

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

MARICOPA DEFENDANTS/APPELLEES' BRIEF

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
M. Colleen Connor (Bar No. 015679)
Andrea L. Cummings (Bar No. 013507)
Deputy County Attorneys
MCAO Firm No. 0003200
CIVIL SERVICES DIVISION
222 N. Central Avenue, Suite 1100
Phoenix, Arizona 85004

Telephone (602) 506-8541
Facsimile (602) 506-8567
connorc@mcao.maricopa.gov
cummings@mcao.maricopa.gov
ca-civilmailbox@mcao.maricopa.gov

Attorneys for County Defendants

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, as well as 42 U.S.C. §§ 1983 and 1988. The district court entered the Order on appeal on October 11, 2016, and Plaintiffs filed their Notice of Appeal on October 15, 2016. (ER0001-17); Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this interlocutory order denying Plaintiffs' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

1. Did the district court abuse its discretion in concluding that Arizona's rejection of Out of Precinct ("OOP") ballots did not cause Plaintiffs irreparable harm and the balance of hardships and public interest weigh against issuance of a preliminary injunction?

STATEMENT OF THE CASE

Maricopa County Defendants join in the State Defendants' Statement of the Case.

STANDARD OF REVIEW

This Court reviews the district court's decision not to enter an injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). That review should be "limited and deferential" and does not include "review [of] the underlying merits of the case." *Id.* The district court's interpretation of the law is reviewed de novo. *Id.* This Court "review[s] for clear error the district court's findings of fact, including its ultimate finding

whether, under the totality of the circumstances, the challenged practice violates § 2.” *Gonzalez v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc).

Plaintiffs sought a preliminary injunction—“an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Indeed, with respect to OOP ballots, Plaintiffs sought a mandatory injunction that would go “well beyond maintaining the status quo pendent lite,” by changing how Arizona has counted votes for more than forty years. “[C]ourts should be extremely cautious about issuing a preliminary injunction” in these circumstances. *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

In order to justify such extraordinary relief, Plaintiffs must show that they (1) are “likely to succeed on the merits,” (2) they are “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tip[] in [their] favor, and (4) an injunction is in the public interest.” *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). The less certain “the likelihood of success on the merits, the more plaintiffs must convince the [] court that the public interest and balance of hardships tip in their favor.” *Sw. Voter Registration*, 344 F.3d at 918.

SUMMARY OF THE ARGUMENT

For more than forty years, Arizona has followed the well-recognized rule that votes cast out-of-precinct are not counted. Now, two weeks before the General Election, Plaintiffs ask this Court to enjoin that practice and craft a new

procedure for counting OOP ballots. But the district court correctly determined that Plaintiffs had not met their burden to obtain a mandatory injunction that would require the majority of Arizona's counties to develop and implement a new procedure for counting OOP ballots. Because the district court did not abuse its discretion when it denied Plaintiffs' requested injunction, this Court should affirm.

The County Defendants can clearly demonstrate that an injunction would harm elections officials and the voters. The public interest would not be served by changing the rules relating to OOP ballots two weeks or less before Election Day. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *Sw. Voter Registration*, 344 F.3d at 919. Creating and implementing a procedure to count OOP ballots—which at this late date would be a manual process—would be very costly, injects the possibility of human error into the ballot tabulation process, and is very likely to cause elections officials to miss statutory deadlines for counting ballots and reporting results.

For these reasons, the district court did not abuse its discretion in denying Plaintiffs' request for a mandatory injunction directing that OOP ballots be counted. This Court should affirm that decision.

ARGUMENT

I. The Balance of Hardships and Public Interest Weigh Heavily in Favor of the State and County Defendants.

By this Friday, October 28, 2016, hundreds of thousands of Arizona voters will receive a sample ballot in the mail for the November 8, 2016 General Election.

A.R.S. § 16-510(C)(board of supervisors shall mail sample ballots at least eleven days before the general election). Maricopa County's sample ballot will list a voter's polling place location – the exact address and a street map – and the sample ballot will direct voters to go to that specific location to vote. ER2464. If an injunction is issued, the information on hundreds of thousands of sample ballots will be incorrect.

A change in election administration would not only confuse voters, but will also confuse poll workers. Maricopa County has already trained thousands of poll workers to staff the 724 polling places for the general election. ER2466. These poll workers are given an in person training class as well as a training manual to use as a reference on election day. ER2879 to 2962. With precious days before the election, there is not enough time for the County to retrain thousands of poll workers and to reprint thousands of training manuals. Even if there was sufficient time to retrain poll workers or reprint manuals, what would poll workers be expected to say to voters who go to the wrong precinct? Should a poll worker be expected to explain this complex litigation and that the law has been enjoined pending the outcome of an appeal?

Moreover, after the election, Arizona has no procedure or guidance on how to count ballots cast by voters who vote in the wrong precinct. There are eleven¹ other counties in Arizona that conduct precinct based elections. Those Counties have not been named in this lawsuit and may not even be aware of this issue.

Plaintiffs cavalierly argue that the Counties can duplicate the OOP ballot just in the way they currently duplicate damaged ballots. First, duplicating a damaged ballot requires duplicating an identical ballot style. Every vote cast on the damaged ballot is replicated on the exact same ballot. For OOP ballots, election officials would be “duplicating” votes on one ballot style to a completely different ballot style. Second, without any procedure in place, there is no process for ensuring the secrecy of the ballot during this OOP duplication process. The election official would be required to identify the voter, determine the exact precinct the voter was eligible to vote in, and find the ballot style for that voter’s precinct. Plaintiffs overly simplistic solution to counting OOP ballot does a disserve to the voters and election officials in the final days before an election.

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¹ Pinal, Pima, Cochise, Coconino, Navajo, Apache, Mohave, Greenlee, La Paz, Gila, and Santa Cruz.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Plaintiffs' Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 24th day of October 2016.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

BY: /s/ M. Colleen Connor
M. COLLEEN CONNOR
ANDREA L. CUMMINGS
Deputy County Attorneys
Attorneys for Maricopa County Defendants

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the State Defendants state that they are aware of Case No. 16-16698 pending before this Court, in which Plaintiffs appeal the district court's September 23, 2016, order denying them preliminary injunctive relief on their claims related to H.B. 2023.

s/M. Colleen Connor

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by Ninth Circuit Rule 32(a)(7). The Brief contains 1,176 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/M. Colleen Connor

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 October 24, 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/M. Colleen Connor