No. 22-35612

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Doug Smith, Robert Griffin, Allen Vezey, Albert Haynes,
Trevor Shaw, Families of the Last Frontier,
and Alaska Free Market Coalition,
Plaintiffs-Appellants,
v.

Anne Helzer, in her official capacity as chair of the Alaska
Public Offices Commission, and Van Lawrence, Richard Stillie
Jr., Suzanne Hancock, and Dan LaSota, in their official
capacities as members of the Alaska Public Offices
Commission,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska
No. 3:22-cv-00077-SLG
Hon. Sharon L. Gleason

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Appellants submit this Supplemental Brief to address the questions raised by this Court in its December 21, 2022 order: whether the completion of the 2022 election cycle affects this appeal and whether it is now moot, whether this Court should address the question of irreparable harm, and whether there is irreparable harm now that the election is over. *See* Dkt. 34.

The completion of the election cycle has no substantive effect on this appeal, in regards to mootness or for any other reason: Neither of Appellants' claims, nor their arguments in favor of a preliminary injunction, relied in substance on the then-approaching election. Rather, the 2022 election cycle was referenced in Appellants' pleadings and briefing only to express the urgency of the harm to Appellants. This is a challenge to campaign finance reporting and disclosure requirements, which remain in effect, and will remain in effect going forward without injunctive relief.

All that has changed is that Appellants suffered the harm they had hoped to be relieved from—and they continue to suffer it to this day. And that harm is irreparable, as any denial of First Amendment rights

is. It is therefore appropriate for this Court to rule on the issue of irreparable harm along with the merits, since Appellants' success on the merits would necessarily establish that they are suffering irreparable injury.

ARGUMENT

I. P.I. appeals are not moot after the passage of an election when they challenge the structure of election laws and the parties' activities are not specific to a single election.

It is certainly possible for an interlocutory appeal of a preliminary injunction (P.I.) to become moot, even as the district court retains jurisdiction of the merits of the underlying case. *See, e.g., In Def. of Animals v. United States DOI*, 648 F.3d 1012, 1013 (9th Cir. 2011) (preliminary injunction appeal is moot because the event that plaintiffs sought to enjoin had taken place). In such a case, the appropriate course is to dismiss the appeal for mootness and let the district court decide the merits, for instance the amount of actual or nominal damages owed now that the event has taken place.

However, a P.I. appeal is not moot when it challenges legal structures that have ongoing application to the parties' ongoing activities. In election-related appeals, the key questions are (1) whether

the legal structures at issue affect future elections, and (2) whether the parties plan to participate in future elections. Thus, in *Disability Law Ctr. of Alaska v. Meyer*, 857 F. App'x 284 (9th Cir. 2021), this Court dismissed the P.I. appeal as moot because the plaintiffs, who were persons with preexisting medical conditions, sought absentee ballots by mail for the 2020 election because of the COVID-19 pandemic. The Court said, "Because the 2020 election has passed, we 'can no longer grant any effective relief sought in the injunction request.'" *Id*. at 285. Similarly, in *Save Our Preserve PAC of Scottsdale v. City of Scottsdale*, 753 F. App'x 476 (9th Cir. 2019), this Court concluded a P.I. appeal was moot because a PAC sought to influence a single ballot referendum that was now passed: "The appeal is moot. SOP PAC conceded during oral argument that it is currently undertaking no advocacy efforts." *Id*. at 477. And once more, in *De La Fuente v. Padilla*, 686 F. App'x 383 (9th Cir. 2017), a P.I. appeal was moot because the election had passed wherein a candidate sought to get on the ballot and run for an office. Thus, "there is no present risk that Sections 8400 and 8403 will be applied to De La Fuente." *Id*. at 384.

All three of these cases relied on this Court's decision in *Akina v.*

Hawaii, 835 F.3d 1003 (9th Cir. 2016), which concerned an election within a Native Hawaiian self-government corporation. That election was cancelled, "and the plaintiffs do not argue that similar elections will occur in the future. . . . No other ratification elections have been scheduled. Further, Na'i Aupuni itself has dissolved as a non-profit corporation and any future election would likely be held by an entity that is not a party to this litigation." *Id*. at 1010. As a result, the P.I. appeal was moot. Other circuits take a similar approach mooting P.I. appeals for elections that have passed when the case concerned a specific candidate or ballot measure, *see, e.g., Bogaert v. Land*, 543 F.3d 862, 864 (6th Cir. 2008).

