

No. 18-15845

**In the United States Court of Appeals
for the Ninth Circuit**

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC,
AKA Democratic Senatorial Campaign;
THE ARIZONA DEMOCRATIC PARTY,

Plaintiffs - Appellants,

v.

MICHELE REAGAN, in her official capacity as Secretary of State of Arizona;
MARK BRNOVICH, Attorney General, in his official capacity as Arizona
Attorney General,

Defendants - Appellees,

THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman;
SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.;
TONY RIVERO, Rep.,

Intervenors-Defendants - Appellees.

On Appeal from the United States District Court
for the District of Arizona
Cause No. CV-16-01065-PHX-DLR

PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE APPEAL

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RULE 27-12 STATEMENT

Pursuant to Local Rule 27-12, Plaintiffs-Appellants conferred with opposing counsel on May 18, 2018 to determine their position on the motion. Counsel for the State advised that they take no position on the motion, on the basis that they were not able to review a draft of the instant motion prior to filing. Counsel for the Arizona Republican Party has not provided a position to Plaintiffs' request for a statement of their position.

The transcript in this case has been ordered and completed. If the district court holds any additional hearings regarding Plaintiffs-Appellants' Motion for Injunction Pending Appeal, Plaintiffs-Appellants will promptly order any additional transcripts on a rush basis.

I. INTRODUCTION

Plaintiffs-Appellants the Democratic National Committee, the DSCC, and the Arizona Democratic Party (“Plaintiffs”) respectfully request that this Court expedite their appeal in the above-captioned matter pursuant to 28 U.S.C. § 1657, Federal Rule of Appellate Procedure 31(a)(2), and Ninth Circuit Local Rule 27-12.

The issues in this case concern the constitutionality and legality under the Voting Rights Act of (1) Arizona House Bill 2023 (“HB 2023”), which largely prohibits the practice of ballot collection, and (2) Arizona’s practice of rejecting ballots cast out-of-precinct (“OOP”), in their entirety. These laws impact the fundamental right to vote of thousands of Arizona voters who, without swift relief from this Court, will be severely and irreparably burdened in the upcoming August 28 primary election, as well as the November 6 general election.

This Court previously recognized the importance of quickly resolving these critical issues in November 2016, when it voted *sua sponte* to rehear *en banc* both the appeal of the District Court’s order denying Plaintiffs’ motion to preliminarily enjoin HB 2023, and Plaintiffs’ appeal of the District Court’s order denying their motion to preliminarily enjoin Arizona’s practice of rejecting OOP ballots. *See* Order, ECF No. 68, *Feldman, et al. v. Ariz. Sec’y of State*, No. 16-16698 (9th Cir. 2016) (“*Feldman I*”); Order, ECF No. 34, *Feldman, et al. v. Ariz. Sec’y of State*, No. 16-16865 (9th Cir. 2016) (“*Feldman II*”). The *en banc* Court issued an injunction pending appeal on Plaintiffs’ request for preliminary injunctive relief on HB 2023.¹

¹ Even before the votes for rehearing *en banc*, the merits panel proceeded under extremely expedited schedules, issuing panel decisions in both appeals within 5

Feldman I, ECF No. 70-1. Given the nature of the rights impacted, as well as the need for prompt relief, this Court has good cause to expedite the instant appeal, and Plaintiffs respectfully request that the Court do so.

II. FACTUAL BACKGROUND

This appeal arises from the enactment and implementation of HB 2023, Arizona's ban on ballot collection, and Arizona's practice of not counting provisional ballots cast by voters in a precinct other than the one to which they are assigned in any given election (the "OOP practice"). Arizona precincts routinely change for many voters from election to election, yet under the OOP practice, any ballots cast OOP are rejected in their entirety, even for those races in which the voter is otherwise eligible to vote. Both HB 2023 and Arizona's OOP practice severely burden the right to vote of thousands of voters and disproportionately burden minority voters.

HB 2023 brought a significant change to Arizona law by making it a felony for Arizonans to engage in "ballot collection," a practice through which thousands of voters relied on friends, neighbors, advocacy and political organizations, and campaigns to collect and deliver their early ballots to ensure they arrived by the 7 p.m. Election Day deadline. As Chief Judge Thomas previously recognized, because of HB2023, an "effective method[] of minority voting [in Arizona] is now a crime." *Feldman I*, ECF No. 55-2 at 29 (Thomas, C.J. dissenting).

weeks of noticing the appeals. *Feldman II*, ECF No. 4 (setting out expedited schedule); *Feldman I*, ECF No. 18 (same).

