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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 League of United Latin American Citizens
10 Arizona, et al.,

11 Plaintiffs,

12 v.

13 Michele Reagan, in her official capacity as
14 Secretary of State of Arizona, et al.,

Defendants.

No. CV17-4102 PHX DGC

ORDER

15 In November 2017, the League of United Latin American Citizens Arizona and
16 the Arizona Students' Association ("Plaintiffs") brought this action against Michele
17 Reagan, in her capacity as Secretary of State of Arizona, and Adrian Fontes, in his
18 capacity as Maricopa County Recorder ("Defendants"). Plaintiffs alleged that Arizona
19 had a dual voter registration system that violated various constitutional guarantees. The
20 parties settled the lawsuit by negotiating a Consent Decree to solve the problem identified
21 by Plaintiffs. Without admitting fault, Defendants agreed to take certain steps to ensure
22 that voters would not be disadvantaged by the issues Plaintiffs had noted. On stipulation
23 of the parties, the Court entered the Consent Decree on June 18, 2018. Doc. 37.

24 A federal, state, and local election was held on November 6, 2018. Three days
25 later, on November 9, 2018, the ACLU filed a motion on behalf of Luis Cisneros, arguing
26 that Defendants had violated the Consent Decree. Doc. 39. Although Mr. Cisneros was
27 not a party to the decree, the ACLU argued that he was entitled to enforce it because he
28 was an intended beneficiary. The motion asked the Court to issue orders to Defendant

1 Reagan and the Pima County Recorder. Although the Pima County Recorder was not a
2 party to the Consent Decree, the ACLU argued that the decree could be enforced against
3 her pursuant to Rules 65 and 71 of the Federal Rules of Civil Procedure. Doc. 39.

4 Mr. Cisneros complained that he is a naturalized United States citizen, that he
5 registered to vote in Pima County after moving there recently, and that he received a
6 letter from the Pima County Recorder advising him that he was not eligible to vote. His
7 ineligibility stemmed from the fact that Mr. Cisneros holds an F-type Arizona driver's
8 license, which normally is issued to noncitizens. Knowing that he was a citizen, Mr.
9 Cisneros promptly went to the County Recorder's office, submitted his passport as proof
10 of citizenship, and was registered as a voter. Although he was told that he would not be
11 able to vote until after the November 6th election, Mr. Cisneros submitted a provisional
12 ballot for the election. His motion asked the Court to order Defendant Reagan and the
13 Pima County Recorder to count his provisional ballot.

14 Mr. Cisneros' ballot was later counted. *See* Doc. 45. As a result, his motion is
15 now moot.

16 On Monday, November 12, 2018, Plaintiffs filed a motion asking the Court to hold
17 that Defendants violated the Consent Decree. Doc. 40. Plaintiffs' motion was based on
18 Mr. Cisneros's situation. Because he, as a holder of an F-type driver's license, initially
19 had not been allowed to register to vote, Plaintiffs alleged that others might be in the
20 same situation. Plaintiffs asked the Court to impose relief that will be described below.

21 Plaintiffs' motion comes with some time pressure. As the parties agree, County
22 Recorders and the Secretary of State are required by statute to complete their verification
23 of ballots cast in the November 6th election by this Friday, November 16, 2018. This is a
24 time-intensive process that requires election officials to verify millions of votes cast in
25 Arizona last week. The canvas for the election must be completed ten days later, by
26 November 26, 2018. Counsel for the Maricopa County Recorder's Office explained that
27 the canvas for Maricopa County will be thousands of pages in length and will provide
28 data on votes cast for each office, in each of hundreds of precincts, and substantial

1 additional information. The canvas must be approved by the Maricopa County Board of
2 Supervisors by November 26, 2018, and provided to the Secretary of State. Because of
3 these pressing dates, Plaintiffs asked that their motion be heard on an emergency basis.
4 Doc. 40 at 2.

5 On the afternoon of November 12th, the Court entered an order requiring the
6 affected persons – Defendant Reagan and the Pima County Recorder – to file responses
7 the next day, and scheduled a hearing for today at 9:00 a.m. Doc. 41. Defendant Reagan
8 and the Pima County Recorder filed their responses (*see* Docs. 46, 49), and the Court
9 held a hearing this morning for almost two hours. After confirming that the motion
10 brought by the ACLU is now moot, the hearing focused on issues raised in Plaintiffs’
11 motion and Defendants’ responses.

12 The Court’s schedule also creates time pressure. As the Court advised the parties
13 at the hearing, due to the press of other cases, it was not able to begin reading briefs on
14 this matter until 8:30 p.m. last night. The Court also advised the parties that it must rule
15 by early this afternoon because its schedule is fully committed the remainder of today and
16 on November 15th and 16th.

