

FILED

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UNITED STATES COURT OF APPEALS

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

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ,; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs - Appellants,

v.

STATE OF ARIZONA; JAN BREWER, in her official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ,

No. 08-17094

D.C. Nos. 2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

District of Arizona,
Phoenix

ORDER

Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants - Appellees,

YES ON PROPOSITION 200,

Defendant-intervenor -
Appellee,

Before: O’CONNOR, Associate Justice,* KOZINSKI, Chief Judge and IKUTA, Circuit Judge.

On October 26, 2010, we issued *Gonzalez v. Arizona*, – F.3d –, 2010 WL 4192623 (9th Cir. 2010), holding that the Arizona statutes requiring prospective voters to present documentary proof of citizenship in order to register to vote in a federal election, Ariz. Rev. Stat. §§ 16-152(A)(23), -166(F), were superseded by the National Voter Registration Act (NVRA) and therefore invalid. *See Gonzalez*, 2010 WL 4192623, at *1. At the time we issued this opinion, voter registration for Arizona’s 2010 general election had already closed; the last day for registration was October 4, 2010. *See Ariz. Rev. Stat. § 16-120*. Voting commenced on November 2, 2010. Arizona voters who attempted to vote in the general election, but whose names were not on the precinct register, were permitted to cast a provisional ballot after presenting specified forms of identification. *See id.* § 16-584(B). Approximately 84,000 provisional ballots were cast in the 2010 general election. After election day, county officials began the statutorily required process of verifying whether the individuals who cast a provisional ballot were properly registered in the county. *See id.* § 16-584(E). By state statute, county officials must complete this verification process by November 12, 2010. *See id.*

* The Honorable Sandra Day O’Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

On November 5, 2010, Appellants filed an emergency motion with this court requesting a temporary stay to “order Arizona counties to review the provisional ballots cast in the November 2, 2010 General Election and count the ballots that were submitted by individuals who applied to register to vote between July 5, 2010 and October 4, 2010 but who were not added to the voter rolls because of Proposition 200’s registration provisions.” We construe this motion as requesting affirmative injunctive relief rather than a stay. *See Nken v. Holder*, 129 S. Ct. 1749, 1757–58 (2009) (explaining that a stay stops or postpones a judicial proceeding or “temporarily divest[s] an order of enforceability,” whereas an injunction “tells someone what to do or not to do”). In evaluating Appellants’ motion, we are guided by the Supreme Court’s instruction that “[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

We conclude that Appellants have not established their entitlement to injunctive relief under *Winter*. First, the Appellants have not established a likelihood of success on the merits. Although Appellants argue that they have

already succeeded on the merits, pointing to our opinion in *Gonzalez*, 2010 WL 4192623, the legal issue raised by Appellants' motion for injunctive relief is not the same as the issue we resolved in our prior decision. Whereas *Gonzalez* addressed the facial validity of Sections 16-152(A)(23) and 16-166(F), Appellants' motion raises the question whether a federal court should require Arizona to count the provisional ballots of voters who were improperly refused registration due to the implementation of Sections 16-152(A)(23) and 16-166(F), and therefore were not registered at the time they cast their provisional ballots. Appellants have made no showing that they are likely to succeed on the merits of that issue. Moreover, we generally decline to interfere with statewide elections after voting has begun. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (per curiam) ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented." (citation omitted)). While Appellants note that in certain rare cases courts have required election officials to count ballots that were unlawfully excluded during an election, *see Hill v. Stone*, 421 U.S. 289, 293–94, 301 (1975); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 83, 98 (2d Cir. 2005), *Democratic Party of the V.I. v. Bd. of Elections, St. Thomas-St. John*, 649 F. Supp. 1549, 1553 (D.V.I. 1986), those cases considered legal issues distinct from the one

before us, and therefore do not support Appellants' argument that they are likely to succeed on the merits of this case.

Second, Appellants have not established that they are "likely to suffer irreparable harm in the absence of preliminary relief," *Winter*, 129 S. Ct. at 374. Although they point to four individuals who were allegedly wrongly prevented from voting, they have not demonstrated that counting the relevant provisional ballots would influence the result of the election, *cf. Hoblock*, 422 F.3d at 82; *Sw. Voter*, 344 F.3d at 919–20; *Griffin v. Burns*, 570 F.2d 1065, 1079–80 (1st Cir. 1978), nor have they demonstrated that they are precluded from obtaining post-election relief through state processes.

Third, the balance of equities favors Appellees. Appellants have not demonstrated diligence in pursuing the relief they now seek. Because the registration period closed October 4, 2010, nothing prevented Appellants from identifying individuals who had been improperly denied the right to register and filing their motion for injunctive relief during the period between the date we issued *Gonzalez* and the general election. Instead, Appellants did not file their motion until voting had ended and the state was already engaged in verifying the provisional ballots. If we now granted relief, Appellants' delay would substantially increase the burden on county election officials in determining which

provisional ballots are attributable to voters who were improperly denied registration under the invalidated law, and could ultimately preclude the state from completing this process in time to certify the election results by Arizona's statutory deadline. *See* Ariz. Rev. Stat. §§ 16-642(A), -648(A). The Supreme Court has cautioned courts to be wary of interfering with state election processes where there remains insufficient time before the election must be certified to ensure that adequate procedures and protections are put in place. *See Bush v. Gore*, 531 U.S. 98, 109–10 (2000) (per curiam).

Finally, the public interest would be significantly affected by a federal court's interference in this election. Granting the injunction would seriously disrupt Arizona's vote-counting process and could delay the certification of the election results. While we must give due weight to the interests of individuals who have been denied the right to vote in a federal election, we must weigh their concerns against the impact of the requested relief on the state as a whole. *Cf. Sw. Voter*, 344 F.3d at 919–20 (balancing the hardship asserted by the plaintiffs against the hardship of postponing a scheduled election, which “falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California, because this case concerns a statewide election”).

Because a consideration of the relevant factors establishes that Appellants are not entitled to injunctive relief, Appellants' emergency motion is denied.

DENIED.