Feldman v. Arizona, No. 16-16698

Smith, N.R., Circuit Judge, dissenting from the order enjoining Arizona:

I join Parts I, II, and III of Judge O'Scannlain's dissent, along with Judge Bybee's separate dissent. However, I write separately to emphasize that the majority erred in granting the stay pending appeal, because Appellants cannot meet the standard set forth by *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

The standard for granting a stay pending appeal is well established: (1) "the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury"; (2) "the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor"; and (3) we should "strongly consider[]" the "public interest." *Id.*; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In this case, in order to determine whether Appellants have met this standard, and are thus entitled to a stay, "we must evaluate [their] arguments for overturning the district court's [denial of a] preliminary injunction on appeal." *See Lopez*, 713 F.2d at 1436. We evaluate the district court's denial of a preliminary injunction, applying an abuse of discretion standard of review. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). We cannot reverse a district court's decision unless its

decision was based "on an erroneous legal standard or clearly erroneous finding of fact." *Id*. (quoting *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc)). Here, the district court did neither. Thus, it is not probable that Appellants will succeed on the merits of their appeal.

In applying these standards here, I wholeheartedly agree with Judge Ikuta's three-judge panel majority opinion in *Feldman v. Arizona*, No. 16-16698, 2016 WL 6427146 (9th Cir. Oct. 28, 2016). Appellants raise several challenges to H.B. 2023, including violations of the Voting Rights Act of 1965, § 2; the Fourteenth Amendment; and the First Amendment.

Judge Ikuta thoroughly analyzed Appellants' likelihood of success on the merits of each theory appealed to us. *See Feldman*, 2016 WL 6427146 at *6-20. When evaluating whether the district court based its decision by applying an erroneous legal standard, Judge Ikuta first properly applied the two-part legal framework, adopted by our sister circuits, in resolving the Voting Rights Act issue. *Id.* at * 6-16. She explained why the district court properly applied that legal authority. *Id.* at * 17-18. I agree that, because the district court found that Appellants' § 2 claim failed at the first prong, it had no obligation to reach the second prong. *Id.* at *13. Judge Ikuta next laid out the legal framework for facial challenges to voting laws under the Fourteenth and First Amendments and

considered Feldman's challenges. *Id.* at * 14-20. She properly applied the *Anderson*/*Burdick* balancing test. *Id.* at * 16-20. As to the Fourteenth Amendment claim, she explained why "the district court did not clearly err in finding that H.B. 2023 did not 'significantly increase the usual burdens of voting.'" *Id.* at *16. She correctly applied *Crawford* in that analysis. *Id.* at * 16-19. Lastly, Judge Ikuta addressed the legal authority applicable to the First Amendment claim and correctly determined that "the district court's conclusion that Arizona's regulatory interests in preventing voter fraud justifies the minimal burden that H.B. 2023 imposes on associational rights under the *Anderson*/*Burdick* test." *Id.* at *19.

Appellants also failed to establish that the district court's decision as to the facts was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Id.* at *13 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). Judge Ikuta's discussion of the district court's factual findings evidences no abuse of discretion. *See id.* at *6-20.

Having concluded that the district court did not err in holding that Appellants failed to demonstrate a likelihood of success on the merits, Judge Ikuta then considered the remaining factors for issuing a preliminary injunction. *Id.* at * 20-21. I agree with her that Appellants have not established that irreparable harm

will flow from a failure to enjoin Arizona, because it is not likely they will suffer a violation of their statutory or constitutional rights. *See id.* at *20. Appellants have failed to show that the balance of hardships tips sharply in their favor. *See id.* The district court's factual finding that many voters (who entrust their ballots to collectors) do so merely for convenience is not clear error. *See id.* The record does not reflect any hardship of the organizational plaintiffs to reallocate resources. *See id.* Thus, Arizona's hardship in "preserving ballot secrecy and preventing 'undue influence, fraud, ballot tampering, and voter intimidation'" has not been outweighed. *See id.* (quoting *Miller v. Picacho Elementary Sch. Dist. No. 33*, 877 P.2d 277, 279 (Ariz. 1994) (en banc)). Finally, this record does not evidence that the public's interest weighs one way or the other in determining this issue. *See id.* at * 21.

This error is further compounded by issuing this stay on the eve of an election. As Judge O'Scannlain excellently points out in his dissent, when our court is presented a request to interfere in a state's election laws, "just weeks before an election" we are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006) (per curiam). These considerations provide an additional reason why we should restrain ourselves in

granting a stay in election law cases such as this one. I agree with Judge O'Scannlain's arguments and many cases cited in his dissent emphasizing this constraint. However, *Purcell* itself gives specific guidance to us in this case, because the Supreme Court was specifically addressing a Ninth Circuit decision to grant an injunction when dealing with voter identification rules. There, the Supreme Court explained:

> We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and "[n]o bright line separates permissible election-related regulation from unconstitutional infringements." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). Given the imminence of the election and the inadequate time to resolve the factual disputes, *our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.*

Id. at 5-6 (emphasis added).

In other words, even if the Ninth Circuit were right in the ultimate decision to enjoin the application of the voter identification rules in *Purcell*, "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes," the Supreme Court, out "of necessity," allowed the election to proceed without a stay of the application of the voter identification rules. *Id.*

I especially note the advice in the concurrence of Justice Stevens:

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. . . . Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

Id. at 6 (Stevens, J., concurring). Even if I were to agree with the majority, that a preliminary injunction should issue, I would heed Justice Stevens's advice and allow Arizona's law to be evaluated on facts rather than speculation.[1] I cannot join the majority opinion, which does not take heed to this good counsel.

[1] Early voting in Arizona occurs from October 12, 2016, through November 4, 2016. Staying the enforcement of H.B. 2023 at this late date (which would only allow persons to drop off the early ballots today and on Election Day) will likely result in greater confusion and will not provide courts with a better record of the law's constitutionality.