

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 04 2016

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**LESLIE FELDMAN; LUZ
MAGALLANES; MERCEDEZ
HYMES; JULIO MORERA; CLEO
OVALLE; PETERSON ZAH, Former
Chairman and First President of the
Navajo Nation; THE DEMOCRATIC
NATIONAL COMMITTEE; DSCC,
AKA Democratic Senatorial Campaign
Committee; THE ARIZONA
DEMOCRATIC PARTY;
KIRKPATRICK FOR U.S. SENATE;
HILLARY FOR AMERICA,**

Plaintiffs-Appellants,

BERNIE 2016, INC.,

Intervenor-Plaintiff-
Appellant,

v.

**ARIZONA SECRETARY OF STATE'S
OFFICE; MICHELE REAGAN, in her
official capacity as Secretary of State of
Arizona; MARICOPA COUNTY
BOARD OF SUPERVISORS; DENNY
BARNEY; STEVE CHUCRI; ANDY
KUNASEK; CLINT HICKMAN;
STEVE GALLARDO, member of the
Maricopa County Board of Supervisors,
in their official capacities; MARICOPA**

No. 16-16865

D.C. No. 2:16-cv-01065-DLR
District of Arizona,
Phoenix

ORDER

COUNTY RECORDER AND ELECTIONS DEPARTMENT; HELEN PURCELL, in her official capacity as Maricopa County Recorder; KAREN OSBORNE, in her official capacity as Maricopa County Elections Director; MARK BRNOVICH, in his official capacity as Arizona Attorney General,

Defendants-Appellees,

THE ARIZONA REPUBLICAN PARTY; DEBBIE LESKO; TONY RIVERO; BILL GATES; SUZANNE KLAPP,

Intervenor-Defendants-Appellees.

BEFORE: THOMAS, Chief Judge and O'SCANNLAIN, W. FLETCHER, RAWLINSON, CLIFTON, BYBEE, CALLAHAN, N. R. SMITH, MURGUIA, WATFORD, and OWENS, Circuit Judges.

PER CURIAM:

En banc oral argument will take place during the week of January 17, 2017, in San Francisco, California. The date and time will be determined by separate order. Plaintiffs' motion for an injunction pending appeal is **DENIED**.

In this action, plaintiffs challenge the provisions of Arizona law that precludes counting ballots that are cast outside of the voter's designated precinct, even when those ballots include races and ballot measures for which the voter is

eligible and qualified to vote. Plaintiffs argue that this procedure violates the Voting Rights Act of 1965, and the Fourteenth Amendment to the Constitution.

The district court denied the plaintiffs' request for a preliminary injunction. A divided three judge panel affirmed the district court's order. A majority of the non-recused active judges then voted to rehear this case en banc.

En banc argument will be confined to the question of whether or not a preliminary injunction should issue as to future elections. The en banc court will not consider whether or not out-of-precinct votes should be counted in the pending general election. Current Arizona election law, practices, and procedures as to out-of-precinct voting will be fully applicable to this election. The en banc court declines to issue any order that would potentially disrupt procedures in the upcoming election. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

For further information or special requests regarding scheduling, please contact Deputy Clerk Paul Keller at paul_keller@ca9.uscourts.gov or (206) 224-2236.

Within seven days from the date of this order, the parties shall forward to the Clerk of Court twenty-five additional paper copies of the original briefs and twelve additional paper copies of the excerpts of record. The paper copies must be accompanied by certification (attached to the end of each copy of the brief) that the

brief is identical to the version submitted electronically. A sample certificate is available at

<http://www.ca9.uscourts.gov/datastore/uploads/cmecf/Certificate-for-Brief-in-Paper-Format.pdf>. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF.

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THOMAS, Chief Judge, concurring in part, and dissenting in part, with whom W. FLETCHER, RAWLINSON, AND MURGUIA, Circuit Judges, join:

I agree that this appeal should be reheard en banc for the reasons stated in my dissent. *Feldman v. Arizona Sec’y of State*, 2016 WL 6472060, at *10–21 (9th Cir. 2016) (Thomas, J., dissenting). The issues presented are important for both the present and future elections.

However, I would hold argument and decide the appeal prior to the certification of results for the present election. As I explained in my dissent, qualified voters have been, and will continue to be, disenfranchised by Arizona’s refusal to count legitimate ballots cast out-of-precinct. There is no reason why

these legitimate votes should not be counted in this election, particularly when the votes are collected and available for election officials to tabulate.