No. 22-16689

In the United States Court of Appeals
for the Ninth Circuit

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiffs - Appellants,

v.

CLEAN ELECTIONS USA, et al.,
Defendants - Appellees.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-01823-PHX-MTL

PLAINTIFFS-APPELLANTS' SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE DISTRICT COURT JUDGMENT

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants Arizona Alliance for Retired Americans and Voto Latino, respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein

INTRODUCTION

This is an appeal from the district court's denial of a temporary restraining order and preliminary injunction motion challenging Defendants' incitement and intimidation at ballot drop boxes in Arizona. The district court denied a preliminary injunction on October 28, holding that Defendants' incitement and intimidation were constitutionally protected under the First Amendment. It also held that the public interest and the balancing of equities favored neither party because voters' right to vote free of intimidation stood on an equal footing with Defendants' desire to engage in vigilante law enforcement against an imagined threat of fraudulent voting.

Plaintiffs appealed the district court's order that same day and moved for an immediate injunction pending appeal. Four days later, however, on November 1, the district court granted much of the relief Plaintiffs sought by entering a temporary restraining order in a consolidated case brought by different plaintiffs, but with the same claims and the same Defendants, now holding that the First Amendment did not bar relief against Defendants and that the public interest and the balance of the equities tilted in favor of relief. The emergency having been abated, Plaintiffs moved to withdraw their motion in this Court for an immediate injunction pending appeal, Dkt. 18, but their underlying appeal of the district court's denial of their motion for a restraining order and preliminary injunction remains pending.

Election day has now come and gone and ballot drop boxes are no longer operating in Arizona. The parties' dispute over whether Defendants' conduct related to such drop boxes should be preliminarily enjoined is therefore moot, and this appeal along with it. This Court should follow its "established practice" when a case becomes moot on appeal and vacate the district court's order and dismiss Plaintiffs' appeal as moot. *See Pub. Util. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996).

PROCEDURAL BACKGROUND

Plaintiffs filed a complaint and motion for a temporary restraining order and preliminary injunction in the district court on October 24. ER039-078.[1] The district court held an evidentiary hearing on October 26 and denied Plaintiffs' motion on October 28. ER015-038. The court held Plaintiffs were not likely to succeed on their claim that Defendants had violated Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), because it found Defendants' conduct was protected by the First Amendment. ER005-010. The court also held that Plaintiffs were not likely to succeed under the Ku Klux Klan Act of 1871, 42 U.S.C. § 1985(3), because Defendants did not intend to intimidate lawful voters, apparently crediting Defendants' assertion that they target only "ballot mules." ER010-011. And the

[1] All cites to ER are to the Excerpts of Record filed with Plaintiffs' emergency motion for an injunction pending appeal on October 28.

court determined that while Plaintiffs showed irreparable harm, the balance of the equities and the public interest factors favored neither party, ER011-013, because voters' rights to vote free of intimidation stood on an equal footing with Defendants' efforts to intimidate them while trying to privately enforce election law. Plaintiffs filed a Notice of Appeal and an emergency motion for a preliminary injunction pending appeal before the district court that same day. ER168-172, ER179. The district court denied that motion on October 31. *See* Dkt. 7-2.

On October 28, Plaintiffs also filed an emergency motion in this court under Circuit Rule 27-3 for an immediate injunction pending appeal. Dkt. 2. Plaintiffs stressed that they and countless other Arizona voters would suffer severe and irreparable harm absent injunctive relief. *Id.* at 21. Pursuant to this Court's order, Defendants filed a response on October 31 and Plaintiffs filed a reply on November 1. Dkt. 3, 11, 13.

Separately, a different group of plaintiffs filed suit against Defendants on October 25, alleging similar violations of the Voting Rights Act and the Ku Klux Klan Act. *See* Compl., *League of Women Voters of Ariz. v. Lions of Liberty*, 3:22-cv-08196 (D. Ariz. Oct. 25, 2022), ECF No. 1. The district court consolidated the *League* case and the present case on October 31, Dkt. 9, and ordered the parties in this case to provide a joint notice to this Court of developments in the *League* case on the morning of November 1, Dkt. 14-1. The district court held an evidentiary

hearing in the *League* case on November 1 and, at the conclusion of the hearing, issued a temporary restraining order that provided much of the relief Plaintiffs sought in this case. Dkt. 17-1. In contrast to its written October 28 order in this case, the district court orally held in the *League* case that relief was permitted by the First Amendment and supported by the public interest and the balance of the equities. Because the district court's order in the *League* case abated much of the emergency requiring immediate relief in this appeal, Plaintiffs on November 2 filed an unopposed motion to withdraw their previously-filed emergency motion for an injunction pending appeal. Dkt. 18. That motion remains pending.

Election day was yesterday, November 8. Now that election day has passed, there are no ballot drop boxes operating in Arizona, and the parties' dispute over whether Defendants' conduct related to such drop boxes should be preliminarily enjoined is moot.

