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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Mark Reed,

Plaintiff,

vs.

Helen Purcell, et al.,

Defendants.

Civil Action No. CV 10-2324-PHX-JAT

Plaintiff's Response In Opposition To Defendants' Motion to Dismiss

Plaintiff Mark Reed, by and through his counsel, submits his response in opposition to Defendants' Motion to Dismiss as follows:

INTRODUCTION

On October 28, 2010, Plaintiff filed a civil rights complaint pursuant to 42 U.S.C. §1983, against Maricopa County and Defendants Purcell and Owens, in their individual and official capacities, as County Recorder and Elections Director, respectively. (Compl. Dkt. 1) In the Complaint, Plaintiff alleges that Defendants, through their enforcement of state electioneering laws, are intentionally,

maliciously and recklessly violating his constitutional rights to free speech and association, equal protection and due process through Defendants' issuing a blanket ban on all apparel with the words "tea" and "party" from the polling sites in Maricopa County and exercising standardless discretion in the enforcement of electioneering laws throughout the County. (*See* Compl. ¶¶ 37, 39, 45, 51.) This ban was instituted just days after this Court issued an injunction on October 20, 2010, preventing the Coconino County Recorder from banning Flagstaff Tea Party tea shirts in the polling site. (Compl. ¶33.) Plaintiff is also suing the County for maintaining these unconstitutional policies and practices. (*Id.* at ¶¶ 55-62.)

Also on October 28, 2010, Plaintiff filed a Motion for Temporary Restraining Order to enjoin Defendants' enforcement of the per se ban in the November 2, 2010, general election. (Pl.'s Mot. For TRO.) On November 1, an evidentiary hearing was held on Plaintiff's Motion. After the close of the hearing, the Court issued an order granting Plaintiff's motion. (Order, Nov.1, 2010, Dkt. 15.)

On December 8, 2010, Defendants County, Purcell and Osborne filed a Motion to Dismiss in part Plaintiff's Complaint based on two grounds: 1) damages should be dismissed against Defendants in their individual capacities based on their belief that Mr. Reed was "not damaged"; and 2) the individual Defendants are entitled to qualified immunity. (Defs.' Mot. to Dismiss, 1.)

Defendants Purcell and Osborne argue they are entitled to qualified immunity[1] because they did not "violate clearly established constitutional rights of which a reasonable person would know" and that "in the days leading up to the general election, it was not clearly established that enforcing Arizona's prohibition on of 'political or electioneering materials' . . . with respect to 'Tea Party' apparel would violate plaintiff's First or Fourteenth Amendment rights." Therefore, Defendants argue that they acted "reasonably" when they instituted the per se ban at issue in this case and are entitled to qualified immunity for their actions. (*Id.*)

MOTION TO DISMISS STANDARD

In determining whether a complaint states a claim, allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Wyler Summit P'ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th

[1] Defendants assert in a footnote that "damages against the Election Officials in their official capacity are essentially claims against the state, which are barred by the Eleventh Amendment and cannot be asserted under 42 U.S.C. § 1983." (Defs.' Mot. 5 n.1.) However, counties and their officials are not considered part of the state pursuant to *Monell v. New York City Dept. of Social Servs*, 436 U.S. 658 (1978), and its progeny, so it is unclear why this footnote is relevant, or if intended to be substantive, placed in a footnote. To be clear, that the individual Defendants are acting in their official capacities is an element of Plaintiff's §1983 claims. *See Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho,* 42 F.3d 1278, 1284 (9th Cir. 1994) (A § 1983 claim consists of a defendant acting "under color of state law," resulting in the deprivation of "federal rights, privileges, or immunities.") In *Shoshone-Bannock*, like here, Plaintiff made no monetary damages claims against individual Defendants in their official capacities, and, thus, the court denied the defendant's request to dismiss the plaintiff's claims against the officials because there was no issue in controversy. To the extent Defendants raise this defense here, it should likewise be dismissed.

Cir. 1998). An inquiry into the adequacy of the evidence is improper when deciding whether to dismiss a complaint for failure to state a claim. *Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998).

SUMMARY OF THE ARGUMENT

Plaintiff submits that Defendants' Motion is premature and wrong as a matter of law. In light of the 12(b)(6) standard (as well as the evidence adduced at the November 1, 2010, hearing on Plaintiff's TRO Motion, should the Court consider it[2]), Defendants' Motion to Dismiss Plaintiff's damages claims against the individual Defendants must be denied. Plaintiff sufficiently pled compensatory and punitive damages in his Complaint and would be entitled to those, or nominal damages in lieu of compensatory damages, should he prevail. (*See* Compl. ¶¶ 37, 43.)

