

his prosecution for being a deported alien found in the United States, 8 U.S.C. § 1326(b)(1) and (b)(2), was the result of impermissible selective prosecution on the basis of race. We remand.

Since the district court's decision in this case, we decided *United States v. Armstrong*, 48 F.3d 1508 (9th Cir.1995) (en banc). We decline the invitation to determine whether the district court must, may, or may not grant discovery on the facts of this case following *Armstrong*, as we conclude that the issue is properly resolved as an initial matter by the district court. We therefore remand.

On remand, if the district court determines that discovery is not justified or, following appropriate proceedings, that the defendant has not made out a showing of selective prosecution so as to justify dismissal of the indictment, then the court shall enter a new final judgment of conviction. See *Goldberg v. United States*, 425 U.S. 94, 111-112, 96 S.Ct. 1338, 47 L.Ed.2d 603 (1976); *United States v. Ogbuehi*, 18 F.3d 807, 811-12 (9th Cir.1994). If the district court concludes that Rendon-Abundez was a victim of selective prosecution, it shall vacate the judgment of conviction. *Id.*

REMANDED.



GREGORIO T., by and through His Guardian Ad Litem JOSE T.; Xiomara T.; Maria R.; Carlos P., by and through His Guardian Ad Litem Ana P., Plaintiffs-Appellees,

and

California Association of Catholic Hospitals; City of Los Angeles, Plaintiffs-Intervenors,

v.

Pete WILSON, Governor, of the State of California; Daniel E. Lungren, Attorney General, for the State of California; Kimberly Belshe, Director, of the Department of Health Services for the State of California; Eloise Anderson, Director, of the Department of Social Services for the State of California, Defendants-Appellants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, Plaintiff-Appellee,

v.

Pete WILSON, Governor, of the State of California; Daniel E. Lungren, Attorney General, for the State of California; Kimberly Belshe, Director, of the Department of Health Services for the State of California; Eloise Anderson, Director, of the Department of Social Services for the State of California, Defendants-Appellants,

and

Orange Unified School District; San Diego Unified School District; William D. Dawson, Acting Superintendent of Public Instruction, for the State of California, Defendants.

Barbara AYALA, a minor, by and through Her Guardian Ad Litem, Andrea Ayala, Plaintiff-Appellee,

v.

Pete WILSON, Governor, of the State of California; Daniel E. Lungren, Attorney General, for the State of California; Kimberly Belshe, Director, of the Department of Health Services for the State of California; Eloise Anderson, Director, of the Department of Social Services for the State of California, Defendants-Appellants,

and

Alhambra Unified School
District, Defendant.

CHILDREN WHO WANT AN EDUCATION, who are undocumented in America, who will be adversely affected by California Proposition 187, Plaintiff-Appellee,

v.

Pete WILSON, Governor, of the State of California; Daniel E. Lungren, Attorney General, for the State of California; Kimberly Belshe, Director, of the Department of Health Services for the State of California; Eloise Anderson, Director, of the Department of Social Services for the State of California, Defendants-Appellants,

and

Los Angeles Unified School
District, Defendant.

Nos. 95-55186, 95-55188, 95-55191 and 95-55192.

United States Court of Appeals,
Ninth Circuit.

Submitted July 5, 1995*.

Decided July 14, 1995.

Challenge to implementation and enforcement of California voter initiative was brought. Preliminary injunction against implementation and enforcement of sections of initiative was granted in the United States District Court for the Central District of California, Mariana R. Pfaelzer, J., and the Court of Appeals, 54 F.3d 599, granted state officers' motion to consolidate and expedite appeals. State officers appealed preliminary injunction. The Court of Appeals held that district court's application of abstention law for purposes of preliminary injunction was not an abuse of discretion.

Affirmed.

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P.

1. Federal Courts ⇌815

Preliminary injunction will be reversed only if district court has relied on erroneous legal premise or abused its discretion.

2. Federal Courts ⇌767

On appeal of preliminary injunction, Court of Appeals focuses initially on whether district court got the law right, that is, whether court employed appropriate legal standards which govern issuance of preliminary injunction, and whether, in applying appropriate standards, court misapprehended the law with respect to underlying issues in litigation.

3. Federal Courts ⇌815

On appeal of preliminary injunction, Court of Appeals does not review underlying merits of case; as long as district court got the law right, it will not be reversed simply because Court of Appeals would have arrived at different results if it had applied the law to facts of case, but only if district court abused its discretion.

4. Federal Courts ⇌813

District Court's application of abstention law for purposes of preliminary injunction against implementation and enforcement of sections of California voter initiative was not an abuse of discretion; district court did not state that it could not abstain but indicated only that it would not, and state officers failed to demonstrate that decision not to abstain was a clear error of judgment or was based on clearly erroneous findings of fact.

John H. Sugiyama, Sr. Asst. Atty. Gen.,
San Francisco, CA, for defendants-appellants.

Carlos Holguin, Center for Human Rights & Constitutional Law, Los Angeles, CA, for plaintiff-appellee League of United Latin American Citizens.

