No. 16-16865

In the United States Court of Appeals

For the Ninth Circuit

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Intervenor-Plaintiff/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenor-Defendants/Appellees.

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

Cause No. CV-16-01065-PHX-DLR

INTERVENOR-DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF IN SUPPORT OF STAY OF PROCEEDINGS UNTIL ENTRY OF JUDGMENT ON PERMANENT INJUNCTION

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FRAP 26.1 Corporate Disclosure Statement

Corporate Intervenor-Defendant Arizona Republican Party (the "Party") hereby certifies that there is no parent corporation, nor any publicly held corporation, that owns 10% or more of the stock in the aforementioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

Arizona has long required voters to cast ballots in their assigned precinct and has only counted ballots cast in the correct precinct. ER0002. At least 34 state elections have now occurred under the out-of-precinct ("OOP") voting system, including the 2016 General Election for which Plaintiffs/Appellants ("Plaintiffs") sought expedited relief. ER0002. Although some municipal elections in the state may be scheduled in 2017, it is unclear whether they will use the OOP voting system. Indeed, it is likely these jurisdictions will use the voting center model, where a voter can vote at any voting center in the jurisdiction. Now that the 2016 General Election is complete, Plaintiffs' requested relief from this Court is moot, making any opinion an unwarranted advisory opinion. ER0131 ("enjoining Defendants from continuing their practice of not counting provisional ballots cast [OOP] in jurisdictions that opt to conduct *the General Election* under a precinct-based…model") (emphasis added). Accordingly, the Court should allow the district court to create a complete record in deciding Plaintiffs' request for a *permanent* injunction.

I. PLAINTIFFS' APPEAL SHOULD BE DISMISSED AS MOOT.

This Court must determine whether any claim has become moot. *Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007) ("If an event occurs during the pendency of the appeal that renders the case moot," then the

Court "lack[s] jurisdiction."); *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016). Article III of the Constitution requires a "case or controversy" be present for jurisdiction to exist. U.S. CONST., art. III, § 2, cl. 1; *Protectmarriage.com–Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014). If jurisdiction does not exist, the matter should be dismissed.

A. Because the General Election has occurred, there is no relief the Court can provide, and it lacks jurisdiction over the appeal.

"The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor." *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*, 598 F.3d 1061, 1068 (9th Cir. 2010). In a case like this, "[a]n 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[,]" even if the "underlying case still presents a live controversy." *Akina*, 835 F.3d at 1010. In *Akina*, for example, the Court declared the case moot when the election at issue was cancelled and no substitute election had been scheduled. *Id.*; *see also Ariz. Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle. All specific demands for relief related to the 2014 election are moot."); *Protectmarriage.com–Yes on 8*, 752 F.3d at 835 (committees' request for injunctive relief moot as information sought to be protected had already been

disseminated). Here, as the 2016 General Election is complete, Plaintiffs' requested relief as to that election is now moot.

B. This case does not fall under a mootness exception.

There are two exceptions to the mootness doctrine, neither of which apply here. First, the voluntary-cessation exception is inapplicable because the OOP system may be used in the 2018 elections. *See Akina*, 835 F.3d at 1010. Second, the capable-of-repetition-yet-evading-review exception only applies where both "(1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again." *See Akina*, 835 F.3d at 1011. Although courts have applied these exceptions to election cases to ensure they do not evade review, *see Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), no such concerns are present here. The only issue for review is Plaintiffs' request for a *preliminary* injunction as to the 2016 General Election. ER0131. But Plaintiffs also sought a separate request for a *permanent* injunction as to future elections. Because that request is still pending,[1] the OOP issue will not evade review. (*See* ER3930 at Doc. 12.)

The next elections occurring in Maricopa County will take place in March

[1] The district court has entered an order that the parties, within 14 days of this Court's rulings, submit a joint proposed briefing schedule on issues including the Party's and other Intervenor-Defendants' pending Motion to Dismiss Plaintiffs' Complaint (*see* ER3939, at Doc. 108); Plaintiffs' amendment of their Complaint, including to remove claims and parties they have voluntarily sought to dismiss; and dismissal of parties from the proceedings due to lack of standing.