Given Plaintiff's sufficiently pled Complaint, Defendants' Motion should be denied. Moreover, Defendants' assertion of the qualified immunity defense in light of their testimony at the November 1 hearing, wherein they essentially admitted to exercising standardless discretion and viewpoint discrimination in the enforcement of state electioneering law in Maricopa County, as discussed further

[2] In their Motion, Defendants cite to Defendant Osborne's Affidavit, which is part of the record from the November 1, TRO hearing. Plaintiff does not object to this because there appears to be some support that the Court may take judicial notice of the evidentiary record, *see Mullis v. United States Bank. Ct. for the Dist. of Nevada*, 828 F.2d 1385, 1388 n.9 (9th Cir. 1996), and because Plaintiff believes the cited record is simply not helpful to Defendants' Motion, but in fact belies it. Accordingly, Plaintiff will primarily rely on citation to his pleadings in opposition to the motion, but will cite to the evidentiary record from the TRO hearing in the event the Court deems it appropriate for consideration.

below, is either shortsighted or brazen. Accordingly, Plaintiff respectfully submits that Defendants' Motion to Dismiss should be denied in its entirety.

ARGUMENT

Defendants spent a great deal of space in their Motion addressing matters such as whether they have the right to regulate speech in the polling site and whether the polling place is a public or non-public forum. (Defs.' Mot. 6-7.) However, all of this discussion is in fact irrelevant to Plaintiff's Complaint and does not support Defendants' Motion. Accordingly, before Plaintiff turns to the issues of damages and qualified immunity raised in Defendants' motion, these issues will be addressed.

First, Plaintiff does not contest that the government has an interest in regulating certain kinds of speech within the polling place; however, the issue in this case is Defendants' discriminatory and standardless regulation of speech in the polling place. Second, Defendants' per se ban on so-called "Tea Party T-shirts" fails to pass constitutional muster regardless of the forum classification of a polling site (*e.g.,* public, non-public): Even if the zone around a polling place is classed as a non-public forum, restrictions still must be reasonable and viewpoint neutral. *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716 (D.C. Cir. 2001); (Court Order, 5.) Unlike the plaintiff in *Marlin* who did not dispute that the regulations were viewpoint neutral, *Marlin*, 236 F.3d at 720, in this case, Defendants' per se ban on "tea party" apparel is neither reasonable nor viewpoint neutral.

1. PLAINTIFF IS ENTITLED TO DAMAGES SHOULD HE PREVAIL

Without citing to a single case, Defendants claim Plaintiff is not entitled to damages and therefore, his claim for damages should be dismissed. However, in making this argument, Defendants are ignoring an entire body of case law, beginning with the United States Supreme Court's decision in *Carey v. Piphus*, which held that upon a showing of a constitutional violation, a plaintiff is entitled to nominal damages, even if he or she did not suffer any other actual injury. 435 U.S. 247, 266 (1978). Of course, Plaintiff is not conceding that he has not suffered any compensable injury, such as emotional distress, as a result of Defendants' willful, reckless and malicious conduct; however, even in the event he prevails on his constitutional claims yet is unable to prove compensatory damages, he is still entitled to nominal damages, and punitive damages if, based on the evidence, the trier of fact so awards them.

"By making the deprivation of such [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Id.* The Ninth Circuit has also recognized that the "deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred." *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); see also *Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1996).

Likewise, pursuant to § 1983, Plaintiff is entitled to punitive damages claims against defendants, even in the event he were only awarded nominal damages, if he proves the allegations in his Complaint that Defendants' conduct was "motivated by evil motive or intent" or "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). "[A]s a general rule, punitive damages may be recovered for constitutional violations without a showing of compensable injury." *Searles v. Van Bebber*, 251 F.3d 869, 880-81 (10th Cir. 2001), citing *Basista v. Weir*, 340 F.2d 74, 87-88 (3rd Cir. 1965) (cited with apparent approval in *Carey*, 435 U.S. at 264 n.22.); *Alexander v. Riga*, 208 F.3d 419, 430 (3rd Cir. 2000) ("[B]eyond a doubt, punitive damages can be awarded in a civil rights case where a jury finds a constitutional violation, even when the jury has not awarded compensatory or nominal damages."), *cert. denied*, 531 U.S. 1069 (2001).

