed a TRO to prevent the Arizona Board of Executive Clemency (Board) from holding Edward Harold Schad, Jr.'s (Schad) clemency hearing on October 2, 2013 and Robert Glen Jones' (Jones) on October 16, 2013. (Dkt. 6.) On October 1, 2013, an evidentiary hearing was held before the district court which denied Appellants' TRO. (Dkt. 10 and 21.) On October 1, 2013, Appellants filed a notice of appeal. (Dkt. 22.)

On October 2, 2013, the Board conducted a commutation/reprieve hearing at which Schad requested that it commute his sentence or grant a reprieve so he could

[1] Appellees cite to Appellants' excerpts of record.

brief this appeal. (Dkt. 6.) The Board voted not to recommend a commutation or a reprieve. Jones' hearing has not yet occurred. *Id*.

On October 5, 2013, Appellants filed a Rule 59 Motion requesting the district court to reconsider its ruling based on a supplemental letter filed by former member Melvin Thomas. (Dkt. 32.) The motion was denied. (Dkt. 34.)

STATEMENT OF FACTS

Appellants were convicted of murder and sentenced to death. (Dkt. 1 and 33.) Schad's execution is scheduled for October 9, 2013 and Jones' is scheduled for October 23, 2013. *Id*. After the TRO was denied, Schad's clemency hearing was held on October 2, 2013 and Jones' is scheduled for October 16, 2013. (Dkt. 33.)

John LaSota, a current member and a former Arizona Attorney General, testified that he was appointed to the Board in 2010. (ER 295.) He testified that he has never been contacted or threatened regarding his votes and that he decides matters on the evidence and arguments presented and not as a result of any improper influences. (ER 296-8.) Appellants noticeably did not cross examine LaSota.

Brian Livingston, a current member, testified that he was appointed in 2012 and was appointed as Executive Director and Chairman of the Board in August

2013. (ER 311.) Livingston testified he has never been contacted by Governor/staff regarding how to vote and that he votes based on the information he receives, including case history, information from the public, testimony and the Board's deliberative process by the Board. *Id*. Livingston testified he has not received pressure to vote a certain way in Appellants' matters and his future on the Board is not a consideration on how he votes. (ER 312-13.)

Ellen Kirschbaum, a current member, was appointed in 2010. (ER 300-304.) She testified she has never been contacted by anyone to influence her vote and that she votes independently. (ER 301.) Kirshbaum testified she has never been told by the Governor/staff that she would lose her job based on her votes. *Id*. While she testified that former members suspected they were not reappointed because of their votes (ER 306.), she did not say she had actual knowledge of the reasons previous members were not reappointed. Kirchbaum testified that she did not believe her votes would be a reason for non-reappointment. (ER 304.)

Melvin Thomas, a former member, testified that he always voted independently and was never told how to vote. (ER 251 and 264.) Thomas testified that he was shown a few sentences of a letter on a tablet computer (ER 111, 254 and 357.), and that he didn't know what the letter was about, who it was from or addressed to, why it was shown to him or the exact nature of its content.

(ER 257-8.) In sum, he wasn't really sure why he was shown a portion of the letter and he was merely speculating about why it was shown to him. *Id.*

Thomas later clarified that the letter shown to him was not a letter from the Governor stating her displeasure with the Board, rather it was the Board's recommendation, drafted by Kirschbaum, to the Governor on a different matter. (ER 357.) He speculated that Kirschbaum showed it to him as a reason for why previous Board members were not reappointed. *Id.* He further acknowledges that he misinterpreted the nature of the letter. *Id.* Nonetheless, Thomas was always consistent in his position that it was a current member who showed the letter to him. (ER 111, 254-5 and 357.)

Jesse Hernandez, a former member, who resigned in August 2013 after an investigation substantiated nine counts of unprofessional conduct, submitted a declaration alleging that the members believed their jobs were at risk based on how they voted. (ER 113 and Dkt. 9.) Hernandez was not called by Appellants to testify at the hearing and so was not subject to cross-examination. Likewise, Appellants did not examine Scott Smith, who was available to testify. While Thomas and Kirschbaum acknowledged that Hernandez made statements regarding the Governor's views on certain votes, both testified that his statements did not impact the way they voted. (ER 111, 264, 301 and 310.)

Duane Belcher, Marilyn Wilkins, Ellen Stinson, former members, claimed in their declarations that they were "ousted" by the Governor, but acknowledged on cross examination they were simply not reappointed after their terms had expired. (Dkt. I-5, I-6 and I-7; ER 235, 268 and 274.) Notably and consistent with current members' testimony, Belcher, Stinson and Wilkins testified that they always voted independently. (ER 248, 272 and 284.)

