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 (Hon. Michael T. Liburdi)

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

RETRIEVED FROM DEMOCRACYDOCKET.COM

Alexander Kolodin
Veronica Lucero
Davillier Law Group, LLC
4105 North 20th Street, Suite 110
Phoenix, AZ 85016
Tel: 602-730-2985
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
phxadmin@davillierlawgroup.com

Attorneys for Defendants-Appellees

INTRODUCTION

The suggestion for mootness should be denied for two reasons. *First*, this case does not present proper grounds for an interlocutory appeal from an ongoing trial court action. *Second,* this is not the type of case in which vacatur is appropriate.

PROCEDURAL BACKGROUND

Below, this case concerns two substantially similar complaints and motions for preliminary injunctive relief filed by Plaintiffs-Appellants Arizona Alliance for Retired Americans ("Alliance") and non-party to this appeal League of Women Voters ("League"). (Dkt. No. 1-2, 24; *Compare* Alliance Compl. at 38-39 *with* League Compl. at 28.) These cases were consolidated on October 31. (Dkt. No. 43.) Both motions for preliminary injunctive relief were denied, but the district court did enter a limited Temporary Restraining Order ("TRO") in the League case, which made more substantial factual allegations. (Dkt. No. 50-51). This TRO has now expired. (*Id.*) The district court then ordered the parties to meet, confer, and file a joint report as to whether some or all of the consolidated case was moot, which the parties subsequently did. (Dkt. No. 62. *See also* Dkt. No. 64 at 1:16-18 ("Unless expressly specified otherwise, the positions set forth below represent the positions of both Plaintiff Arizona Alliance for Retired Americans ('AARA') and Plaintiff League of Women Voters of Arizona ('the League').".) In this joint

RETRIEVED FROM DEMOCRACYDOCKET.COM

report, both the League and Alliance spent several pages describing why the League's prayer for preliminary injunctive relief was not moot. (Dkt. No. 64 at 2:8-3:12.) It is sleight of hand for Appellants to argue on appeal that their own prayer for preliminary injunctive relief is moot while their co-Plaintiff below continues to argue that theirs is not. Further, Appellants have neither withdrawn their suit below, nor any part of it (including their prayer for preliminary injunctive relief), even though Appellees have not yet filed an answer. A motion to dismiss is currently being briefed.

The first two paragraphs of Appellants' section outlining the procedural background of this case is accurate. However, Appellees wish to clarify a few items in the third paragraph. First, Appellants note that the district court issued a TRO at the conclusion of the November 1 hearing. While this is factually accurate, it fails to mention that the district court had ordered the parties to meet and confer on October 31 to determine whether the consolidated case could be resolved, in whole or in part, by agreement. (Dkt. No. 43.) The parties conferred and reached agreement that a stipulated TRO would address Plaintiffs' concerns regarding the current election. Thus, Defendants stipulated to all but three terms of the TRO prior to the November 1 hearing. (Dkt. No. 47). Shortly after the hearing, the Court granted the parties' proposed stipulated TRO but also included the three terms proposed by Plaintiffs and opposed by Defendants. (Dkt. No. 50-51).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Second, while it is true that the district court determined that the TRO was permitted by the First Amendment after hearing evidence at the November 1 hearing, as opposed to its decision denying a TRO after the October 26 hearing (which is the decision from which Appellants appeal here), it is important to qualify the court's analysis. Namely, the court reasoned that the narrow relief afforded by the stipulated TRO for the duration of the election would not infringe on Defendants'-Appellees' First Amendment rights, but the court did not determine whether permanent injunctive relief would satisfy that standard. Moreover, Appellees aver that their acquiescence to all but three terms of the TRO was an important factor in the decision and is also relevant to Appellants' current request for the reasons discussed below.

RETRIEVED FROM DEMOCRACYDOCKET.COM

ARGUMENT

Although Appellees agree that this case is now moot, the Court should not vacate the district court's prior order for several reasons.

First, the election now having passed, this appeal no longer satisfies the standard for an emergency appeal (if it ever did). If Appellants believe that their prayer for preliminary injunctive relief is moot, and vacatur is proper, they must explain why they did not first ask the district court for the relief they seek on what has now become a highly improper interlocutory appeal. *See* Circuit Rule 27-3 (party pursuing an emergency appeal must "explain whether the relief sought in the

