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' REPLY IN SUPPORT OF THEIR SUGGESTION OF MOOTNESS AND MOTION TO VACATE

Roy Herrera
Daniel A. Arellano
Austin T. Marshall
HERRERA ARELLANO LLP
530 East McDowell Road, Suite 107-150
Phoenix, Arizona 85004-1500
Telephone: (602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
austin@ha-firm.com

Counsel for Plaintiffs-Appellants

Elisabeth C. Frost
David R. Fox
Joseph Posimato
Harleen K. Gambhir
Tina Meng
Marcos Mocine-McQueen
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
efrost@elias.law
dfox@elias.law
jposimato@elias.law
hgambhir@elias.law
tmeng@elias.law
mmcqueen@elias.law

INTRODUCTION

The Court should follow its "established practice" and vacate the district court's order, which became moot before it could be reviewed on appeal. *Pub. Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *United States v. Munsingwear*, 340 U.S. 36, 39 (1950)). The district court denied Plaintiffs' preliminary injunction motion on a compressed timeline without briefing on the First Amendment issues it resolved, which were an affirmative defense that Defendants did not raise before the hearing. The next week the same judge reached a very different conclusion in a consolidated case brought by the League of Women Voters, after receiving briefing on the issue and facing imminent review by this Court. But the initial denial in Plaintiffs' case will stand unreviewable unless the Court vacates it, because the end of the November 2022 election has mooted Plaintiffs' appeal.

Defendants concede that this appeal is moot. Resp. 3. They argue it is an improper appeal but ignore 28 U.S.C. § 1292(a)(1), which authorizes appeals from denials of injunctions. They instead invoke inapplicable requirements that govern emergency motions and appeals under the collateral-order doctrine. And contrary to Defendants' arguments, Plaintiffs did not cause this appeal to become moot: Plaintiffs reached no settlement below, and the appeal would have become moot when the election ended on November 8 no matter what Plaintiffs did. The Court should therefore vacate the district court's order and dismiss the appeal.

ARGUMENT

This Court's "established practice . . . in dealing with a civil case . . . which has become moot while on its way here or pending [a] decision on the merits is to reverse or vacate the judgment below." *Pub. Utils. Comm'n*, 100 F.3d at 1461 (quoting *Munsingwear*, 340 U.S. at 39). That practice applies to appeals from denials of preliminary injunctions like this one. *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); *Ohio v. U.S. EPA*, 969 F.3d 306, 310 (6th Cir. 2020); *Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995). Defendants do not dispute these general rules, and they concede that this appeal is now moot. Resp. 3. Defendants nevertheless oppose vacatur, contending that this is an improper appeal and that an exception to the "established practice" of vacatur applies. Both arguments are wrong.

I. This is a proper appeal.

This is not "a highly improper interlocutory appeal." Resp. 3. Under 28 U.S.C. § 1292(a)(1), the Court has "jurisdiction over appeals from the denial of preliminary injunctive relief." *Norbert v. City & Cnty. of S.F.*, 10 F.4th 918, 926 (9th Cir. 2021). The district court's order expressly denied Plaintiffs' motion for a preliminary

injunction. ER01–02.[1] Express denials of injunctions are *always* appealable under § 1292(a)(1); no showing of an emergency is required. *See Shee Atika v. Sealaska Corp.*, 39 F.3d 247, 249 (9th Cir. 1994) (no "requirement of irreparable injury applies to appeals from orders specifically denying injunctions"); *Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996) (same).

In arguing otherwise, Defendants point to Circuit Rule 27-3, which applies to emergency *motions*, not underlying appeals. *See* 9th Cir. R. 27-3. When Plaintiffs previously filed an emergency motion for an injunction pending appeal, they complied with Rule 27-3. *See* Emergency Mot. for Inj. Pending Appeal, ECF No. 2-1 (including a Rule 27-3 certificate explaining that Plaintiffs had filed a motion for an injunction pending appeal in the district court that had not yet been ruled on). But nothing in Rule 27-3 applies to the underlying appeal itself, nor to this non-emergency motion to vacate. And Plaintiffs could not have first moved in the district court for the relief they seek here anyway, because once Plaintiffs appealed, "the district court no longer has jurisdiction to consider motions to vacate judgment." *Davis v. Yageo Corp.*, 481 F.3d 661, 685 (9th Cir. 2007); *see also Rodriguez v. Cnty. of L.A.*, 891 F.3d 776, 790 (9th Cir. 2018) ("[T]he filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the

[1] Citations to ER are to the excerpts of record, filed on this Court's docket at ECF No. 2-2. Cites to ECF are to this Court's docket.

appeal." (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982))). No surprise, then, that Defendants do not cite a single *Munsingwear* case that became moot on appeal in which the movant first sought vacatur in the district court, much less any case imposing such a requirement.[2]

