

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Alliance for Retired Americans, et al,

Plaintiff,

vs.

Clean Elections USA, et al,

Defendants.

No. CV-22-01823-PHX-MTL

(Consolidated with
CV-22-08196-PCT-MTL)

JOINT STATUS REPORT

League of Women Voters of Arizona,

Plaintiff,

vs.

Lions of Liberty LLC, et al.,

Defendants.

Pursuant to this Court's order, Dkt. 62, Plaintiffs and Defendants in this consolidated case conferred on November 14, 2022, and, through their undersigned counsel, submit this joint status report.

Plaintiffs' position

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 consolidated case, both Plaintiffs assert two separate causes of action against Defendants. First, Plaintiffs claim that Defendants have violated Section 11(b) of the Voting Rights Act of 1965 ("VRA"), codified at 52 U.S.C. § 10307(b). Second, Plaintiffs claim that Defendants have violated the Ku Klux Klan Act ("Klan Act"), codified at 42 U.S.C. § 1985(3). Plaintiffs seek both declaratory and injunctive relief for these legal violations as well as compensatory and punitive damages.

1
2 Plaintiffs have begun to initiate settlement discussions with Defendants.
3 Nevertheless, Plaintiffs’ cases are not at all moot following the 2022 midterm election.
4 First, Plaintiffs retain their claims for compensatory and punitive damages against
5 Defendants, which are, by definition, not moot. *See Nat’l Coal. on Black Civic*
6 *Participation v. Wohl*, 512 F. Supp. 3d 500, 516 (S.D.N.Y. 2021) (noting that Klan Act
7 and 11(b) claims were not moot because Plaintiffs sought, *inter alia*, compensatory and
8 punitive damages); *Bernhardt v. Cnty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)
(claims not moot because Plaintiff sought compensatory and punitive damages).
9 Defendants do not dispute that these claims remain live.

10 Second, the League’s motion for preliminary injunctive (and ultimately,
11 permanent injunctive) relief is also not moot. The Court’s temporary restraining order has
12 expired. The purpose of a preliminary injunction is distinct; it maintains the status quo
13 between the parties and is intended to prevent further unlawful conduct during the
14 pendency of the action. *See, e.g., Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)
15 (“The purpose of a preliminary injunction is . . . to preserve the relative positions of the
16 parties until a trial on the merits can be held”). A preliminary injunction remains
17 warranted because it would prevent Defendants from recommencing conduct that this
18 Court has already found unlawful until the parties reach a settlement or the Court issues
19 a final judgment in this case. *See Wohl*, 512 F. Supp. 3d at 516 (concluding that the
20 passage of the 2020 election did not moot Plaintiffs’ 11(b) and Klan Act claims because
21 “other elections will continue to be held and present new opportunities for Defendants to
22 employ similar tactics”). State and local elections using drop boxes will continue to be
23 held during the pendency of this matter—with the next potentially scheduled as early as
March 2023.¹ Furthermore, regardless of the calendar of elections, in the absence of a
continuing injunction, Defendants can engage in doxxing and can circulate false

¹ *See Peter Valencia, 2 seats for Phoenix city council could go into a runoff, early returns show*, AZFamily.com (Nov. 9, 2022), <https://www.azfamily.com/2022/11/09/2-seats-phoenix-city-council-could-go-into-runoff-early-returns-show/>.

1 information about lawful voter practices at any time. Nor does Defendants' suggestion
2 that they do not know of any plans to recommence unlawful conduct alter the mootness
3 analysis. That is paradigmatic voluntary cessation. *See Friends of the Earth, Inc. v.*
4 *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (holding that standard for
5 evaluating mootness based on "defendant's voluntary conduct is stringent," requiring
6 defendant to meet "heavy burden" of proving that challenged conduct will not recur).

7 Plaintiffs disagree with Defendants that the Court's November 1 TRO adjudicated
8 the League's concurrent motion for a preliminary injunction. Quite the contrary, the
9 Court understood the two motions as legally distinct. *See* Nov. 1 Transcript at Tr. 162:16-
10 21 (the Court inquiring "if I grant the relief that you are seeking . . . is it sufficient for me
11 to do that in a TRO, or would you like that reduced to a preliminary injunction"). Tr.
12 178:10-14 (Plaintiff's counsel request that the Court also issue a preliminary injunction).
13 The Court then indicated that following the hearing, it intended to convert the TRO into
14 a preliminary injunction. *See* Nov 1. Transcript at 190:25-191:5.²

15 Although neither these cases nor the League's motion for preliminary injunction
16 are moot, Plaintiffs believe it is prudent for the parties to discuss settlement at this
17 juncture. To that end, Plaintiffs have agreed to extend Defendants' deadlines to answer
18 their Complaints. Plaintiffs have further proposed that the parties agree that the League's
19 preliminary injunction motion can be held in abeyance pending settlement discussions if
20 the parties jointly agree to (or if Defendants will not oppose) a request that the Court issue
21 an opinion memorializing its oral findings in support of the November 1, 2022 TRO.³
22 Plaintiffs believe that a written opinion or order incorporating the findings the Court made
23 from the bench in support of the TRO will be important to help the parties arrive at a

² Plaintiffs disagree that Defendants had no opportunity for responsive briefing. Absent a request for modification or extension, Defendants' deadline for a responsive memorandum would have been due November 14 (taking into account the November 11 holiday) under Local Rule 7.2(c).