17 **A. Complex Issues.**

18 Plaintiff’s motion presents a number of complex issues. These include, but are not
19 limited to, the following:

20 1. Plaintiffs seek relief against the Pima County Recorder, who is not a party
21 to the Consent Decree. And Defendants assert that the relief requested by Plaintiffs
22 would require action on the part of every other County Recorder in Arizona. With the
23 exception of the Maricopa County Recorder, no County Recorder is a party to this action.

24 Plaintiffs contend that the Court may take action against nonparties pursuant to
25 Rule 71. But this rule does not provide a basis for the Court to hold that all County
26 Recorders within Arizona are bound by the Consent Decree. “While Rule 71 establishes
27 the procedure for enforcing an order against a nonparty, it does not define the scope of
28 individuals who are bound by an order, or grant the Court authority over any particular

1 categories of nonparties.” *Llorens Pharm., Inc. v. Novis PR, Inc.*, No. 04-2188, 2010 WL
2 521144, at *6 (D.P.R. Feb. 9, 2010); *see also Intl Millennium Consultants, Inc. v. Taycom*
3 *Bus. Solutions*, 463 F.App’x. 506, 511 n.1 (6th Cir. 2012).

4 Plaintiffs also contend that the Consent Decree can be enforced against nonparty
5 County Recorders pursuant to Rule 65(d)(2)(C). That rule allows enforcement of an
6 order against “persons who are in active concert or participation” with a party to the
7 order. Fed. R. Civ. P. 65(d)(2)(C). Case law recognizes that this rule applies to two
8 categories of persons: nonparties who aid and abet a party in violating a court order, and
9 nonparties who are in privity with a nonparty, generally meaning nonparties who are in
10 some way legally identified with the enjoined party. *See ADT LLC v. Northstar Alarm*
11 *Servs., Inc., LLC*, 853 F.3d 1348, 1352 (11th Cir. 2017).

12 Whether County Recorders in Arizona can be said to be in privity with the
13 Arizona Secretary of State for purposes of Rule 65 is a question not easily answered. To
14 resolve this issue, the Court would need to research Arizona statutes and case law
15 concerning the relationship between the Secretary of State and County Recorders (an
16 issue on which the parties have strong disagreement), as well as the interpretation of
17 Rule 65 within the Ninth Circuit. The parties have not briefed this issue, and the Court
18 does not have time to research and resolve it.

19 2. Whether Defendant Reagan has violated the Consent Decree is another
20 complicated issue. The most relevant portion of the decree is section 2, beginning on
21 page 8. *See Doc. 37*. The first three subsections require the Secretary to “provide
22 guidance” to County Recorders regarding the decree. *Id.* The fourth section requires the
23 Secretary to compare all state voter registration applications submitted without
24 documentary proof of citizenship (“DPOC”) to a State database. If the database shows
25 that an applicant holds an F-type driver’s license, the Secretary is to notify the relevant
26 County Recorder of this fact. Upon receiving this notification, the County Recorder must
27 change the applicant’s voter registration to “not eligible” because F-type driver’s licenses
28 generally are issued to noncitizens. The Consent Decree then instructs the Secretary to

1 “provide guidance” to the County Recorders that they must notify the applicants by U.S.
2 Mail, within ten business days, that the applicant holds an F-type license, indicating
3 noncitizenship, and therefore will not be registered to vote. The notification must also
4 inform the applicant that he or she can provide valid DPOC to the County Recorder by
5 the Thursday before the election in order to receive authorization to vote. *Id.* at 9.

6 Defendant Reagan contends that she complied with these requirements. She notes
7 that she sent an email to all County Recorders advising them of this requirement of the
8 Consent Decree, attaching an explanatory Powerpoint presentation and a copy of the
9 Consent Decree. *See* Doc. 40-2. She further notes that she held a meeting with all
10 County Recorders to advise them of the Consent Decree requirements. She contends that
11 she complied with the requirement to advise County Recorders when applicants had F-
12 type driver’s licenses, and, to the extent County Recorders did not notify such applicants
13 that they could submit DPOC by the Thursday before the election, she was not at fault.

14 Plaintiffs contend that Defendant Reagan had an obligation to create a form that
15 would advise F-type license holders of the opportunity to submit DPOC by the Thursday
16 before the election. Plaintiffs assert that Defendant Reagan never did so, that the
17 opportunity to submit DPOC therefore was not communicated by County Recorders to
18 people in Mr. Cisneros’s position, and that Defendant Reagan therefore violated the
19 Consent Decree.

