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Feldman v. Arizona Secretary of State, No. 16-16698MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Bybee, Circuit Judge, with whom Circuit Judges O'Scannlain, Clifton, Callahan, and N.R. Smith join, dissenting:

I join in full Judge O'Scannlain's dissent. I write separately to emphasize two brief points: First, Arizona's restrictions on who may *collect* an early ballot—a question very different from who may *vote* by early ballot—follows closely the recommendation of the bipartisan Commission on Federal Election Reform. Second, the Arizona early ballot law at issue here is a common provision, and similar restrictions on the collection of early or absentee ballots may be found on the books of some twenty-one states. Those provisions have been in effect for decades, and they have been enforced. Unless the Voting Rights Act means that identical provisions are permissible in some states and impermissible in other states, our decision would invalidate many of those provisions, including provisions in other states of the Ninth Circuit.

I

There is no constitutional or federal statutory right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm'rs of Chic.*, 394 U.S. 802, 807–08 (1969) (“It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . [T]he absentee statutes, which are designed to make

voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise”); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment) (“That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required.”); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting the claim that there is “a blanket right of registered voters to vote by absentee ballot;” “it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting or Internet voting”).

Arizona’s restrictions on the collection and handling of absentee ballots are neutral provisions designed to ensure the integrity of the voting process. Although the majority claims that there is no evidence of “voter fraud caused by ballot collection,” Maj. Op. at 2, (adopting *Feldman v. Ariz. Sec’y of State*, --- F.3d ---, 2016 WL 6427146 *24 (9th Cir. 2016) (Thomas, C.J., dissenting)), Arizona does not have to wait until it possesses such evidence before it acts. It may be proactive, rather than reactionary. And the evidence for voter fraud in the handling of absentee ballots is well known. In 2005, the bi-partisan Commission on Federal

Election Reform¹ found: “Absentee ballots remain the largest source of potential voter fraud.” *Comm’n on Fed. Elections Reform, Building Confidence in U.S. Elections* 46 (2005) [hereinafter *Building Confidence*]. As the Seventh Circuit so colorfully described it: “Voting fraud is a serious problem in the U.S. elections generally . . . and it is facilitated by absentee voting. . . . [A]bsentee voting is to voting in person as a take-home exam is to a proctored one.” *Griffin*, 385 F.3d at 1130–31; *see also Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) (“[T]here is considerable room for fraud in absentee voting and . . . a failure to comply with the regulatory provision governing absentee voting increases the opportunity for fraud.” (citation omitted)); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. Times (Oct. 6, 2012), <http://nyti.ms/QUbcrg> (discussing a variety of problems in states).

The Commission on Federal Election Reform recommended that “States . . . should reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” *Building Confidence, supra*, at 46. It made a formal

¹ The Commission on Federal Election Reform was organized by American University’s Center for Democracy and Election Management and supported by the Carnegie Corporation of New York, The Ford Foundation, the John S. and James L. Knight Foundation, and the Omidyar Network. It was co-chaired by former President Jimmy Carter and former Secretary of State James Baker.

recommendation:

State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.

Id. at 47 (Recommendation 5.2.1). Arizona’s restrictions hew closely to the Commission’s recommendation. H.B. 2023 provides that “A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony.” Ariz. Rev. Stat. Ann. § 16-1005(H) (codifying H.B. 2023).

Consistent with the Commission’s recommendation, the law does not apply to three classes of persons: (1) “[a]n election official,” (2) “a United States postal service worker or any other person who is allowed by law to transmit United States mail,” and (3) “[a] family member, household member or caregiver of the voter.”

Id. § 16-1005(H)–(I)(1). I don’t see how Arizona can be said to have violated constitutional or statutory norms when it follows bipartisan recommendations for election reform in an area well understood to be fraught with the risk of voter fraud. Nothing could be more damaging to confidence in our elections than fraud at the ballot box. *See* Liptak, *supra* (describing a study by a political scientist at MIT finding that election officials rejected 800,000 absentee ballots in the 2008 presidential election; “That suggests an overall failure rate of as much as 21

percent.”).

II

Moreover, the Arizona provision is substantially similar to the laws in effect in other states. In Indiana, for example, it is a felony for anyone to collect a voter’s absentee ballot, with exceptions for members of the voter’s household, the voter’s designated attorney in fact, certain election officials, and mail carriers. Ind. Code § 3-14-2-16(4). Connecticut also restricts ballot collection, permitting only the voter, a designee of an ill or disabled voter, or the voter’s immediate family members to mail or return an absentee ballot. Conn. Gen. Stat. § 9-140b(a). New Mexico likewise permits only the voter, a member of the voter’s immediate family, or the voter’s caregiver to mail or return an absentee ballot. N.M. Stat. Ann. § 1-6-10.1. At least seven other states (Georgia, Missouri, Nevada, North Carolina, Oklahoma, Ohio, and Texas) similarly restrict who can personally deliver an absentee ballot to a voting location. Ga. Code Ann. § 21-2-385(a) (limiting who may personally deliver an absentee ballot to designees of ill or disabled voters or family members); Mo. Rev. Stat. § 115.291(2) (restricting who can personally deliver an absentee ballot); Nev. Rev. Stat. § 293.330(4) (making it a felony for anyone other than the voter or the voter’s family member to return an absentee ballot); N.C. Gen. Stat. § 163-231(b)(1) (allowing only family members or

guardians to personally deliver an absentee ballot); Okla. Stat. Tit. 26, § 14-108(C) (voter delivering a ballot must provide proof of identity); Ohio Rev. Code Ann. § 3509.05(A) (limiting who may personally deliver an absent voter's ballot); Tex. Elec. Code Ann. § 86.006(a) (permitting only the voter to personally deliver the ballot).²