³ Plaintiffs can also offer proposed findings of fact and conclusions of law, based on the Court's oral ruling, should that be helpful.

1 settlement. Defendants have advised that they need additional time to evaluate this
2 request.

3 **Defendants' position**

4 Defendants' position is that there is no motion for TRO or preliminary injunction
5 currently pending. As Plaintiffs indicated above, this Court's previous order resolved the
6 prayers for both preliminary injunctive relief and a TRO. Indeed, this was at the specific
7 request of Plaintiffs. *See* Tr. 162:16-21 (court request for Plaintiffs' position),⁴ Tr.
8 178:10-14 (Plaintiffs' reply that preliminary injunction is preferred).⁵ And the court did
9 not indicate that it would convert the order into a preliminary injunction, quite the
10 contrary. *See* Tr. 190:14-23.⁶ Thus, the request for a preliminary injunction has already
11 been adjudicated. If, however, Defendants misunderstand the procedural posture and the
12 Court believes that such a motion is pending, Defendants request that the Court please so
13 notify the parties and set a briefing schedule.

14 And if such a motion for preliminary injunctive relief is now pending, then it is
15 certainly moot. This Court ordered entry of a TRO to expire a few days after the election
16 [Dkt. 51]. The election has now passed. The 9th Circuit has provided the applicable rule:

17 ⁴ "THE COURT: Okay. Final question: If I -- if I grant the relief that you are seeking,
18 and I would note in addition to entering the -- the proposed TRO, but also the three
19 items that you're requesting that -- that defendants contest, is it sufficient for me to do
20 that in a TRO, or would you like that reduced to a preliminary injunction for -- for
21 appeal purposes?"

22 ⁵ "MR. DANJUMA: Your Honor, thank you so much. And I know it's been a long day.
23 Very brief. 30 seconds. First of all, what you asked, if we'd prefer a PI or a
TRO, and we would prefer a preliminary injunction, but we will take anything that the
Court provides to us."

⁶ "[THE COURT]: I -- I want to state with the narrow -- the form of narrowly tailored
injunction that I would find that the balance of equities and public interest does tip slightly
in plaintiffs' favor. As I have mentioned, it is paramount that we balance the rights of --
of defendants to engage in their constitutionally protected First Amendment activity with
the interest of plaintiffs and voters in casting their vote in a manner that's free of
intimidation and harassment. **And I believe that the -- that the temporary restraining
order achieves that purpose.**"

1
2 Speculative injury does not constitute irreparable injury sufficient to
3 warrant **granting a preliminary injunction**. *Goldie's Bookstore, Inc. v.*
4 *Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). A plaintiff must do
5 more than merely allege imminent harm sufficient to establish standing; a
6 plaintiff must *demonstrate* immediate threatened injury as a prerequisite to
7 preliminary injunctive relief. *L.A. Coliseum*, 634 F.2d at 1201.

8 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (italics in
9 original, emphasis in bold supplied). As the election is now behind us, there can be no
10 imminent threat of injury. Any allegation that Defendants will engage in drop box
11 monitoring in the future at all, much less in an upcoming municipal election which is far
12 less likely to attract the time and attention of volunteer monitors than a general election,
13 is entirely speculative. And were Defendants to conduct such monitoring, any allegations
14 regarding what policies and procedures they might put in place, legally required or not,
15 to mitigate the alleged harms would also be speculative. This is not an exhaustive list of
16 grounds under which Defendants might argue mootness or otherwise oppose Plaintiffs
17 claims.

18 The portion of [Nat'l Coal. on Black Civic Participation v. Wohl](#) cited by Plaintiffs
19 [is not to the contrary](#). Rather, that portion of the case involves a discussion of the standing
20 [analysis on a motion to dismiss](#). 512 F. Supp. 3d 500, 515-16 (S.D.N.Y. 2021) (citing
21 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-82 and
22 further making express reference to claims for money damages).

23 Defendants' position is that the Court's reasons for entering its Preliminary
Injunction/TRO have already been stated in the record and no written order is necessary.
See Tr. 182:1-190:23; *see also* (Doc. 51) 1:15-16 ("For the reasons stated on the record,
IT IS ORDERED ...). Defendants are happy to provide Plaintiffs with the relevant portion
of the transcript.

1
2 To the extent that anything in Plaintiffs' position is not addressed herein, then
3 Defendants reserve the right to contest that position.

4 **Joint position**

5 The parties are hopeful that this matter can be resolved by agreement and have
6 begun to discuss settlement.

7 To facilitate settlement negotiations between the parties, Plaintiffs have stipulated
8 to an extension of Defendants' deadlines to respond to both complaints in this matter and
9 yesterday submitted a joint motion for such an extension. The parties to the League case
10 have also stipulated that briefing in that matter in the Circuit Court be stayed, except that
11 Clean Elections' response to AARA's Suggestion of Mootness is due, by stipulation, on
12 December 5th.

13 DATED this 16th day of November, 2022.

14 OSBORN MALEDON, P.A.

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