SUMMARY OF THE ARGUMENT

Appellants sought a TRO ordering Appellees to stay their clemency hearings/executions until an impartial Board could hear them. They did not, however, establish that they were entitled to a TRO. Therefore, the district court properly denied their TRO.

ARGUMENT

I. The District Court Correctly Denied Appellants' TRO because No Evidence Was Presented Demonstrating that the Current Board Members Have Actual Bias or Prejudice.

A. Standard of Review

The appellate court reviews a denial of an injunction for abuse of discretion. An abuse of discretion will be found if the district court based its decision "on an erroneous legal standard or clearly erroneous findings of fact." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "We review conclusions of law de novo and findings of act for clear error." *Id.* "[A]s long as

the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id*.

B. Appellants Did Not Establish that They Were Likely to Succeed on the Merits.

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and an injunction is in the public interest. *Winter v. NRDC, Inc*., 555 U.S. 7, 20-22 (2008). This Court has articulated an alternate formulation of the *Winter* test, "under which 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (quoting *Cottrell*, 632 F.3d at 1135. A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Appellants did not meet their burden of persuasion, and the district court correctly denied their TRO.

1. Appellants Did Not Establish that the Current Board Did or Will Violate Their Minimal Due Process Rights In a Clemency Hearing.

"Pardon and commutation decisions have not traditionally been the business of the courts; as such, *they are rarely, if ever*, appropriate subjects for judicial review." *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (emphasis added). In *Ohio Parole Authority v. Woodard*, Justice O'Connor's concurring opinion, which provides the narrowest majority holding, found that "some minimal procedural safeguards apply to clemency proceedings." 523 U.S. 272, 289 (1998).

There is no constitutional requirement for a state to have a clemency process; however, if a state chooses to establish one, it must meet minimal due process. *Id.* Minimal due process has been defined as an opportunity to present reasons clemency should be granted and a decision-maker who does not act in a completely arbitrary and capricious manner. *Id*. Due process in a clemency hearing is limited. *Woratzeck v. Arizona Bd. of Executive Clemency*, 117 F. 3d 400, 404 (9th Cir. 1997). Due process violations only exists if the Board's procedures "shock the conscience." *Id*.

a. Non-reappointment of Board members does not violate due process.

The Board's procedures do not "shock the conscience" and Appellants present no evidence that the current Board did or will act arbitrarily or capriciously. Clemency proceedings are a function of the executive branch. *Woodard*, 523 U.S. at 284. Pursuant to article 5, section 5 of the Arizona

Constitution and A.R.S. § 31-443, the Governor has the "sole power to determine whether to commute a prisoner's sentence." *State v. Arnold*, 805 P.2d 388, 390 (Ariz. App. 1991). A.R.S. § 31-401 provides that the Governor appoint members of the Board to five-year terms. Members may only be removed for cause. A.R.S. § 31-401 (E). An official whose term has expired has no right to be reappointed.

Appellants allege there is a pattern of inappropriate influence by the Governor/staff against the Board based on the use of the her power to appoint members. Appellants illogically conclude that since the Governor does not automatically reappoint members, the mere fear of losing a appointed position is sufficient to demonstrate bias and a violation of due process. Appellants rely on this "fear of not being reappointed" to warrant a TRO. Appellants argue that the current members violate due process because they are appointed members and by virtue of their appointment, they are biased because their reappointment is subject to the Governor's approval.

The district court correctly concluded that Appellants' claims of due process violations as a result of the alleged irregularity in the appointment process fails on the merits. Even if an irregularity existed, it in and of itself is not a due process violation.

b. Appellants failed to establish "actual" bias.

"Public officials are presumed to act fairly and with honesty and integrity." *Madrid v. Concho Elementary Sch. Dist. No. 6 of Apache Cnty.*, 2010 WL 1980329 *7. (D. Ariz 2010). Appellants bear the burden of rebutting this presumption and must show an "actual bias." *Id*. Mere speculation based on the perceptions of the former members is insufficient to show bias. *Id*.

In *Anderson v. Davis*, this Court rejected an inmate's request for a TRO to disqualify a Governor from participating in the clemency process after the Governor asserted he would consider the matter fairly regardless of his alleged blanket policy of denying all applications of executive clemency. 279 F.3d 674, 676-677 (9th Cir. 2002). Similarly, the Eleventh Circuit denied a TRO when an inmate claimed the chairman of the clemency board was biased because he previously stated that no one would ever be granted clemency while he was on the board. *Parker v. State Board of Pardons and Paroles*, 275 F.3d 1032, 1035-1036 (11th Cir. 2001). Both circuits relied heavily on the public officials' testimonies that they had not prejudged the matter and would be fair.