Similarly, Arizona's practice of not counting OOP ballots results in thousands of Arizonans being disenfranchised each election. Indeed, Arizona leads the nation in the rate at which in-person voters are disenfranchised for voting out of precinct, and minority voters are twice as likely as white voters to be disenfranchised. Findings of Fact and Conclusions of Law at 64-65, ECF No. 416, *Democratic Nat'l Comm., et al. v. Reagan, et al.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 10, 2018). In 2016, among all counties that reported OOP ballots in the general election, a little over one in every 100 Hispanic voters, one in every 100 African-American voters, and one in every 100 Native-American voters cast an OOP ballot and was disenfranchised, but only one in every 200 white voters was disenfranchised. *Id.*

Plaintiffs filed this suit on April 15, 2016, and quickly sought a preliminary injunction as to both HB 2023 and the OOP practice. *Id.* at ECF No. 1 (Complaint); *id.* at ECF Nos. 72, 84 (motions for preliminary injunction). Plaintiffs' request for preliminary relief on HB 2023 was denied on September 23, 2016, *id.* at ECF No. 204, and their request for relief as to the OOP practice was denied on October 11, 2016. *Id.* at ECF No. 214. Plaintiffs promptly sought injunctions pending appeal and emergency appeals on both issues. *Id.* at ECF Nos. 206, 210, 216. Indeed, as the *en banc* Court handling these appeals would later recognize, Plaintiffs "pursued expedited consideration of their claims at every stage of the litigation." *Feldman I*, ECF No. 70-1 at 6.

On appeal, a divided three-judge panel of this Court affirmed the District Court's denial of preliminary relief on both the HB 2023 and OOP issues. *Feldman I*, ECF No. 55-1, 55-2 (HB2023); *Feldman II*, ECF No. 33 (OOP). In both decisions,

Chief Judge Thomas wrote separately, in the dissent, explaining his view that the District Court's refusal to grant the requested preliminary injunctions was an abuse of discretion. *Feldman I*, ECF No. 55 at 59-87 (HB2023); *Feldman II*, ECF No. 33-2 at 1-33 (OOP).

On October 29, 2016, a judge of this Court *sua sponte* called for a vote to rehear the HB 2023 issue *en banc*. *Feldman I*, ECF No. 56. The Court granted rehearing *en banc* on November 2. *Id.* at ECF No. 68. On November 4, 2016, this Court also *sua sponte* ordered rehearing *en banc* of the OOP issue. *Feldman II*, ECF No. 34.

On November 4, 2016, the *en banc* Court also issued an injunction pending appeal on Plaintiffs' request for preliminary injunctive relief on HB 2023. *Feldman I*, ECF No. 70-1. That order was issued four days before the 2016 general election and was stayed by the U.S. Supreme Court pending final disposition of the appeal. Order Granting Application to Stay, *Arizona Sec. of State's Office, et al. v. Feldman, Leslie, et al.*, No. 16A-460 (2016). The *en banc* Court never reached the merits of the OOP issue, due to concerns about *Purcell v. Gonzalez*, 549 U.S. 1 (2006). See *Feldman II*, ECF No. 36 at 3.

Subsequently, the *en banc* Court stayed its proceedings on both HB 2023 and OOP pending the entry of a final judgment in the District Court, and it wrote that it would "retain jurisdiction over any subsequent appeal, which w[ould] be consolidated with this appeal" (which specifically concerned only the denial of Plaintiffs' motions for preliminary injunction). *Feldman I*, ECF No. 89; *Feldman II*,

ECF No. 57. It directed the District Court to expedite the proceedings in the underlying case.

Nearly a year and five months after the *en banc* Court's first directive to expedite the case and nearly seven months after a full trial on the merits, the District Court issued its Findings of Fact and Conclusions of Law and Judgment on the merits, denying Plaintiffs' requests for permanent injunctive relief with respect to both HB 2023 and Arizona's practice of rejecting OOP ballots in their entirety. *See* Findings of Fact and Conclusion of Law, ECF No. 416, *Democratic Nat'l Comm.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 10, 2018); *id.* at ECF No. 413 (Judgment). Thus, despite the *en banc* Court's 2016 directive that this matter be expedited, as well as Plaintiffs' continued diligence in prosecuting this matter, the timing of the District Court's decision once again has left a relatively short amount of time to decide this matter sufficiently in advance of upcoming elections: the primary election is scheduled for August 28, and the general election is scheduled for November 6, 2018.

