UNITED STATES DISTRICT COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK WANDERING MEDICINE; HUGH CLUB FOOT; LENARD ELK SHOULDER; CHARLES BEAR COMES OUT; WINFIELD RUSSELL; JAMES DAY CHILD; WOODROW BRIEN; SARAH STRAY CALF; MARTY OTHER BULL; NEWLYN LITTLE OWL; DONOVAN ARCHAMBAULT; ED MOORE; PATTY QUISNO; MICHAEL D. FOX; FRANK JEFFERSON; and PHYLLIS POND CULBERTSON, Plaintiff(s) – Appellants, v. LINDA MCCULLOCH, in her official capacity as Montana Secretary of State; GERALDINE CUSTER, in her official capacity as Rosebud County Clerk and Recorder; ROSEBUD COUNTY, MONTANA; ROBERT E. LEE; DOUGLAS D. MARTENS; DANIEL M. SIOUX, in their official capacities as members of the County Board of Commissioners for Rosebud County, Montana; SANDRA L. BOARDMAN, in her official capacity as Blaine County Clerk and Recorder; BLAINE COUNTY, MONTANA; CHARLIE KULBECK; M. DELORES PLUMAGE; FRANK DEPRIEST, in their official capacities as members of the County Board of Commissioners for Blaine County, Montana; DULCIE BEAR DON'T	Case No.: 12-35926 D.C. No.: 1:12-cv-00135-RFC U.S. District Court for Montana, Billings **ALL DEFENDANTS' JOINT MOTION TO DISMISS APPEAL AS MOOT**

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WALK, in her official capacity of Big Horn County Election Administrator; BIG HORN COUNTY, MONTANA; SIDNEY FITZPATRICK, JR.; CHAD FENNER; JOHN PRETTY ON TOP, in their official capacities as members of the County Board of Commissioners for Big Horn County, Montana; and KIMBERLY YARLOTT, in her official capacity as Big Horn County Clerk and Recorder,

Defendant(s) – Appellees.

COMES NOW Defendants Geraldine Custer, in her official capacity as Rosebud County Clerk and Recorder; Rosebud County, Montana; Robert E. Lee; Douglas D. Martens; Daniel M. Sioux, in their official capacities as members of the County Board of Commissioners for Rosebud County, Montana; Sandra L. Boardman, in her official capacity as Blaine County Clerk and Recorder; Blaine County, Montana; Charlie Kulbeck; M. Delores Plumage; Frank DePriest, in their official capacities as members of the County Board of Commissioners for Blaine County, Montana; Dulcie Bear Don't Walk, in her official capacity of Big Horn County Election Administrator; Big Horn County, Montana; Sidney Fitzpatrick, Jr.; Chad Fenner; John Pretty On Top, in their official capacities as members of the County Board of Commissioners for Big Horn County, Montana; and Kimberly Yarlott, in her official capacity as Big Horn County Clerk and Recorder, hereinafter referred to as "County Defendants" by and through Sara Frankenstein of Gunderson, Palmer, Nelson and Ashmore, L.L.P., Lance Pederson, Donald A.

Ranstrom, and Michael B. Hayworth, their attorneys, and Linda McCulloch, in her official capacity as Montana Secretary of State, by and through, Jorge Quintana, Chief Legal Counsel of the Montana Secretary of State's Office, and respectfully submit this Joint Motion to Dismiss Appeal As Moot pursuant to Rule of Appellate Procedure 38 and Rule 27. All Defendants move to dismiss Plaintiffs' Preliminary Injunction Appeal as frivolous because it is lacking subject matter jurisdiction in that it is moot.

PROCEDURAL BACKGROUND

Plaintiffs filed a Complaint and simultaneously filed a Motion for Preliminary Injunction on October 10, 2012. (Docs. 1, 3). Plaintiffs' Motion for Preliminary Injunction requested satellite county offices be opened in certain locations for 30 days prior to the November 6, 2012, election. Plaintiffs' Complaint contains a request for a permanent injunction, which is pending before the District Court, and is in the beginning stage of litigation. The pending permanent injunction involves Plaintiffs' request for satellite county offices 30 days prior to future elections, the next of which will be in the year 2014. The Motion for Preliminary Injunction was limited to only the November 6, 2012, primary election, which has now passed.

The District Court held a hearing on the Motion for Preliminary Injunction on October 29 and 30, 2012. Before presenting all of County Defendants'

evidence, County Defendants moved for dismissal of the various claims throughout the hearing as it became apparent that Plaintiffs could not prove the elements of their claims. The District Court dismissed each claim from the bench, and then issued a written decision denying Plaintiffs' Motion for Preliminary Injunction on November 6, 2012. (Doc. 79). The District Court found that Plaintiffs failed to meet their burden under both the facts and the law relevant to their claims. (Doc. 79).

In the pending District Court case, all Defendants have filed several motions to dismiss, which are pending District Court adjudication. None of Plaintiffs' claims, other than their Motion for Preliminary Injunction, have yet been denied.

The November 6, 2012, primary election has passed, and upon review, this Court could not afford Plaintiffs the relief they seek in their motion – a satellite county office in place 30 days prior to the November 6, 2012 election. This appeal is moot.