Other states are somewhat less restrictive than Arizona because they permit a broader range of people to collect early ballots from voters but restrict how many ballots any one person can collect and return. Colorado forbids anyone from collecting more than ten ballots. Colo. Rev. Stat. § 1-7.5-107(4)(b); *cf.* Ga. Code Ann. § 21-2-385(b) (prohibiting any person from assisting more than ten physically disabled or illiterate electors in preparing their ballot). North Dakota prohibits anyone from collecting more than four ballots, N.D. Cent. Code § 16.1-07-08(1); New Jersey, N.J. Stat. Ann. § 19:63-4(a), and Minnesota, Minn. Stat. Ann. § 203B.08 subd. 1, three; Arkansas, Ark. Code Ann. § 7-5-403, Nebraska,

² Moreover, at least two states had similar provisions on the books until recently. California formerly limited who could return mail ballots to the voter's family or those living in the same household. Cal. Elec. Code § 3017. It only amended its law earlier this year. 2016 Cal. Legis. Serv. Ch. 820. Illinois also used to make it a felony for anyone but the voter, his or her family, or certain licenced delivery companies to mail or deliver an absentee ballot. 10 Ill. Comp. Stat. 5/19-6 (1996); 10 Ill. Comp. Stat. 5/29-20(4). Illinois amended that provision in 2015 to let voters authorize others to mail or deliver their ballots. 10 Ill. Comp. Stat. 5/19-6 (2015).

Neb. Rev. Stat. § 32-943(2), and West Virginia, W. Va. Code § 3-3-5(k), two. South Dakota prohibits anyone from collecting more than one ballot without notifying “the person in charge of the election of all voters for whom he is a messenger.” S.D. Codified Laws § 12-19-2.2.

Still other states have adopted slightly different restrictions on who may collect early ballots. California and Maine, for example, make it illegal to collect an absentee ballot for compensation. 2016 Cal. Legis. Serv. Ch. 820 (amending California Election Code § 3017 to enable anyone to collect an early ballot provided they receive no compensation); 21-A Me. Rev. Stat. Ann. § 791(2)(A) (making it a crime to receive compensation for collecting absentee ballots); *see also* Fla. Stat. § 104.0616(2) (making it a misdemeanor to receive compensation for collecting more than two vote-by-mail ballots); N.D. Cent. Code § 16.1-07-08(1) (prohibiting a person to receive compensation for acting as an agent for an elector); Tex. Elec. Code Ann. § 86.0052 (criminalizing compensation schemes based on the number of ballots collected for mailing).

Some of the laws are stated as a restriction on how the early voter may return a ballot. In those states, the voter risks having his vote disqualified. *See, e.g., Wrinn v. Dunleavy*, 440 A.2d 261, 272 (Conn. 1982) (disqualifying ballots and ordering a new primary election when an unauthorized individual mailed

absentee ballots). In other states, as in Arizona, the statute penalizes the person collecting the ballot. *See* Ind. Code § 3-14-2-16 (making it a felony knowingly to receive a ballot from a voter); Nev. Rev. Stat. § 293.330(4) (making it a felony for unauthorized persons to return an absentee ballot); Tex. Elec. Code Ann. § 86.006 (making it a misdemeanor for an unauthorized person to possess between one and twenty ballots and a felony to possess more than twenty); *see also* *Murphy v. State*, 837 N.E.2d 591, 594–96 (Ind. Ct. App. 2005) (affirming a denial of a motion to dismiss a charge for unauthorized receipt of a ballot from an absentee voter); *People v. Deganutti*, 810 N.E.2d 191, 198 (Ill. App. Ct. 2004) (affirming conviction for absentee ballot violation); *see also* Ga. Code Ann. § 21-2-385(b) (providing for penalties up to ten years and a fine of \$100,000 for anyone assisting more than ten physically disabled or illiterate electors). In those states, the ballot, even if collected improperly, may be valid. *See In re Election of Member of Rock Hill Bd. of Educ.*, 669 N.E.2d 1116, 1122–23 (Ohio 1996) (holding that a ballot will not be disqualified for technical error).

III

“[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.” *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). H.B. 2023 is well within the range of

regulations that other states have enacted. I see no infirmity, constitutional or statutory, in Arizona's efforts to prevent the potential for fraud in the collection of early ballots. I respectfully dissent.