Certainly, Plaintiff sufficiently pled damages in his Complaint – including specifically punitive damages against the individual Defendants. (*See e.g.*, "Defendants by evil motive or intent, through reckless or callous indifference to the federally protected rights of Plaintiff," "harassed, threatened, silenced, and chilled Plaintiff's rights to freedom of speech and association" (Compl. ¶ 40); "announced a policy of exercising standardless discretion over what expressive conduct is characterized as electioneering, leaving them free to censor ideas and enforce their own personal preferences" (*id.* at ¶ 47); "failed to develop objective

standards to ensure that citizens such as Plaintiff are not disenfranchised, harassed, or otherwise deprived of constitutional rights without due process of law" (*id.* at ¶ 48); and "announced a policy to intentionally discriminate against Plaintiff by using electioneering laws to impose barriers that thwart the exercise of Plaintiff's constitutional rights based on his association with any 'tea party' organization," while failing to "apply a similar policy to other groups that are similarly situated." (*Id.* at ¶¶ 52-53.)) Whether or not Plaintiff ultimately prevails in whole or in part on his Complaint, including his claims for damages, Defendants' Motion to Dismiss his damage claims is not only premature, it is wholly against legal precedent.

2. QUALIFIED IMMUNITY IS NO DEFENSE TO DEFENDANTS' CONDUCT IN THIS CASE

In his Complaint, Plaintiff specifically alleges that Defendants are enforcing the electioneering laws in the County with evil motive or intent or through reckless or callous indifference to Plaintiff's constitutional rights. (Compl. *see e.g.*, ¶¶ 47-48.) Qualified immunity is no defense to this alleged conduct.

Qualified Immunity Standard

In asserting the affirmative defense of qualified immunity, it is Defendants' burden to show that "a reasonable . . . officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right." *Gasho v. United States, 39 F.3d 1420, 1438* (9th Cir. 1994). The standard for qualified

immunity is objective. An officer's subjective understanding of the constitutionality of his or her conduct is irrelevant. *Harlow*, 457 U.S. at 818. However, the official's exact action need not previously have been held unlawful to subject the official to liability. *Anderson v. Creighton*, 483 U.S. 635 (1987); *see also Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). "The matching of fact patterns demands only a level of particularity such 'that a reasonable official would understand that what he is doing violates th[e] right.'" *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008).

"An officer who enforces a statute in an arbitrary or discriminatory manner is not entitled to presume that his conduct is constitutional simply because the statute exists." *Grossman v. Portland*, 33 F.3d 1200, 1209 n.19 (9th Cir. 1994). Furthermore, alleged enforcement of a statute does not relieve a government official from liability if the officer "unlawfully enforces an ordinance in a particularly egregious manner," *id.* at 1209-1210, as Plaintiff Reed alleges Defendants do here. The Ninth Circuit distinguishes between circumstances like those in *Grossman*, where an officer was entitled to qualified immunity for enforcing an ordinance because acting in accordance with the Constitution would have required him to "ignore his clear duty under the statute," versus a situation in which officers, like Defendants here, "were not forced to choose between complying with one or the other" and "could easily have complied with both." *Collins v. Jordan*, 110 F.3d 1363, 1378 n. 12 (9th Cir. 1996).

A. Defendants' Conduct Violated Clearly Established Rights

Defendants argue that "they were not aware of such a parallel or comparable fact pattern" and that "existing authority" supports their actions, therefore entitling them to qualified immunity. (Defs.' Mot. 6.) In support of their argument Defendants seemingly dismiss as "too old" the on-point Arizona appellate court decision that actually provides constitutional guidance for the enforcement of electioneering law in the State: *Fish v. Redeker*, 411 P.2d 40 (Ariz. Ct. App. 1966). (*See* Defs.' Mot. 8.) In *Fish*, the Arizona Court of Appeals provided a clear definition of electioneering, which directly conflicts with Defendants' lack of objective standards for the enforcement of the law and per se ban on "tea party" apparel:

> In our opinion, electioneering encompasses an attempt on the part of an individual or candidate to persuade or influence voters to vote for a particular candidate, party or proposition.

Id. at 42.