James M. Harris, Sidley & Austin, Los Angeles, CA, for plaintiffs-appellees California Ass'n of Catholic Hospitals, and Catholic Health Care Ass'n of the U.S.

Stephen Yagman, Yagman & Yagman, Venice, CA, for plaintiff-appellee Children Who Want an Educ.

Fred J. Kumetz, Kumetz & Glick, Los Angeles, CA, for plaintiff-appellee Barbara Ayala.

Karl Manheim, Loyola Law School, Los Angeles, CA; Mark D. Rosenbaum, ACLU Foundation of Southern California, Los Angeles, CA; Thomas A. Saenz, Mexican American Legal Defense and Educ. Fund, Los Angeles, CA; Bruce Iwasaki, O'Melveny & Myers, Los Angeles, CA, for plaintiff-appellee Gregorio T.

Jessica F. Heinz, Deputy City Attorney, Los Angeles, CA, for plaintiff-appellee City of Los Angeles.

Appeals from the United States District Court for the Central District of California.

Before: WALLACE, Chief Judge, HUG, and NOONAN, Circuit Judges.

ORDER

Governor Pete Wilson and other officials of the State of California (State officers) appeal from the district court's preliminary injunction against implementation and enforcement of sections 4, 5, 6, 7, and 9 of Proposition 187. In a previous order, we consolidated and expedited these appeals for consideration under new Ninth Circuit Rule 3-3 (effective July 1, 1995), and retained jurisdiction for decision on the merits. *See Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir.1995). The State limits its arguments on appeal to whether the district court improperly entered its preliminary injunction because it is required to abstain under *Younger v. Harris*,

401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), or *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

The parties have briefed this issue as if we were to decide de novo the merits of the abstention decisions of the district court. In our earlier order, we directed their attention to *Sports Form, Inc. v. United Press International*, 686 F.2d 750 (9th Cir.1982) (*Sports Form*), to provide guidance for their briefing and so that they could be of most assistance to the court. Their briefs will be of great help to us if the district court enters a permanent injunction and it is appealed, but that is not the issue before us.

[1, 2] A preliminary "injunction will be reversed only if the district court relied on an erroneous legal premise or abused its discretion." *Id.* at 752. We focus initially on whether the district court got the law right, that is, whether "the court [employed] the appropriate legal standards which govern the issuance of a preliminary injunction, [and] if, in applying the appropriate standards, the court misapprehend[ed] the law with respect to the underlying issues in litigation." *Id.* (citations omitted).

[3] Thus, we do not review the underlying merits of the case. As long as the district court got the law right, "it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion." *Id.*

Neither party suggests that the district court applied the wrong preliminary injunction standard. Neither party asserts that the district court misapprehended the law dealing with abstention. Rather, the State officers only assert that the law of abstention was misapplied. Thus, the only question is whether the district court abused its discretion in entering the preliminary injunction.

[4] The State officers argue that the district court incorrectly decided whether abstention applied. But at this stage, it has not

been demonstrated by the State officers that the district court abused its discretion, that is, that "there has been a clear error of judgment" or a conclusion based on "clearly erroneous findings of fact." *Id.* at 752. The district court did not state that it could not abstain, but indicated only that it would not. This was not an abuse of discretion. See *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 (9th Cir.) (abstention involves discretion on exercise of court's equity powers), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982).

As we stated in *Sports Form*:

We emphasize the ways in which review of an order granting or denying a preliminary injunction differs from review of an order involving a permanent injunction because we are persuaded that in some cases, parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation. Because of the limited scope of our review of the law applied by the district court and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits.

Sports Form, 686 F.2d at 753.

We caution the parties not to read too much into our holding. We only hold now that the district court's application of the abstention law for purposes of a preliminary injunction was not an abuse of discretion. We need not and should not go farther in our review at this time.

AFFIRMED.



Jorge L. CALDERON, Petitioner-
Appellee,

v.

K.W. PRUNTY, Chief Deputy Warden,
Respondent-Appellant.

No. 94-16251.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 12, 1995.

Decided July 17, 1995.

After defendant was convicted in state court of two counts of first-degree murder and one count of grand theft, he filed petition for writ of habeas corpus, alleging that he did not receive adequate notice of prosecution's theory that he committed murders by means of lying in wait. The United States District Court for the Northern District of California, Charles A. Legge, J., 857 F.Supp. 720, ordered that writ be issued unless petitioner be retried by state within reasonable time. State appealed. The Court of Appeals, Floyd R. Gibson, Senior Circuit Judge, sitting by designation, held that petitioner received constitutionally adequate notice of lying in wait theory, since, although trial court determined at pretrial hearing that there was insufficient evidence of special circumstance of lying in wait and state failed to reallege such special circumstance or file charge of murder by means of lying in wait, trial court's determination did not by implication remove theory of first-degree murder from murder charge.

Reversed and remanded.

1. Habeas Corpus ⇨842

Court of Appeals reviews district court's decision to grant or deny petition for habeas relief de novo.

2. Homicide ⇨357(3)

Under California law, factual situation necessary to sustain jury's finding of lying in wait as special circumstance of murder is intentional murder, committed under circumstances which include concealment of pur-