2017 (City of Goodyear Council primary), May 2017 (City of Goodyear Council general), and August 2017 (City of Phoenix Council election).[2] Plaintiffs have never noted any legal issues surrounding Goodyear's use of precinct-based polling for its local elections, and Phoenix employs a voting-center model that allows anyone residing in the city to vote at any voting center.[3] The next major election in Maricopa County will be in the 2018 election cycle, and there is ample time for Plaintiffs to litigate their permanent injunction claims before then.[4]

The mootness issue is particularly clear here where the Court is considering an appeal of a *preliminary* injunction request related to an already occurred event. This Court cannot offer any relief as to the 2016 General Election. And when the Court "cannot undo what has already been done, the action is moot, and must be

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[2] *See* Maricopa County Recorder's Office, "Election Calendar 2016," *available at* http://recorder.maricopa.gov/elections/electioncalendar.aspx; Phoenix City Clerk's Office, "Elections Information," *available at* https://www.phoenix.gov/cityclerk/services/election-information.

[3] *See* Phoenix City Clerk's Office, "Voting in City of Phoenix Elections Using Voting Centers," *available at* https://www.phoenix.gov/cityclerk/services/election-information/voting-at-the-polls.

[4] Other elections in Arizona have a similar timeframe, but their use of OOP versus vote centers remains unclear. The City of Tucson holds its primary in August 2017 and its general election in November 2017. *See* Tucson City Clerk's Office, "About City of Tucson Elections," *available at* https://www.tucsonaz.gov/clerks/about-city-tucson-elections. In Yuma, Arizona, "[t]he City of Yuma holds regular elections in odd numbered years for the purpose of electing candidates," and presumably would have a 2017 election. *See* City of Yuma Elections, *available at* http://www.yumaaz.gov/city-clerks-office/elections/index.html.

dismissed." *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 871 (9th Cir. 2002).

In addition, the Arizona laws concerning OOP (the validity of which has never been disputed in this matter) have existed for decades. ER0014. Delay is an important factor to continue to consider in determining whether to stay or dismiss these appellate proceedings. As recognized by the district court, Plaintiffs' "'long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.'" ER0015 (quoting *Oakland Tribune, Inc. v. Chronicle Pub. Co*., 762 F.2d 1374, 1377 (9th Cir. 1985)). In disputing the district court's reasoning, Plaintiffs argued that delay only matters for purposes of a requested preliminary injunction when the complained-of harm has already occurred. (Doc. 2, at 18.) Based on this logic, Plaintiffs can no longer argue irreparable harm—"the *sine qua non* for all injunctive relief" —because any harm in the 2016 General Election has already passed. *See Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978). As such, dismissal of the appeal or a stay of appeal is appropriate.

II. THIS COURT SHOULD REFRAIN FROM ISSUING ADVISORY OPINIONS.

If the Court issues an opinion on the preliminary injunction appeal, it would "amount to an impermissible advisory opinion." *Akina*, 835 F.3d at 1010–11. The prohibition against advisory opinions is "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted). "The Constitution limits the jurisdiction of the federal

courts to live cases and controversies, and as such, federal courts may not issue advisory opinions." *Kittel v. Thomas*, 620 F.3d 949, 951 (9th Cir. 2010).

In the preliminary injunction context, the advisory opinion prohibition is closely linked to the doctrine of mootness because it concerns the Court's fundamental ability to decide a matter: "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943); *see also Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) ("our disposition of this appeal will affect the rights of the parties only until the district court renders judgment on the merits of the case, at which time the losing party may again appeal"). Any ruling here would decide an issue that no longer has any actual legal relevance for the parties. By hearing the case, the Court would squander valuable judicial resources to reach an opinion on an inherently limited review by the district court and a limited record. *See DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011) (appellate opinions on denials of preliminary injunctions are often an "inefficient use of judicial resources"). The Court should thus allow the district court an opportunity to decide the merits of Plaintiffs' OOP claims, which will provide a fuller record for appellate review.

Indeed, Plaintiffs' *only* proper avenue of relief now is through the permanent injunction phase after a trial on the merits. *See Univ. of Texas v. Camenisch*, 451

U.S. 390, 396 (1981) ("[W]hen the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits."). The Court should refuse to issue an advisory opinion and allow the district court to decide the merits of the case in the first instance. Dismissal is appropriate.

III. IN THE ALTERNATIVE, A STAY IS APPROPRIATE PENDING RESOLUTION OF JURISDICTIONAL QUESTIONS AND THE CREATION OF A BETTER RECORD.