Plaintiffs noticed their appeal of the District Court's final judgment on the merits in this case the day after judgment was entered. *See id.* at ECF No. 414.² As required by Federal Rule of Appellate Procedure 8, Plaintiffs first sought an injunction pending appeal from the District Court. *See id.* at ECF No. 419. The

² Plaintiffs also filed an Amended Notice of Appeal on May 10, 2018, after the District Court amended its Finding of Facts and Conclusions of Law. Am. Notice of Appeal, ECF No. 417, *Democratic Nat'l Comm.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 10, 2018).

District Court denied their request with respect to the rejection of OOP ballots, but directed the parties to submit limited briefing on the HB 2023 issue. *Id.* at ECF No. 420. The District Court directed Plaintiffs to file their brief by Thursday, May 17, with Defendants to file a response by Tuesday, May 22. The District Court has not stated when it will issue a decision as to whether to grant Plaintiffs' motion for an injunction pending appeal on the HB 2023 issue.

Because the District Court could still issue an injunction pending appeal on the HB 2023 issue, Plaintiffs have not yet sought an injunction pending appeal from this Court. However, because time is of the essence, Plaintiffs intend to do so, either on both issues or solely on the OOP issue (depending on how the District Court rules on the HB 2023 question), promptly after the District Court issues its ruling on Plaintiffs' request for an injunction of HB 2023, but in any case no later than May 25, 2018, unless this Court directs otherwise.³

In sum, as was true when this matter initially came before this Court at the preliminary injunction stage, time is of the essence in resolving Plaintiffs' requests for permanent injunctive relief. Statewide primary elections in Arizona will take place as early as August 28, 2018, and without an order from this Court reversing the District Court's judgment, thousands of Arizona voters will continue to be severely and unnecessarily burdened by the challenged laws.

III. ARGUMENT

The reasons for expediting consideration of this appeal are straightforward, and this Court has good cause to do so as Plaintiffs and thousands of Arizona voters

³ Plaintiffs intend to brief both issues together, unless the Court directs otherwise.

will be irreparably harmed as early as August 28, 2018, without a decision from this Court.

Arizona will conduct primary elections on August 28, 2018. As it currently stands, in the absence of an expedited ruling from this Court, the State will be free to enforce HB 2023, which criminalizes ballot collection, and reject in their entirety, any ballots cast by a voter in a precinct other than the one to which they are assigned, during that election. As the record before the District Court demonstrates (and as an *en banc* panel of this Court has already recognized with respect to HB 2023), the enforcement of these laws will irreparably harm thousands of Arizona voters, a disproportionate share of whom will almost certainly be minority voters. *See, e.g., League of Women Voters of N. Car. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury” because “once [an] election occurs, there can be no do-over and no redress.”); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury’”); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“A restriction on the fundamental right to vote...constitutes irreparable injury.”).

This urgency is amplified by the fact that, if this Court enjoins Arizona’s policy of rejecting OOP ballots in their entirety, the State will require some period of time to implement the process for counting OOP ballots. Thus, as a practical

matter, an expedited decision from this Court by early July 2018 is necessary to ensure that this relief may be secured for the upcoming primary elections.

Indeed, this case presents precisely the kind of circumstance in which expedited review is mandated by statute, *see* 28 U.S.C. § 1657 (“[E]ach court of the United States shall ... expedite the consideration of any other action if good cause is [] shown. . . . ‘good cause’ is shown if a right under the Constitution of the United States or a Federal Statute” is implicated), and expressly permitted by the Federal Rules of Appellate Procedure and this Court’s local rules, *see* Fed. R. App. P. 31(a)(2) (providing that an appellate court “may shorten the time to serve and file briefs”); Ninth Circuit Local Rule 27-12 (providing that the Court may expedite an appeal for briefing and oral argument where “good cause” is shown, including “irreparable harm”).

For each of these reasons, Plaintiffs submit that there is good cause to expedite the schedule for briefing and oral argument in this appeal, issuing a schedule that will enable the Court to issue a decision by no later than the second week of July 2018, and strongly urge the Court to do so as quickly as possible.

RESPECTFULLY SUBMITTED this 18th day of May, 2018.

s/ Sarah R. Gonski

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 18, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, hereby certifies that this brief complies with the length and formatting requirements permitted by Fed. R. App. P. 27(d) and Ninth Circuit Rule 27-1(1). The motion contains 2161 words and 8 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Sarah R. Gonski