Defendants also rely on *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863 (1994), but neither involved an appeal from the denial of injunctive relief under § 1292(a)(1). Rather, both involved the "collateral order doctrine"—a judge-made exception to the general rule that only final judgments are appealable. *See Cohen*, 337 U.S. at 546; *Digit. Equip. Corp.*, 511 U.S. at 865. The collateral-order doctrine's requirements do not apply to appeals from denials of injunctions under § 1292(a)(1). *See, e.g.*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 288 (distinguishing between orders "appealable under § 1292(a)(1)" and those that "may, in appropriate circumstances, be reviewed under the collateral-order doctrine"); *Orange Cnty. v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 823–27 (9th Cir. 1995) (separately analyzing whether an order was appealable under the collateral-order doctrine and § 1292(a)(1)). Plaintiffs therefore need not show that they appeal from a "decision on an 'important' question" that would "be 'effectively

[2] *Reid v. BCBSM, Inc.*, 787 F.3d 892, 895 (8th Cir. 2015), became moot in the district court rather than on appeal, which is why the district court addressed vacatur in the first instance there. *See id.*

unreviewable' upon final judgment." Resp. 4 (quoting *Digit. Equip. Corp.*, 511 U.S. at 869). Plaintiffs need only show that they appeal from the denial of a preliminary injunction, which they do.

This is therefore a proper appeal under 28 U.S.C. § 1292(a)(1). And while the parties agree that the appeal is now moot, Resp. 3, that means only that the Court "may not consider [the appeal's] merits." *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21 (1994) (quoting *Walling v. James V. Reuter Co.*, 321 U.S. 671, 677 (1944)). The Court still has jurisdiction to vacate the decision below. *Id.*

II. Vacatur is proper because this appeal became moot when the 2022 election ended, not because of anything Plaintiffs did.

Defendants argue that they are not responsible for the appeal becoming moot, Resp. 6, but that does not make vacatur improper. The Court has "adopted [the] general approach to vacatur as 'automatic'" when an appeal becomes moot before it can be decided. *Pub. Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1461 (9th Cir. 1996) (quoting *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995)). The only exception is when "*the party seeking appellate relief* fails to protect itself or is the cause of subsequent mootness." *Pub. Utils. Comm'n*, 100 F.3d at 1461. In contrast, if mootness results *either* "from happenstance *or* from the 'unilateral action of the party who prevailed below,'" vacatur is required. *Id.* (emphasis added).

Here, mootness resulted from happenstance: the election ended before the appeal could be resolved on the merits. Courts of appeals have repeatedly vacated

decisions in similar circumstances. *See Thompson v. DeWine*, 7 F.4th 521, 524 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1233 (2022) (vacating district court's order after 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 March 2000 primary election, which had passed); *see also Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (Mem.) (en banc) (dismissing appeal and vacating judgment of district court in a redistricting case because 2019 general election had ended so the challenged "district lines [would] neither be used nor operate as a base for any future election").

Defendants attempt to distinguish these cases, but their distinctions are inconsistent with their concession (at 3) that the end of the election renders this appeal moot. Defendants argue that here, unlike in those cases, "the events spawning the *case* at bar" may "recur," because Defendants "hope to" engage in the challenged behavior "in future elections." Resp. 10 (emphasis added). But that is an argument that the *case* is not moot—not that this appeal from the district court's preliminary injunction order (which is the subject of this motion for vacatur) is not moot. Plaintiffs' preliminary injunction motion focused entirely on threats to the November 2022 election, which has ended. ER15–38. For the same reason, Defendants' argument that Plaintiffs have not dismissed their underlying case

entirely misses the mark; Plaintiffs' requests for permanent injunctive relief and nominal and compensatory damages remain live controversies below; they just are not part of this appeal.

Moreover, if Defendants' distinctions of *Thompson*, *Van Wie*, and *Thomas* were correct, that would mean that this appeal is not moot. The proper course would then be for the Court to deny this motion entirely and decide the appeal on the merits after briefing and argument. In no event could Defendants' distinctions justify dismissing the appeal as moot but declining to vacate the district court's decision.[3] And Defendants' additional contention that *Thompson* "did not discuss . . . whether vacatur was appropriate or automatic," Resp. 10, ignores that, after concluding that the appeal was moot, *Thompson* expressly vacated the district court's order, citing *Munsingwear*. 7 F.4th at 526–27. No extended explanation was needed precisely *because* vacatur is nearly automatic where an appeal becomes moot before it can be decided on the merits.

[3] The same is true of Defendants' contention that Plaintiffs' argument that this appeal is moot is inconsistent with the League's argument to the district court that their own preliminary injunction motion is *not* moot. Resp. 1–2. Plaintiffs and the League are separately represented and filed different preliminary injunction motions below. The district court unambiguously denied Plaintiffs' motion, while granting the portion of the League's motion that requested a temporary restraining order (which has since expired). The League's argument that its preliminary injunction motion is not moot is only bolstered by Defendants' representations to this Court that they would like to engage in the same conduct in the future. *Id.* at 10. If the Court concludes based on those representations that this appeal is not moot, it should deny this motion and hear the appeal on the merits.