STANDARD FOR RELIEF

When a civil suit becomes moot pending appeal, the "established practice" of this Court is to vacate the order or judgment being appealed. *See Pub. Util. Comm'n of Cal.*, 100 F.3d at 1461 (quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994)); *see also Camreta v. Greene*, 563 U.S. 692, 712 (2011) ("When a civil suit becomes moot pending appeal" the Court's "'established' . . . practice in this situation is to

vacate the judgment below" (quoting *Munsingwear*, 340 U.S. at 39)); *United States v. Bd. of Managers of Walker Tower Condo.*, 854 F. App'x 196, 197 (9th Cir. 2021). This Court has "adopted this general approach to vacatur as 'automatic.'" *Pub. Util. Comm'n of Cal.*, 100 F.3d at 1461 (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)). It is fully applicable in appeals from decisions involving preliminary injunctive relief. *See, e.g.*, *Loc. No. 44 of Int'l All. of Theatrical Stage Emps. & Moving Picture Mach. Operators of U.S. & Canada v. Int'l All. of Theatrical Stage Emps. & Moving Picture Mach. Operators of U.S. & Canada*, 886 F.2d 1320, 1989 WL 117195, at *1–2 (9th Cir. 1989) (unpublished) (dismissing a PI appeal as moot and ordering vacatur under *Munsingwear*); *Ohio v. U.S. EPA*, 969 F.3d 306, 310 (6th Cir. 2020) ("We also vacate the district court's order denying the States' motion for a preliminary injunction, given that mootness precludes us from reviewing the merits of that order."); *Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995) (similar).

ARGUMENT

The end of the 2022 general election has rendered moot Plaintiffs' appeal of the district court's denial of their motion for a temporary restraining order and preliminary injunction. "A case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries." *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987). Here, Plaintiffs sought to enjoin Defendants' incitement and intimidation related to Arizona's ballot drop boxes in

the run-up to the 2022 general election, but that election has now ended and the drop boxes are no longer operational. This Court therefore can no longer provide relief related to the district court's denial of Plaintiffs' request for a temporary restraining order or preliminary injunction.

Because this appeal became moot before this Court could review the district court's decision, the Court should vacate the district court's order on Plaintiffs' motion for a temporary restraining order and preliminary injunction. This Court regularly orders vacatur under *Munsingwear* where the relief sought has become moot due to the passage of an event tied to the relief. *See In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005) (explaining that the Supreme Court has affirmed vacatur under *Munsingwear* "as it relates to mootness that arises by 'happenstance,'" (quoting *Bancorp*, 513 U.S. at 25 n.3)); *WildEarth Guardians v. Mark*, 741 Fed. App'x 404, 406 (9th Cir. 2018) (ordering a district court to vacate its judgment because the event Plaintiffs challenged occurred prior to the district court's order). Numerous federal circuit courts have recognized that vacatur under *Munsingwear* is appropriate where Plaintiffs had sought relief related to an election that occurred before the appeal was decided. *See Thompson v. DeWine*, 7 F.4th 521, 524 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022) (vacating district court's order following the November 2020 election, because "the event for which plaintiffs sought relief ha[d] passed"); *Van Wie v. Pataki*, 267 F.3d 109, 111 (2d Cir. 2001) (dismissing

appeal as moot and vacating judgment of district court where plaintiffs sought relief in connection with the March 2000 primary election, which had passed); *see also Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (Mem.) (en banc) (unanimously dismissing the appeal and vacating the judgment of the district court in a redistricting suit, because the 2019 general election had occurred and so the challenged "district lines [would] neither be used nor operate as a base for any future election").

Vacatur of a district court's adverse judgment is appropriate where, as here, mootness occurs by "happenstance," because the party challenging the district court's decision is deprived of the opportunity to seek review of that judgment, and "[v]acatur then rightly strips the decision below of its binding effect and clears the path for future relitigation," *Camreta*, 131 S. Ct. at 2035 (cleaned up). Moreover, vacatur is especially appropriate here, where the district court entered a written opinion denying Plaintiffs emergency relief in this case on October 28, but then orally granted relief in a consolidated case with nearly identical claims on November 1. For the district court's written opinion denying relief to Plaintiffs to stand unreviewed and unreviewable under such circumstances would present a misleading impression of the law as even the district court understood it.[2]

[2] None of the exceptions to *Munsingwear* apply here. In *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, the Supreme Court held that a losing party may forfeit its ability to seek vacatur by intentionally mooting a case through settlement. 513 U.S. at 25-26. And in *Karcher v. May*, the Court held that *Munsingwear* vacatur is not

CONCLUSION

For the forgoing reasons, the Court should vacate the district court's order and dismiss this appeal as moot.

available to a litigant who moots a case by their own action, such as by deciding not to pursue an appeal. 484 U.S. 72 (1987). Here, however, Plaintiffs' appeal was mooted not by settlement nor by their own conduct but by the end of the election. And although Plaintiffs withdrew their emergency motion for an injunction pending appeal after the district court provided relief in the consolidated case, Dkt. 18, granting that motion would have provided only interim relief pending further review in this Court. Thus, even if Plaintiffs had not withdrawn their emergency motion, they would not and could not have obtained a decision on the merits in their appeal before the passage of time inevitably rendered it moot.

Respectfully submitted this 9th day of November, 2022.

/s Daniel A. Arellano

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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 November 9, 2022. In addition, given the expedited nature of this motion, I will immediately serve a copy on Defendants' counsel via email.

s/ Daniel A. Arellano

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 1,752 words. This motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

Dated: November 9, 2022 *s/* Daniel A. Arellano