Unlike in *Parker* and *Anderson*, Appellants do not allege the current members made statements or formed a policy that they will never vote for clemency in death cases. The current members testified that they are not biased and did not predetermine Appellants' requests for clemency. (ER 296-8, 301 and 311.) Appellants offered no contrary evidence except for the declaration by

Hernandez, which was disputed by former member Thomas, and current members. (ER 264, 299, 302 and 313.) Appellants did not call Hernandez as a witness and so was never cross-examined. The district court found the current members credible and correctly gave deference to their testimony.

c. Thomas' supplemental filing does not prove bias.

Thomas's statement filed on October 3, 2013 raises no new issues or pertinent facts. Contrary to Appellants' position, Thomas's nebulous testimony was not perjurous. (Dkt. No. 31) Thomas' submission is irrelevant to the issue of whether members have not and will not provide fair clemency hearings. The district court considered Thomas' supplemental filing in issuing her written decision properly denying Appellants subsequent Rule 59 Motion.

Appellants also argue that Kirschbaum's testimony is suspect and she attempted to intimidate Thomas. Thomas testified he wasn't really sure why he was shown the letter and he was merely speculating about why it was shown to him. (ER 257-8.) Regardless, Thomas is not a current member and even if true, his speculations are irrelevant to how the current members would or will vote.

Thomas' clarification does not impact Kirschbaum's testimony her credibility. Thomas' hazy recollection does not contradict Kirschbaum's affidavit or her hearing testimony. Kirschbaum testified that she believed that former members suspected they were not reappointed because of how they voted. (ER

306.) However, she did not testify that she had actual knowledge about the reasons previous members were not reappointed. Thomas' submission does not provide any new relevant evidence. Moreover, all the members, both past and present, testified that they have always voted independently and were never told how to vote. (ER 248, 264, 272, 284, 298, 301 and 311.)

d. The district court's properly quashed appellants' subpoenas.

Appellants argue that the district court erred when it did not grant their TRO to allow further discovery, including the quashing of their subpoenas duces tecum. Appellants have not demonstrated the district court abused its discretion. *See Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010) ("We review district court rulings on discovery matters for abuse of discretion."). In *Premium Service Corp. v. Sperry & Hutchinson Co*., 511 F.2d 225, 229 (9th Cir. 1975), this Court affirmed an order quashing a subpoena duces tecum and explained:

> We will reverse such an order to quash only for abuse of discretion. Such abuses must be unusual and exceptional; we will not merely substitute our judgment for that of the trial judge A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision.

The district court was correct in its discovery rulings because permitting discovery would be tantamount to allowing Appellants to engage in a fishing

expedition in an attempt to prove a nonexistent bias. The district court provided Appellants with the opportunity to prove actual bias, but they failed to do so. The record demonstrates that after being given the opportunity to fully question past and present members, without exception, each witness testified that their votes on clemency matters were fair and impartial, and were undertaken without outside influence. (ER 248, 264, 272, 284, 298, 301 and 311.)

e. The district court properly weighed witness testimony.

The district court did not make clearly erroneous findings of fact. It accepted the former members' testimony that the Governor/her office were unhappy with their votes. (Dkt. 30 at 14). Regardless of the Governor's position, it is irrelevant because Appellants fail to show bias by the current members. Instead, they rely heavily on the alleged discrepancies in Kirschbaum and Thomas' testimony they believe entitle them to the TRO. Even where there are inconsistencies and discrepancies in witness testimony, this Court does not determine the credibility of witnesses. *See U.S. v. Felix*, 425 F.2d 240, 241-242 (9th Cir. 1970) (" . . . it is not for the appellate court to determine the credibility of witnesses or to weigh the evidence.")

Appellants have not demonstrated that anything in the record indicates that the district court, did not consider the testimony of all witnesses in denying the TRO. To the contrary, the district court specifically considered Thomas'

supplemental filing and found Kirscbaum's testimony credible. The district court correctly found all of the testimony was consistent because none of the prior or current members voted at the direction of the Governor/staff.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted this 6th day of October, 2013.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellees state that they are not aware of any related cases pending in the Ninth Circuit.

/s Kelly Gillilan-Gibson
Kelly Gillilan-Gibson
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with this Court's briefing order because it contains 2,785words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 6th day of October, 2013.

/s Kelly Gillilan-Gibson
Kelly Gillilan-Gibson
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2013, I electronically transmitted this document to the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF System for filing and emailed a copy to the following:

Kelley J. Henry, Attorney for Appellant Schad
Dale Baich, Attorney for Appellant Robert Glen Jones, Jr.
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