In contrast, an appeal is not moot when the plaintiff's "request for a preliminary injunction was not limited to the November 2016 election." *De La Fuente v. Kemp,* 679 F. App'x 932, 933-34 (11th Cir. 2017). In that case, the plaintiff had said "he intends to seek the presidency again in 2020, at which point he will once again be forced to comply with the Georgia deadline statute or face exclusion from the ballot. So, to the extent that De La Fuente seeks a preliminary injunction as to future presidential elections, his claims are not moot. Those elections haven't

happened yet." *Id*. Similarly, a P.I. appeal is not moot when "[t]he election commissioners have the ongoing duty" to apply the statute to all elections, not only the one first at issue in the complaint. *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir. 1973).

As Appellants demonstrate below, this case falls within the distinction laid out in *Akina*. The 2022 election has passed, but "similar elections will occur in the future." Elections in 2023 and 2024 "have been scheduled." Campaign speech in these "future election[s]" will also be regulated by the commissioners of the Alaska Public Office Commission. There is a "present risk that" Ballot Measure 2 will be applied to Appellants. As institutional actors and regular donors, the Appellants will "undertake[] advocacy efforts" in elections still upcoming while this case is pending. In other words, Ballot Measure 2 applies to future elections, and (as demonstrated at length below), Appellants and Appellees will participate in those elections under the rules set in Ballot Measure 2.

As a result, granting the preliminary injunction Appellants seek "will have some effect in the real world," 13 C. Wright, A. Miller & E. Cooper,

Federal Practice and Procedure: Jurisdiction § 3533, at 270 (1975), namely, it will protect the Appellants' advocacy in the 2023 and 2024 elections (and beyond) while this case is litigated on the merits.

II. Completion of the 2022 election cycle does not moot or otherwise undermine this appeal because this case and appeal were not predicated on that election.

The completion of the 2022 election cycle does not affect this appeal from a denial of a preliminary injunction, and does not render the appeal moot, because Appellants in this case are not challenging any law, policy, or official action specific to the 2022 election cycle. Rather, they challenge provisions of Ballot Measure 2, a campaign finance regulation that continues to regulate Appellants' ongoing political activities in Alaska. The record reflects that Appellants have a consistent history of participating in Alaska elections, and their speech will be restricted by Ballot Measure 2 going forward, including in relation to upcoming elections in the state in 2023 and 2024. Neither Appellants' claims, nor the law or facts supporting them, are undermined by the completion of the most recent election cycle.

None of the claims pled in Appellants' Complaint are specific to the 2022 election. *See* District of Alaska No. 3:22-cv-00077-SLG, Dkt. 1.

Counts I through III, and the Prayer for Relief, make no mention of the 2022 election at all. *Id.* at ¶¶ 60 *et seq*. Nor are the allegations regarding Appellants specific to the 2022 election. It is mentioned in the Complaint only three times: once to allege that there was a then-upcoming election where Ballot Measure 2 would be operable, *id.* at ¶ 20, and in two paragraphs each for the Appellant entities, alleging that Families of the Last Frontier and the Alaska Free Market Coalition intended to participate in the upcoming election, and would be subject to Ballot Measure 2 if they did. *Id.* at ¶¶ 37-38 and 49-50. It is not mentioned anywhere else, because Appellants are not challenging the operation of the 2022 election, they are challenging campaign finance regulations that apply to all Alaska elections going forward.

Nor was Appellants' Motion for Preliminary Injunction specific to the 2022 election—it likewise mentions the impending election only to establish the urgency of the matter, since Appellants right to speak would be (and as it turned out, was) abridged in that election. In their Motion, Appellants explained that they were "entitled to a preliminary injunction because they are likely to succeed on the merits of their claims that [the challenged provisions] all violate the First

Amendment's protections of political speech and association." District of Alaska No. 3:22-cv-00077-SLG, Dkt. 7 at 2. They were not asking to enjoin Ballot Measure 2 as-applied to some specific race in 2022 in which they particularly wanted to participate.

