UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al.*,

Plaintiffs-Appellees,

v.

STEVEN HOBBS, in his official capacity as the Secretary of State of Washington, and the STATE OF WASHINGTON,

Defendants-Appellees,

and

JOSE TREVINO, ISMAEL CAMPOS, and ALEX YBARRA,

Intervenors-Defendants-Appellants.

No. 24-1602

D.C. No. 3:22-cv-05035-RSL
United States District Court for the Western District of Washington
Tacoma, Washington

PLAINTIFFS-APPELLEES' REPLY IN SUPPORT OF MOTION TO CONSTRUE APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL AS A MOTION FOR RECONSIDERATION AND TRANSFER TO ORIGINAL MOTIONS PANEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

Appellants ("Intervenors") make four arguments why their second motion for a stay should not be treated as a motion for reconsideration of the denial of their first motion for a stay and processed under what they call "the arcane procedure of Circuit Rule 27-10." Dkt. 13.2 at 3. None has merit. The majority of Intervenors' arguments are the *same* and seek a stay of the *same* district court injunction. The Court should process their motion under Rule 27-10 and direct it to the prior motions panel for adjudication. This Court's rules are not "arcane," and they serve an important purpose.

First, Intervenors contend that this appeal (No. 24-1602) is different than their prior appeal (No. 23-35595) because the latter "concerned the district court's prohibitory injunction and order" and the former (*i.e.*, their current motion) concerns "the court's mandatory injunction and remedial order." Dkt. 13.2 at 4. But Intervenors' current motion argues that a stay should be issued because of purported "clear errors in [the district court's] merits and remedial orders." Mot. at 3. Intervenors then divide their "Argument" Section into two parts—the first dealing with the district court's August 2023 prohibitory injunction and final judgment and the second dealing with the district court's March 2024 remedial order. Mot. at 9-10, 16. In the first section, Intervenors specifically request that this Court stay the liability injunction pending appeal—the precise relief they were already denied by

this Court. Mot. at 9. They then proceed to make the *precise same arguments* that the prior motions panel considered and rejected in denying their first motion for a stay. *Compare* Mot. for Stay ("Second Stay Motion") at 10-16 *with* Mot. to Stay Injunction and Lower Court Proceedings, *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 5, 2023), Dkt. 34-1 ("First Stay Motion").

It is irrelevant that Intervenors now also seek a stay—and raise new arguments in doing so—regarding the district court's remedial order. That does not excuse their attempted end-run around Rule 27-10 with respect to their arguments regarding the district court's liability order. Parties cannot circumvent Rule 27-10's requirements—and its sensible court processing rules that direct motions to the prior panel—by simply repeating the same arguments that the Court previously rejected while adding new ones. And it would serve judicial economy for the same panel to consider both aspects of Intervenors' motion.[1]

Second, Intervenors contend that their prior motion simply sought a stay of the remedial proceedings. Dkt. 13.2 at 5. But just one page earlier, they contend that their first stay motion "concerned the district court's prohibitory injunction and order." Dkt. 13.2 at 4. Indeed, the basis of their first stay motion was what they

[1] This is especially so because the district court's injunction means that, in the absence of a remedy, the state is without a legislative map for this year's elections. Intervenors' motion is properly considered by the panel that has already ruled on the majority of its substance and is most familiar with the case.

perceived to be "likely-to-be-reversed errors" in the district court's liability order. Second Stay Motion, No. 23-35595, at 9. The Court rejected those arguments and now Intervenors raise them again. Both motions sought a stay of the district court's liability order and injunction.

Third, Intervenors complain that the prior motions panel "only cit[ed] to the *Nken* standard" in denying their requested stay and issued an "unreasoned *outcome*" based on what Intervenors remarkably label their "more speculative harms" at the time. Dkt. 13.2 at 5 (emphasis in original). Intervenors' contention that this Court did not base its decision on any reasoning is surprising. In any event, Rule 27-10 contains no exceptions permitting litigants to bypass its procedures based upon the length of the Court's order. And while Plaintiffs agree Intervenors' harms were speculative then, they are now too. That is why Plaintiffs have twice objected to Intervenors' standing to appeal—another repeat issue that was previously before the prior motions panel. Nothing about Intervenors' entitlement to a stay has changed since the prior panel's ruling.

Fourth, Intervenors contend that the prior panel's denial of their first stay motion is not preclusive here, citing *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1186 n.3 (9th Cir. 2021). But *Hobbs* is about whether the *merits panel* is bound by a prior motions panel's prediction regarding the merits in adjudicating a request for a stay. *Id.* This case is not yet at the merits stage—but rather is before the Court

on a successive motion for a stay. A successive motion for a stay seeking the same relief regarding the same district court order that was previously denied is a motion for reconsideration. Litigants cannot evade this Court's Rules, including Rule 27-10, with the labels they place on their filings.

Moreover, Intervenor's characterization that the prior motions panel here "resolv[ed] no issue specifically" is wrong. Dkt. 13.2 at 6. Rather, it very specifically resolved Intervenor's entitlement to a stay of the district court's liability order and injunction based upon their likelihood of success on appeal. Not only did that adjudication involve considering the same arguments Intervenors now raise for a second time, but it also involved considering Plaintiffs' (and the State's) contention that Intervenors have no standing to appeal. *See* Plaintiffs' Opposition to Motion for Stay at 3-7, *Palmer v. Hobbs*, No. 23-35595 (Dec. 15, 2023), Dkt. 35-1; State of Washington's Opposition to Motion for Stay at 9-11, *Palmer v. Hobbs*, No. 23-35595, Dkt. 36-1.

CONCLUSION

Intervenors' motion should be processed under Ninth Circuit Rule 27-10 and directed to the motions panel that has already considered and denied the majority of the issues it raises.

March 21, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d) because this motion contains 950 words spanning 4 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman size 14-point font with Microsoft Word.

Dated: March 21, 2024

/s/ Mark P. Gaber
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

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