In fact, Defendants seem to put their heads in the sand, utterly pretending that *Fish* does not exist, by instead citing to cases like *Picray v. Sealock*, 138 F.3d 767 (9th Cir. 1998). Defendants cite *Picray* in support of their qualified immunity defense, claiming that like the Defendants in *Picray*, they could turn to no judicial authority to guide them in the enforcement of electioneering law. *Picray* is a case where police officers were given qualified immunity for removing a voter from a polling site in the enforcement of what turned out to be an unconstitutional state law banning political buttons in the polling site. The Ninth Circuit found that the

Picray plaintiff cited to no judicial opinion or authoritative construction of the statute that indicated it could not be enforced by excluding the violator from a polling site; thus, the officers could have reasonably concluded that they acted lawfully when the voter was excluded from the polling stations. *Id.* at 771.

The existence of *Fish*, as well as Supreme Court and Ninth Circuit precedent cited below, coupled with Defendants' discriminatory conduct and exercise of standardless discretion, clearly distinguishes this case from *Picray*.

Defendants' Due Process and Equal Protection Rights

Defendants' motion is in fact is quite myopic, premised on only one aspect of Plaintiff's Complaint, the ban itself, which they argue was a reasonable application of A.R.S. § 16-515. Yet, Defendants do not even fleetingly address or attempt to explain how qualified immunity could protect them from Plaintiff's viewpoint discrimination, equal protection and due process claims (not that Plaintiff believes they could credibly do so in any event based on the sufficiently pled Complaint and Defendants' hearing testimony). Accordingly, even assuming *arguendo* that Defendants could prevail in showing that their interpretation of the law allowed them to ban "tea party" apparel, the victory would be short lived when Defendants are then called upon to explain why, based on their definition of electioneering, a ban was not imposed on apparel from other similarly situated organizations or when they are asked to identify the objective standards for enforcement of the law in Maricopa County (which we know do not exist).

The Constitution abhors the misuse of discretion as a license for arbitrary procedure. *E.g.*, *Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 612 (1991) ("The requirement that the [NLRB] exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case."); *Shuttlesworth v. Burmingham*, 394 U.S. 147, 150 (1969) ("There can be no doubt that the [law], as it is written, conferred upon the City Commission virtually unbridled and absolute power to prohibit [free speech] . . . . For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.'"). "It is settled by a long line of . . . [Supreme Court decisions] that [a law], which . . . makes the peaceful enjoyment of freedom which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Id.* at 151.

Despite this constitutional precedent, Maricopa County has no objective standards that define electioneering. (Compl., ¶ 47-48); (*see also* TRO Hr'g Tr. 49:49, 7-25, 50:1, Nov. 1, 2010.[3]) The following testimony illustrates how voters are treated disparately due to the exercise of this standarless discretion:

> Q. (By the Court) And if someone were to get up in the morning and put on a T-shirt, be it one that says "I love the AFL-CIO" or "I love the Chamber of Commerce" identifying with a group that may be thought to hold sway with candidates or parties, by what you have said here that would not be a prohibited piece of wearing apparel in the polling place. Is that correct?

[3] The cited record is attached hereto as Exhibit 1.

A. (by Ms. Osborne) That's correct, Your Honor.
(TRO Hr'g Tr. 53: 22-25, 54:1-4.)

In the Court's November 1, 2010, Order, the Court explained the danger in the exercise of standardless discretion:

> Lacking a clear standard, voters have no certain method of determining whether their apparel is prohibited electioneering. Messages pertinent to the election can be found everywhere if one looks hard enough. . . . In this way, Maricopa County's standardless discretion chills protected First Amendment expression.

(Court Order 6.)

The unlawfulness of Defendants' admitted exercise of standardless discretion, as well as their per se ban against "tea party" apparel, which is contra to *Fish* and treats similarly situated groups differently and more favorably, was or certainly should have been apparent to Defendants. *See, Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008) (citing *Wilson*, 526 U.S. at 615).

B. <u>Defendants' Conduct Was Not Objectively Reasonable</u>

As Plaintiff alleged in his Complaint (and as Defendants' admitted at the evidentiary hearing), Plaintiff's shirt does not campaign for anyone or anything on the ballot nor did he wish to wear it in order to attempt to influence anyone's vote. (Compl. ¶ 16); (TRO Hr'g Tr., 14:19-25, 15:1.):

> Q. (By Ms. Cohen) Can you look at Exhibit 1 and tell me as you look at this T-shirt what candidates on the November 2nd ballot this shirt endorses?
> A. (by Ms. Osborne) By looking at this shirt, I cannot.
> (*Id*. at 20:9-15.)