motion was first sought in the district court or agency, and if not, why the motion should not be remanded or denied."), *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("Appeal gives the upper court a power of review, not one of intervention."). To maintain an interlocutory appeal, a party must demonstrate that "the decision on an 'important' question be 'effectively unreviewable' upon final judgment." *Dig. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 869 (1994) (citation omitted[1]). But if the prayer for preliminary injunctive relief really is moot, then the question is hardly "important," and, in any event, a party may appeal in the normal course from the denial of vacatur by the district court. *See Reid v. BCBSM, Inc.*, 787 F.3d 892, 895 (8th Cir. 2015) ("We review the district court's denial of vacatur for an abuse of discretion."). Here, of course, the Alliance has not even *moved* for vacatur in the district court. Hence, an interlocutory appeal may not be maintained. Secondly, this is not the type of case in which courts order vacatur because of mootness. Appellants argue that it is general and routine practice for courts to vacate the order or judgement being appealed when a civil suit becomes moot pending appeal. Mot. at 5-6. However, this case is distinguishable from the cases Appellants cite.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Appellants cite the following Supreme Court and Ninth Circuit cases for the applicable standard: *Pub. Util. Comm'n of Cal. v., FERC*, 100 F.3d 1451, 1461

[1] Citations are omitted here and in all other quotes.

(9th Cir. 1996) (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)); *Camreta v. Greene*, 563 U.S. 692, 712 (2011); *United States v. Bd. of Managers of Walker Tower Condo.*, 854 F. App'x 196, 197 (9th Cir. 2021) (unpublished); *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). Mot. at 4-5. In their argument section, they further cite *In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005); *WildEarth Guardians v. Mark*, 741 Fed. App'x 404, 406 (9th Cir. 2018) (unpublished).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Public Utilities Commission of California is a Ninth Circuit case that cites two Supreme Court cases for the proposition that federal courts, subject to certain exception, "normally vacate the orders below when a case becomes moot on appeal," but "mootness resulting from happenstance or from the 'unilateral action of the party who prevailed below' *does* require vacatur." 100 F.3d at 1461 (citing *Munsingwear*, 340 U.S. at 39, *U.S. Bancorp Mortgage Co.*, 513 U.S. 18, 22-23). In that case, the Public Utilities Commission of California ("CPUC") intervened to protest the Federal Energy Regulatory Commission's ("FERC") determination that it had exclusive jurisdiction over Mojave Pipeline's application to expand its natural gas facilities in California (arguing that CPUC had jurisdiction instead). *Id.*

at 1455-56. After CPUC appealed FERC's determination, Mohave Pipeline refused to accept FERC's certificate granting it the expansion because the company determined the expansion was no longer feasible. *Id.* at 1458, 1460. FERC then moved to dismiss the appeals as moot, which CPUC opposed. *Id.* at 1458. Nevertheless, the only relief CPUC requested was that FERC's orders be vacated, which FERC had already done, subject to leave of the Court. *Id.* The Court determined that no exception to automatic vacatur applied because the appeal at issue had become moot due to the prevailing party's unilateral action (Mojave Pipeline's refusal to accept the certificate issued by FERC) and thus ordered vacatur. *Id.* at 1461.

In this case, and concerning the November 28 Order at issue before this Court, the prevailing party (Defendants-Appellees) took no unilateral action to moot the case, and the district court does not seek vacatur—in contrast to *Public Utilities*, where the prevailing party (Mohave Pipeline) took an action that stripped FERC, the commission that issued the order in the first place, of its jurisdiction. Moreover, in that case, both FERC and CPUC sought vacatur. Here, Defendants-Appellees do not seek vacatur, as the Order is instructive as to future elections.

Moreover, as explained in *U.S. Bancorp*, "as *Munsingwear* itself acknowledged, the 'established practice' [of automatic vacatur] (in addition to being unconsidered) was not entirely uniform, at least three cases having been

RETRIEVED FROM DEMOCRACYDOCKET.COM

dismissed for mootness without vacatur withing the four Terms preceding *Munsingwear*." 513 U.S. at 23. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is true when mootness results from unilateral action of the party who prevailed below."[2] *Id.* at 25. "Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur." *Id.*

This case is more akin to *U.S. Bancorp* in that Appellants now voluntarily seek to withdraw their emergency motion for an injunction pending appeal. Mot. at 4. In addition, they stipulated to the November 1 TRO, which they believe "provided much of the relief Plaintiffs sought in this case." *Id.* Now, they simply want this Court to vacate the district court's October 28 Order because it is unfavorable to them, but that is not a valid reason for vacatur.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Instead, "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served

[2] Of course, neither is true here. Appellants have not been "frustrated by the vagaries of circumstance," nor is this case moot due to unilateral action by Defendants-Appellees. Instead, the election came and went. Appellants were satisfied with the TRO to which the parties stipulated and believed it resolved many of the issues in Appellants' favor. Mot. at 4.

by a vacatur." 513 U.S. 18, 26-27. Especially here, the October 28 Order is valuable to the legal community as a whole because it is instructive to litigants and courts in resolving a clash between two fundamental constitutional rights (voting and free speech). And because this issue may reoccur in the future, the public interest would not be served by a vacatur of this instructive judicial precedent.