They invoked the upcoming election only to establish that the harms they alleged were not just imminent, but in fact occurring, since campaigns were ongoing as the days for voting approached: "Moreover, it is vital that this Court act now to prevent irreparable injury . . . The loss of First Amendment rights for even a short time is an irreparable injury under any circumstance, *but the damage is most acute* where, as here, the challenged restrictions implicate an impending election." *Id.* (emphasis added). The 2022 election is invoked only in that paragraph, and then briefly in the section on irreparable harm—again to emphasize the urgency of the matter. *Id.* at 33. That particular urgency is now passed, but nothing in Appellants request for preliminary injunctive relief depended on the upcoming election, except their request for prompt relief in time for that election.

Here, Appellants have established in the record that they have made and intend in the future to make donations and expenditures that

would trigger the challenged provisions of Ballot Measure 2. For instance, Appellant Trevor Shaw's sworn declaration states that he "would like to continue to give similar or even greater amounts to the causes that are important to me, *including* during the 2022 election cycle." (ER 108) (emphasis added). His testimony was not specific to 2022, but rather expressed his continuing desire to participate in Alaska's political process, including but not limited to the 2022 election. The declaration of Steve Strait, on behalf of Appellant Families of the Last Frontier, makes no mention of the 2022 election at all. (ER 106-107). Likewise, the record below shows that each Appellant has an established history of donating and/or making independent expenditures in Alaska elections and intends to do so going forward. *See*, *e.g.*, Compl. ¶¶ 22-23 (about Appellant Doug Smith), ¶¶ 26-27 (about Appellant Allen Vezey). *Accord* Affidavit of Scott Kendall, D.Ct. ECF Doc. 33-1, ¶ 10 (noting that Appellant Families of the Last Frontier has filed 24 independent expenditure forms and Appellant Alaska Free Market Coalition has filed 13); ¶¶ 11-12 (Families of the Last Frontier was active in 2018 and 2019); ¶¶ 14-24 (individual donor

plaintiffs active in 2014, 2018, 2019, 2020). Nothing alleged in these paragraphs has changed since the Complaint was filed.

And there will be future elections. Indeed, as of this filing, the Anchorage municipal election is less than three months away (April 4, 2023), and the deadline for candidates to register for Alaska's October 3 Regional Educational Attendance Area elections is August 4, 2023. *See* Alaska Division of Elections, Official Election Calendar.[1] The Anchorage municipal elections will be hotly contested given a deep divide between the Assembly and the Mayor. Emily Goodykoontz & Zachariah Hughes, *After municipal manager's firing, Anchorage Assembly leaders plan inquiry into Bronson administration spending*, Anchorage Daily News, Dec. 22, 2022.[2]

And for better or worse, the 2024 election is not so far away as it may seem. If the 2022 election is any guide, we should expect 2024 campaigns to begin this year as well. Les Gara, the runner-up, announced his 2022 candidacy for Governor in August 2021, and by

[1] https://www.elections.alaska.gov/calendar/
[2] https://www.adn.com/alaska-news/anchorage/2022/12/21/after-municipal-managers-firing-anchorage-assembly-leaders-plan-inquiry-into-bronson-administration-spending/.

that point there were already three other candidates in the race. Andrew Kitchenman, *Former state Rep. Les Gara becomes fourth candidate for Alaska's governor*, Alaska Public Media, Aug. 20, 2021.[3] There is, therefore, no reasonable question that Appellants continue to experience the injuries pled in their complaint and fairly raised in their preliminary injunction motion.