> Q. (By Ms. Cohen) Does this shirt say anything about taxation, this Exhibit 1?
> A. (by Ms. Osborne) Not on its face.

Q. Does this shirt incite fear in other voters at the polling place?
A. I don't know if it does or not. I am trying to get it stopped.
(*Id.* at 22:3-11.)

Q. (By Ms. Cohen) So this shirt does not coerce any other voter to vote any certain way on the November 2nd ballot, does it?
A. (by Ms. Osborne) I don't know that that's to be true.
Q. You don't know.
A. No.
(*Id.* at 22:18-22.)

Q. (By Ms. Cohen) [D]oes this T-shirt in any way indicate that tea party is supporting any candidate or ballot measure on the November 2nd ballot?
A. (by Ms. Osborne) Not on that T-shirt, no.
Q. Do you believe this T-shirt is electioneering?
A. Yes.
Q. Why is that?
A. Because of what we have seen arise around the tea party issues in this election.
(*Id.* at 74:12-20.)

Further, Defendants admitted they issued the per se ban on "tea party" apparel with little to no knowledge about tea party organizations, which just further evinces the unreasonableness and discriminatory nature of their actions:

- The tea party . . . is a party . . . in my opinion, except for forming signatures at the Secretary of State's Office, is a political movement that is certainly gathered together to influence the outcome of an election . . . there may be different versions of it but the tea party is an entity. (*Id.* at 12:2-8.)

- Defendant Osborne does not know: what percentage of myriad tea party organizations around the country endorses candidates; what the myriad tea party organizations around the country do; and have no information regarding any tea parties in Arizona. (*Id.* at 15:2-16.)

It certainly is not objectively reasonable for Defendants to ban apparel from organizations about which they know little to nothing about. But even assuming *arguendo* that Defendants were reasonable in determining that any apparel with

the words "tea" and "party" constitutes electioneering, this does not explain nor excuse why Defendants treated similarly situated groups differently, and in fact more favorably, and exercised standardless discretion in the enforcement of electioneering law in Maricopa County. In fact, Defendants had the benefit of knowing about the issuance of the injunction in the Coconino County case, yet disregarded it and affirmatively announced their "tea party" ban, just days later. Existing precedents certainly should have alerted Defendants that treating similarly situated groups differently (*e.g.*, tea party organizations versus labor unions, chambers of commerce, newspapers, or any other group that endorses candidates whose names and/or logos are not banned from the polling sites in the county), could not pass constitutional muster, and, thus, were not reasonable:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (citations omitted).

The Supreme Court has explained that "[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (quoting *Village of*

Willowbrook v. Olech, 528 U.S. 562, 564 (2000)). The arbitrariness of Defendants' enforcement of electioneering law in Maricopa County, is no better exemplified than by Defendant Osborne and Purcell's own testimony:

> Q. (By Ms. Cohen) [W]ould it matter to you that the AFL-CIO endorses candidates and donates large sums of money to candidates, would that matter to you in determining whether an AFL-CIO log would be prohibited in the Maricopa County polling sites?
> A. (by Ms. Osborne) No. It would –
> Q. Why wouldn't it matter to you?
> A. I would determine what else was on that T-shirt.
> Q. So the mere fact that an organization endorses predominantly one party or the other would make no . . . difference to your on whether wearing that organization's T-shirt into the polls constituted electioneering?
> A. That's correct.
> (TRO Hr'g Tr. 27:13-25, 28:1-2.)

> A. (By Ms. Purcell): It's one of those things that I can't sit here and try and decide all the permutations that can come in the polling place for this group or any other. It's in the eye of the beholder. It's one of those things you know it when you see it.
> (*Id.* at 55:3-6.)

CONCLUSION

As sufficiently alleged in Plaintiff's Complaint, and as evinced in the TRO hearing testimony, Defendants are willfully, recklessly and without any standards, violating the constitutional rights of Plaintiff and other voters in Maricopa County. In light of the foregoing, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss in its entirety.

DECEMBER 29, 2010

REPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Diane Cohen, an attorney, hereby certify that on December 29, 2010, I electronically filed the foregoing document with the Clerk of the United States District Court-District of Arizona by using the Court's ECF System.

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