The additional cases Appellants cite are also unavailing and instead demonstrate why vacatur is inappropriate here.[3] In *Camreta*, for instance, the Supreme Court considered a case that had become moot under unusual circumstances, namely, the "happenstance" of the victim "moving across country and becoming and adult," which frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim." 563 U.S. at 713-14. As the Court noted, the "equitable remedy of vacatur ensures that 'those who have been prevented from obtaining the review to which they are entitled [are] not . . . treated as if there had been a review.'" *Id.* at 712. "When happenstance prevents that review from occurring, the normal rule

RETRIEVED FROM DEMOCRACYDOCKET.COM

[3] Because these cases are unpublished and are also not instructive, Appellees do not address *United States v. Bd. of Managers of Walker Tower Condo.*, 854 F. App'x 196, 197 (9th Cir. 2021), *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), and *WildEarth Guardians v. Mark*, 741 Fed. App'x 404, 406 (9th Cir. 2018).

should apply: Vacatur then rightly "strips the decision below of its binding effect." *Id.* at 713.

Appellants here have not "been prevented from obtaining the review to which they are entitled…as if there had been a review.'" *Id.* at 712. And it is not "happenstance" that has prevented review. Instead, it is Appellants themselves who have volunteered to withdraw their pending motion, thereby *seeking* to prevent review rather than obtain it. Moreover, the passage of an election is not the type of "happenstance" occurrence that causes a case to become moot. Due to their nature, rather, election cases are predictably cyclical.

In re Burrell addressed the issue of "whether the party seeking relief from the judgment below caused the mootness by voluntary action." 415 F.3d at 999. In that case, the party seeking relief had done nothing to moot the action and was therefore entitled to vacatur. Instead, the adverse party had caused the case to become moot. Again, that is not the case here. Plaintiffs-Appellants have chosen to withdraw their pending appeal because the election has come and gone, and they believe that they have received most of the relief they requested with the district court's entry of the stipulated TRO.

Finally, the out-of-circuit cases Appellants cite are both unauthoritative and unavailing. *Thompson v. DeWine* involved COVID-19 emergency restrictions on gathering signatures for initiative petitions for the 2020 election cycle. 7 F.4th 521,

RETRIEVED FROM DEMOCRACYDOCKET.COM

524 (6th Cir. 2021). There, the Court held that the case was moot, explaining that, "[w]ithout a time machine, we cannot go back and place plaintiffs' initiatives on the 2020 ballot." *Id.* at 524. However, the Court did not discuss it whether vacatur was appropriate or automatic. Thus, there are no assumptions to be drawn from this case. Moreover, this case does not involve the exigencies of COVID-19 emergency cases. In *Van Wie v. Pataki*, the Court determined the case was moot because Appellants had only alleged a mere theoretical possibility that the controversy was capable of repetition. 267 F.3d 109 (2d Cir. 2001). That is not the case here. Moreover, the Court noted that there is no automatic right to vacatur. *Id.* at 115. *Thomas v. Reeves* is also inapplicable as a case involving redistricting that would not be used for any future election. 961 F.3d 800 (5th Cir. 2020) (Mem.) (en banc). Again, there is no claim here that the events spawning the case at bar will never reoccur.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Instead, Defendants-Appellees hope to exercise their First Amendment rights in future elections to express their beliefs regarding election integrity and to associate with one another as they express that message while also attempting to deter illegal voting. The October 28 Order is instructive as to this issue, but Appellants wish for it to be vacated simply because it is unfavorable to them. This Court should not vacate the Order.

CONCLUSION

For all these reasons, the Court should deny Appellants' Motion to Vacate the District Court Judgment.

Respectfully submitted this 5th day of December 2022.

/s/ Veronica Lucero
Alexander Kolodin
Veronica Lucero
Davillier Law Group, LLC
4105 North 20th Street, Suite 110
Phoenix, AZ 85016
Tel: 602-730-2985
akolodin@davillierlawgroup.com
vlucero@davillierlawgroup.com
phxadmin@davillierlawgroup.com

Attorneys for Defendants-Appellees

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

I certify that, on December 5, 2022, a copy of the foregoing was served on all counsel of record via the Court's ECF system.

/s/ Veronica Lucero

CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because it contains 2,495 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: December 5, 2022 */s/ Veronica Lucero*

RETRIEVED FROM DEMOCRACYDOCKET.COM