

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

No. 16-16865

D.C. No.
2:16-cv-01065-DLR

ORDER

Maricopa County Board of Supervisors, in their official capacities; MARICOPA 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.

Filed November 4, 2016

Before: Sidney R. Thomas, Chief Judge,
and Diarmuid F. O'Scannlain, William A. Fletcher,
Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee,
Consuelo M. Callahan, N. Randy Smith, Mary H. Murguia,
Paul J. Watford, and John B. Owens, Circuit Judges.

Per Curiam Order;
Partial Concurrence and Partial Dissent by
Chief Judge Thomas

SUMMARY*

Civil Rights

The en banc court denied plaintiffs' motion for an injunction pending appeal and ordered oral argument to take place during the week of January 17, 2017, in San Francisco, California.

Plaintiffs challenged 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 argued 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.

The en banc court stated that it would 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

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

be fully applicable to this election. The en banc court declined to issue any order that would potentially disrupt procedures in the upcoming election. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Concurring in part and dissenting in part, Chief Judge Thomas, joined by W. Fletcher, Rawlinson and Murguia agreed that this appeal should be reheard en banc for the reasons stated in his dissent in *Feldman v. Arizona Sec'y of State*, 2016 WL 6472060, at *10–21 (9th Cir. 2016). However, Chief Judge Thomas would hold argument and decide the appeal prior to the certification of results for the present election.

ORDER

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.

THOMAS, Chief Judge, concurring in part, and dissenting in part, with whom W. FLETCHER, RAWLINSON, AND MURGUÍA, 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.