The Supreme Court has recognized that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Here, administrative abstention will allow a more complete review. *See Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 716 (9th Cir. 1989) ("The order staying the appeal was unambiguously designed for one purpose only, completion of proceedings below."). Specifically, the district court deferred consideration of whether Plaintiffs named the necessary defendants to obtain *statewide* relief related to OOP. ER0002 n.1. As the 2016 General Election is now over, the Party's and other Intervenor-Defendants' pending motion to dismiss (ER3939, at Doc. 108) on that issue and others is ripe for consideration. If this Court stays the current appeal, the district court would have an opportunity to decide whether Fed. R. Civ. P. 19(a)

applies due to Plaintiffs' failure to name Arizona county officials as defendants in this matter. Critically, Arizona law makes individual counties responsible for counting (or rejecting) votes after elections, including provisional ballots cast within their jurisdictions. *See, e.g.*, A.R.S. § 16-531; A.R.S. § 16-584(E); A.R.S. § 16-601; ER2656. Yet Plaintiffs still have not named *any* county officials as defendants for purposes of their OOP claims.[5]

Plaintiffs' proposed permanent injunction—and any interim decision on the preliminary injunction—will directly impair the interests of the absent counties. Most significantly, the counties—and not the State—would bear the administrative burden and substantial expense of implementing such an injunction. ER0015–16. The district court should be provided an opportunity to review this issue and ensure that the correct parties are participating to obtain a clear and full record on the facts and law. *See Citizens Alert Regarding the Env't v. EPA*, 259 F. Supp. 2d 9, 17 n.7 (D.D.C. 2003) (federal courts "powerless" to issue injunctions against non-parties).

In deciding similar issues related to election law, other circuits have recognized the importance of establishing a clear record of the findings of fact in support of the conclusions of law. *See League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 235-37 (4th Cir. 2014) (affirming the denial of a partial preliminary

[5] Plaintiffs have moved to dismiss the Maricopa County defendants after reaching a settlement concerning other claims. (*See* Doc. 2, at iii n.1.) No other county's officials have ever been named as defendants in this case.

injunction on an incomplete record but recognizing that "a proper application of the law to a more developed factual record could very well result in" portions of the challenged bill being struck down); *see also Veasey v. Abbot*, 830 F.3d 216, 230 (5th Cir. 2016) (finding that some of the district court's factual findings were incomplete and concluding that "we must remand for a reweighing of the evidence"). *Purcell v. Gonzalez* recognized the same. 549 U.S. 1, 5-6 (2006).

Given the nature of Plaintiffs' claims and the lack of meaningful discovery to date, this Court's review of a limited record relating to an already-occurred election would be improper. (Doc. 33-1 at 10 (discussing limited record).) "[T]he fully developed factual record may be materially different from that initially before the district court." *Sports Form*, 686 F.2d at 753. Once the district court rules on the legal issues in light of a full record (with the correct parties participating), this Court will have another opportunity to review that ruling. *See id.*

At the preliminary injunction stage of a proceeding, the rules of evidence are relaxed and a district court is given wide latitude in evaluating the limited record provided by the parties due to the short time frames associated with such actions. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (appellate court review of a denial of a preliminary injunction is "limited and deferential"). As recognized by the Merits Panel during oral argument, there remain significant evidentiary issues concerning the reliability and admissibility of

the evidence presented by the Plaintiffs, who, at oral argument, chose not to press any claim of fact-finding error by the district court. (Doc. 33-1 at 13.) As there is no longer a need to expedite the litigation to obtain a preliminary injunction, the district court is in a better position to address such evidentiary issues. The district court will be applying the permanent injunction standard rather than a preliminary injunction, which may require a more detailed factual analysis. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (permanent injunction standard).

Finally, the denial of a preliminary injunction is not a novel or extraordinary circumstance requiring this Court to continue to proceed *en banc*. *See, e.g., W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012). The merits of the permanent injunction request will be decided by the district court, which ruling Plaintiffs could then appeal. *See Sports Form*, 686 F.2d at 753. The parties and this Court will have a better record to apply legal standards previously established by this Court and that are now followed by other circuits.

CONCLUSION

As the preliminary injunctive relief sought by Plaintiffs is now moot and advisory opinions are inappropriate, this Court should dismiss or stay these proceedings until the district court has an opportunity to enter final judgment on Plaintiffs' request for permanent injunctive relief, which will be based on a complete record that includes findings of fact and law.

Dated: December 5, 2016

Respectfully submitted,

SNELL & WILMER, LLP

By: *s/ Brett W. Johnson*
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor-Defendants state that they are aware of Case No. 16-16698 pending before this Court, in which Plaintiffs appealed the district court's September 23, 2016, order denying them preliminary injunctive relief on their claims related to House Bill 2023. That case was argued and submitted on October 19, 2016, decided on October 28, 2016, and, on November 2, 2016, ordered reheard *en banc*.

s/ Brett W. Johnson

CERTIFICATE OF COMPLIANCE

I certify that this Supplemental Brief complies with the length limits directed by the Court. The Brief is 10 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman font size 14.

s/ Brett W. Johnson

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/ Brett W. Johnson