20 An essential part of this dispute concerns the authority of the Secretary of State.
21 Defendant Reagan contends that she does not control County Recorders. Plaintiffs
22 disagree. Each side cites statutes and case law. Resolving this issue, and parsing the
23 Consent Decree to determine whether or not a violation has occurred, would require
24 significant research and analysis. There is no time for such research and analysis.

25 3. As relief, Plaintiffs ask the Court to order Defendant Reagan to identify all
26 persons who attempted to register as voters but were advised they were not eligible
27 because they held an F-type driver’s license. From among these, Plaintiffs ask that
28 Defendant Reagan be ordered to identify all individuals who, like Mr. Cisneros,

1 submitted DPOC by the Thursday before the election and cast a provisional ballot.
2 Plaintiffs ask the Court to order that the ballots for such individuals be counted. For
3 persons who received notice that they were not eligible and did not submit DPOC by the
4 Thursday before the election, but nonetheless cast a provisional ballot, Plaintiffs ask the
5 Court to order that Defendant Reagan and the County Recorders allow the submission of
6 DPOC now, and, upon its submission, count the provisional ballots for such individuals.

7 Defendants contend that these steps would require extensive work and be highly
8 disruptive during this intense time of verifying and canvassing of ballots from the
9 November 6th election. They contend that special queries would have to be written for
10 the State database, and that County Recorders would have to be involved in identifying
11 which individuals received notices like Mr. Cisneros's. Plaintiffs disagree, asserting that
12 Defendant Reagan has access to a comprehensive database from which this information
13 should be readily available.

14 The Court is not equipped to resolve this factual dispute. It has nothing more than
15 the parties' assertions. But if the relief sought by Plaintiffs would significantly disrupt
16 the work of completing the election, it raises concerns discussed below.

17 **B. The Problem of Rushed Election Litigation.**

18 The parties' briefing and today's hearing show that Plaintiffs knew about some of
19 these problems in August. Plaintiffs' counsel contacted counsel for Defendant Reagan on
20 August 1, 2018, asserting that Defendant Reagan was required to create a special form for
21 F-type license holders to be used in connection with the November 6th election.
22 Plaintiffs' counsel asked that a copy of the form be created and shared with Plaintiffs.
23 Counsel for Defendant Reagan disagreed that the Consent Decree required the creation of
24 such a form. The parties exchanged emails in August, and again during the month of
25 October, but no resolution of this issue was reached. Plaintiffs' counsel stated during
26 today's hearing that counsel for Defendant Reagan assured her that the Secretary would
27 comply with the Consent Decree.¹

28 ¹ Although the Court does not have all the facts, it also appears that counsel for

1 During today's hearing, Plaintiffs' counsel took the position that Defendant
2 Reagan's failure to create a specific form for F-type driver's license holders is at the heart
3 of the confusion caused to Mr. Cisneros and others in his position. In other words, the
4 very issue addressed by the parties in August has now created problems in the election.
5 Despite the fact that the issue arose back in August, Plaintiffs did not file their motion
6 until 10:00 a.m. on November 12, 2018, a full six days after the election and less than
7 five days before voter verification work must be completed.

8 As this Court has previously stated: "Over the last 25 years, the Arizona Supreme
9 Court has repeatedly cautioned that litigants should bring election challenges in a timely
10 manner or have their requests for relief denied on the basis of laches." *Arizona*
11 *Libertarian Party, et al. v. Reagan*, 189 F.Supp.3d 920, 923 (D. Ariz. 2016). As the
12 Court further explained:

13 As Arizona cases have noted, the real prejudice caused by delay in election
14 cases is to the quality of decision making in matters of great public
15 importance. Unreasonable delay can prejudice the administration of justice
16 by compelling the court to steamroll through delicate legal issues in order
17 to meet election deadlines. Late filings deprive judges of the ability to
fairly and reasonably process and consider the issues and rush appellate
review, leaving little time for reflection and wise decision making.

18 *Id.* at 923 (internal citations, quotation marks, ellipses, and brackets omitted).

19 Federal courts have likewise recognized that problems can arise from rushed
20 election-related decisions. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). They have
21 held that a court may refrain from deciding a contested issue where the election or results
22 of the election are imminent, and there is inadequate time to resolve the factual disputes.
23 *Id.*; *see also Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165, 1166 (9th Circ.
24 2016) (Mem.) (declining to issue any order that would potentially disrupt the procedures
25 just four days before the election).

26
27 Plaintiffs had concerns that the guidance created by Defendant Reagan in the form of an
28 addendum to the state-wide manual used by County Recorders did not accurately reflect
the Consent Decree. Those concerns were also communicated to Defendants months
before the election.