As an alternative way to think about the issue, even where a case might otherwise be moot, the federal courts retain jurisdiction to decide the appeal if the issue is capable of repetition, but would evade review. Under this Circuit's law, "election cases often fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003) (quoting *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003)). In this case, "[t]he provisions of Alaska law challenged by [Appellants] remain in place, and there is sufficient likelihood that [Appellants] will again be

[3] https://alaskapublic.org/2021/08/20/former-state-rep-les-gara-becomes-fourth-candidate-for-alaskas-governor/

required to comply with them that its appeal is not moot." *Alaska Right to Life Comm. v. Miles,* 441 F.3d 773, 779 (9th Cir. 2006); *see also Libertarian Party of Mich. v. Johnson*, 714 F.3d 929, 930 (6th Cir. 2013) (challenge to Michigan's "sore-loser" statute was judicable despite the holding of the election, since candidates would be subject to the law in future elections); *La Rouche v. State Bd. of Elections*, 758 F.2d 998, 999 (4th Cir. 1985). This Court has found just such instances in the past with campaign finance statutes. *Farris v. Seabrook*, 677 F.3d 858, 863 (9th Cir. 2012) (P.I. appeal of campaign finance law on recalls).

In other words, there are two ways to think about this case, either of which leads to the conclusion this Court should retain jurisdiction. Either it is not moot because the P.I. did not seek relief specific to the 2022 election, and the appellants and appellees will continue to donate and advocate and to enforce the law during upcoming elections. Or the appeal is moot but evading review because the same rules will be applied to the same parties in future cases. Either way, this Court should hear and decide this appeal.

Sound policy reasons likewise support such a conclusion. Appellants proceeded in this case under the normal appeals process for a

preliminary injunction, which already incorporates some level of expedited treatment by the Court. They did not file an emergency application with this Court, or with the Supreme Court, for the simple reasons that 1) their claims were not specific to one election, but rather implicated all future Alaska elections, and 2) it is not desirable that every campaign finance case be decided under exigent circumstances, without the full briefing and argument important First Amendment questions deserve. If this Court were to establish that any such appeal will be dismissed if not resolved prior to the instant election, the incentive for litigants will be to force its hand with eleventh-hour emergency filings—a practice that has already become endemic in recent years. *See, e.g.,* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019-2020).

III. This Court should find that Appellants are likely to suffer irreparable harm.

Appellants suffered irreparable harm during the 2022 election cycle because of Ballot Measure 2 and continue to suffer it to this day. As explained in their preliminary injunction motion below and in their briefing in this Court, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."

Elrod v. Burns, 427 U.S. 347, 373 (1976). Appellants lost those freedoms in 2022, and they will remain lost in future elections without injunctive relief.

This Court's order for supplemental briefing asks whether Appellants can demonstrate irreparable injury "where the only harm they identified relates to enforcement of Ballot Measure 2 in advance of the 2022 election." Dkt. 34 at 1-2. But again, the harm to Appellants was not limited to the 2022 election cycle—they did not seek, and do not seek, an injunction specific to that election. Rather, their harm is being subject to Ballot Measure 2, now and forevermore. The references in Appellants' briefing to the impending election simply acknowledged the then-most acute instance of that harm.

Appellants do believe it would be appropriate for this Court to address the question of irreparable harm here, despite the district court's declination to do so in the first instance. In a First Amendment case such as this, the other preliminary injunction factors, including irreparable harm, effectively collapse into the merits. Under this Court's precedent, as long as Appellants have "a colorable First Amendment claim," they have inherently "demonstrated that [they]

likely will suffer irreparable harm." *Am. Beverage Ass'n v. City and County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). Even the brief loss of First Amendment rights causes "irreparable injury" and tilts "the balance of hardships . . . sharply in [the plaintiff's] favor," and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* Therefore, if Appellants have persuaded this Court that they have at least a colorable First Amendment claim, irreparable harm follows from that holding *a fortiori*, and a remand to the district court to address the question in the first instance would serve no formal or practical purpose.

CONCLUSION

For the forgoing reasons, and those articulated in Appellants' Opening and Reply Briefs, this Court should reverse the decision below.

Dated: January 20, 2023 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(g)

I certify that this brief complies with the word limit of Cir. R. 32-1, and the 5,000 word limit set in this Court's order, *see* Dkt. 34, because this brief contains 2,956 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Daniel R. Suhr
January 20, 2023