Defendants' argument that Plaintiffs are responsible for this appeal becoming moot is equally wrong. Resp. 7–9. Defendants rely on two events: the district court's entry of a temporary restraining order in the League's consolidated case, and Plaintiffs' later withdrawal of their emergency motion for an injunction pending appeal in this court. *Id.* at 9.

The district court's entry of a temporary restraining order did not moot this appeal because it provided much narrower relief than Plaintiffs sought. Plaintiffs moved for an order prohibiting Defendants from, among other things, gathering in groups of more than two individuals within 250 feet of drop boxes and organizing others to engage in in-person monitoring of drop boxes. ER166. The League's temporary restraining order did not prohibit such conduct. ECF No. 17-2. An order providing less relief than Plaintiffs sought could not possibly moot this appeal. *See Norbert*, 10 F.4th at 927 ("Plaintiffs are appealing the district court's order to the extent it denied their motion for a preliminary injunction, which sought broader relief than what the district court issued.").

It would, however, make no difference if the district court's temporary restraining order in the League's case *did* moot this appeal. The settlement exception to vacatur of cases that become moot on appeal does "not apply to judgments mooted by court decisions in other cases." *NASD Dispute Resol., Inc. v. Jud. Council of Cal.*, 488 F.3d 1065, 1070 (9th Cir. 2007). That is true even if the party seeking vacatur

was a party to the other case, because parties "c[annot] be required to abandon their consistent position in other pending litigation merely to avoid mooting out another case." *Id.*; *see also City & Cnty. of San Francisco v. Garland*, 42 F.4th 1078, 1088 (9th Cir. 2022). Thus, even if it were the district court's temporary restraining order in the League's case that rendered this appeal moot, vacatur would still be proper.

Moreover, Defendants contradict the record by calling the order in the League's case a "stipulated TRO." Resp. 9. Only a small part of the League's temporary restraining order was stipulated to; the district court entered much of it over Defendants' objections. *See* ECF No. 17-2 at 3. And even the stipulated portion was stipulated *only* between the League and Defendants. Plaintiffs were not a party to it. As Plaintiffs explained below, "the agreement that the League has reached with defendants is purely . . . between the League and defendants. The Alliance and Voto Latino have not reached any agreement that would resolve or in any way moot or change the status of their claims either as they are pending before this Court or on appeal before the Ninth Circuit." Tr. of Nov. 1 Hr'g at 17:9–14, No. 2:22-cv-01823-MTL (D. Ariz. Nov. 1, 2022), attached hereto as Ex. 1. Defendants' statement that the parties "reached agreement that a stipulated TRO would address Plaintiffs' concerns regarding the current election," Resp. 2, is therefore false.[4]

[4] After the district court entered the temporary restraining order in the League's case, Plaintiffs reached an agreement with Defendants in which Plaintiffs withdrew their

Plaintiffs' withdrawal of their emergency motion for an injunction pending appeal from this Court after the district court entered the temporary restraining order in the League's case does not change this. *See* ECF No. 18. That withdrawal reflected the extraordinary nature of Plaintiffs' request for *emergency relief* pending appeal; it does not change the fact that the order in the League's case provided less than the full relief that Plaintiffs sought and therefore did not moot their appeal. *Norbert*, 10 F.4th at 927. Nor does it change the fact that even if the decision in the League's case did moot the appeal, it would be no obstacle to vacatur. *NASD Dispute Resolution*, 488 F.3d at 1070. And Plaintiffs' withdrawal of their emergency motion is not what caused this appeal to become moot; the motion sought only an injunction *pending* appeal, so even if the Court had granted it, the appeal would still have become moot after election day, long before its merits could have been resolved.

CONCLUSION

For the forgoing reasons, the Court should vacate the district court's order and dismiss this appeal as moot. If, however, the Court concludes that the appeal is not moot, then it should deny this motion and decide the appeal on the merits after briefing and argument.

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emergency motion in exchange for Defendants' agreement not to appeal the League's temporary restraining order. The parties did not reach any agreement on the status of this underlying appeal or the question of vacatur: Plaintiffs reserved their right to seek vacatur once the appeal became moot after election day, and Defendants reserved their right to oppose it.

Respectfully submitted this 12th day of December, 2022.

s/ David R. Fox

Roy Herrera
Daniel A. Arellano
Austin T. Marshall
HERRERA ARELLANO LLP
530 East McDowell Road, Suite 107-150
Phoenix, Arizona 85004-1500
Telephone: (602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
austin@ha-firm.com

Elisabeth C. Frost
David R. Fox
Joseph Posimato
Harleen K. Gambhir
Tina Meng
Marcos Mocine-McQueen
ELIAS LAW GROUP LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Telephone: (202) 968-4490
efrost@elias.law
dfox@elias.law
jposimato@elias.law
hgambhir@elias.law
tmeng@elias.law
mmcqueen@elias.law

Counsel for Plaintiffs-Appellants

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 12, 2022.

s/ David R. Fox

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and Circuit R. 27-1(1)(d) because it contains 2,597 words and is no more than 10 pages long. 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: December 12, 2022 *s/* David R. Fox