ARGUMENT & AUTHORITIES

"Federal Courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." Schanou v. Lancaster County Sch. Dist., 62 F.3d 1040, 1042 (8th Cir.1995)(quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 354, 540 (1986)). Article III requires a "case or controversy" to exist at every

stage in the litigation before the Court can reach the merits of a case. See Schanou, 62 F.3d at 1042. A "case or controversy" requires "a definite and concrete controversy involving legal interests at every state in the litigation." McFarlin v. Newport Special Sch. Dist., 980 F.2d 1208, 1210 (8th Cir.1992). "Occasionally, due to the passage of time or a change in circumstances, the issues presented in a case will no longer be 'live' or the parties will no longer have a legally confinable interest in the outcome of the litigation." Arkansas AFL-CIO v. Federal Communications Comm'n, 11 F.2d 1430, 1435 (8th Cir.1993). "[O]nce the action that the plaintiff sought to have enjoined has occurred, the case is mooted because 'no order of this court could affect the parties' rights with respect to the injunction we are called upon to review.'" Seafarers Int'l Union of N.Am. v. National Marine Servs., Inc., 820 F.2d 148, 151-52 (5th Cir.1987); citing Honig v. Students of the Cal. Sch. For the Blind, 471 U.S. 148, 149 (1985).

The Plaintiffs have the burden of proving the justiciability of their case at every stage of litigation, including on appeal. In National Right to Life Political Action Committee v. Connor, 323 F.3d 684 (8th Cir.2003), the plaintiffs sought a declaratory judgment and permanent injunction against enforcement of campaign finance statutes. The Eighth Circuit cited binding Supreme Court case law, finding that "justiciability doctrines [] go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." Id. at 689 (citing Renne v. Geary,

501 U.S. 312, 316 (1991)(internal quotations omitted)). "In reviewing the application of those doctrines, we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record, and it is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Id.; quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986)(internal quotations omitted).

When an appellate court cannot grant the relief Plaintiffs request by reviewing the district court's judgment, an appeal is moot. Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir.1996). Courts of appeals may resolve only "real and substantial controvers[ies] admitting of specific relief". Id. (citing Aetna Life Ins. v. Haworth, 300 U.S. 227, 241 (1937). "The question of mootness focuses upon whether we can still grant relief between the parties." Dream Palace v. County of Maricopa, 384 F.3d 990, 999-1000 (9th Cir.2004). While courts of appeals typically have appellate jurisdiction of preliminary injunction orders, "Congress can only confer jurisdiction upon us to the extent authorized by Article III of the Constitution, and the review of a preliminary injunction that has become moot would run afoul of the constitutional command that limits our jurisdiction to 'cases' and 'controversies.'" Orion Sales, Inc. v. Emerson Radio Corp., 148 F.3d 840, 842 (7th Cir.1998). Courts of appeals are "without power to decide questions

that cannot affect the rights of litigants in the case before [us]." Id. (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971). When the relief the plaintiff seeks cannot be granted, the appeal from a preliminary injunction is moot. Orion, 148 F.3d at 842.

"[A] suit may become moot only as to a particular form of relief." Wilson v. Birnberg, 667 F.3d 591, 595 (5th Cir.2012). Requested injunctive relief affecting an election becomes moot once the election has past, as it is impossible for a court to grant relief after the election. Id. "Claims solely supporting that remedy [injunctive relief] are moot." Id.

In Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172-73 (8th Cir.1994), the Eighth Circuit found that when a construction project the plaintiffs sought to enjoin was completed, the court could not enjoin the defendants from further construction, which mooted the case. Id. Because an order to enjoin the construction would serve no purpose and afford the plaintiffs no relief, the case no longer presented a live case or controversy, and was dismissed. Id.

In Lopez v. City of Houston, 617 F.3d 336, 339 (5th Cir.2010), a group of minority voters sued the City of Houston, claiming that the City's determination of its population violated the Voting Rights Act and Equal Protection Clause. The minority plaintiffs sought an order enjoining the upcoming elections until the City Council added two seats and redistricted. Id. at 339. By the time the appeal was

heard by the Fifth Circuit Court of Appeals, the election at issue had passed. Id. at 340. The court found that the case was not justiciable because review of the case could not affect the election that had passed, and no exception applied. Id. The Court dismissed the plaintiffs' case as moot. Id.

The Seventh Circuit found in accord in Gjertsen v. Board of Election Commissioners, 751 F.2d 199, 201-202 (7th Cir.1984). In Gjertsen, a preliminary injunction was granted regarding an election which passed while on appeal. Id. The Seventh Circuit found the appeal regarding the preliminary injunction involving an election which had passed was moot and dismissed the appeal. Id. at 202. The Gjertsen court found that the case was continuing in the district court below, and was not moot there. Id. Because claims were pending in the court below, the case was not evading review. Id.

Plaintiffs, in order to argue that their case meets the mootness exception of "capable of repetition yet evading review," will likely cite to cases in their response brief in which summary judgment or a permanent injunction was granted, disposing of the entire case. Of course, cases that are entirely dismissed and moot on appeal can potentially meet the exception. This case is not entirely moot – only the appeal regarding the denial of the preliminary injunction is moot. The permanent injunction claim continues at the district court level. Defendants invite the Court to carefully review any cases cited by Plaintiffs regarding the mootness

exception, as all will likely be cases in which the permanent injunction is not proceeding in the district court below. Cases where the permanent injunction is proceeding in the district court below are not "evading review" and therefore cannot meet the mootness exception. Orion, 148 F.3d at 842 (holding that an appeal of a preliminary injunction is moot and cannot evade review when the underlying case is still pending with the district court). This Court should dismiss Plaintiffs' appeal as the permanent injunction is pending in the district court below and can yet be reviewed by this Court properly once that issue is adjudicated below.

CONCLUSION

This Court should dismiss Plaintiffs' appeal as moot, and award just damages and double costs to Defendants/Appellees as provided in FRAP 38.

Dated: November 20, 2012.

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CERTIFICATE OF SERVICE

I hereby certify on November 20, 2012, a true and correct copy of **ALL DEFENDANTS' JOINT MOTION TO DISMISS APPEAL AS MOOT** was served electronically through the CM/ECF system upon the following individuals:

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