No. 16-16698

In the United States Court of Appeals
for the Ninth Circuit

LESLIE FELDMAN; LUZ MAGALLANES; MERCEDEZ HYMES; JULIO MORERA; CLEO OVALLE; PETERSON ZAH, *Former Chairman and First President of the Navajo Nation*; DEMOCRATIC NATIONAL COMMITTEE; DSCC *a/k/a Democratic Senatorial Campaign Committee*; ARIZONA DEMOCRATIC PARTY; KIRKPATRICK FOR U.S. SENATE; HILLARY FOR AMERICA,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE; MICHELE REAGAN, *in her official capacity as Secretary of State of Arizona*; MARICOPA COUNTY BOARD OF SUPERVISORS; DENNY BARNEY, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE CHUCRI, *in his official capacity as member of the Maricopa Board of Supervisors*; ANDY KUNASEK, *in his official capacity as member of the Maricopa Board of Supervisors*; CLINT HICKMAN, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE GALLARDO, *in his official capacity as member of the Maricopa Board of Supervisors*; MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT; HELEN PURCELL, *in her official capacity as Maricopa County Recorder*; KAREN OSBORNE, *in her official capacity as Maricopa County Elections Director*; and MARK BRNOVICH, *in his official capacity as Arizona Attorney General*,

Defendants/Appellees,

ARIZONA REPUBLICAN PARTY; BILL GATES, *Councilman*; SUZANNE KLAPP, *Councilwoman*; SENATOR DEBBIE LESKO; and REPRESENTATIVE TONY RIVERO,

Defendant-Intervenors/Appellees.

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

PLAINTIFFS-APPELLANTS' STATEMENT ON MOOTNESS

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Pursuant to this Court's May 11, 2018 Order, Plaintiffs-Appellants ("Plaintiffs") submit this statement on the mootness of their appeal of the District Court's rulings on their motions to preliminarily enjoin the enforcement of two election policies that disparately burden minority votes in Arizona: (1) House Bill 2023 ("HB 2023"), which largely prohibits the practice of ballot collection, and (2) Arizona's practice of rejecting provisional ballots cast out-of-precinct ("OOP") in their entirety, even for the elections in which the voter is indisputably qualified to vote.[1] Plaintiffs agree that, now that the District Court has issued a final judgment on the merits, their appeal of the District Court's rulings on their motions for preliminary relief are moot.

Plaintiffs emphasize, however, that the central issues in this case (over which this Court has retained jurisdiction)—the constitutionality and legality under the Voting Rights Act of HB 2023 and Arizona's practice of rejecting OOP ballots—remain live, and time remains of the essence in their resolution. This Court previously recognized the importance of resolving these critical issues in November 2016, when it voted *sua sponte* to rehear *en banc* both this appeal of the District

[1] On December 28, 2016, Plaintiffs filed their Second Amended Complaint. Second Am. Compl., ECF No. 233, *Democratic Nat'l Comm. v. Reagan*, No. CV-16-01065-PHX-DLR (D. Ariz. Dec. 28, 2016). In addition to adding a Fifteenth Amendment claim, the Second Amended Complaint included changes to the Plaintiffs maintaining this suit. It was brought solely by the Arizona Democratic Party ("ADP"), the Democratic National Committee ("DNC"), and the DSCC. Bernie 2016, Inc., did not pursue the action any further. The ADP, DNC, and DSCC are accordingly the three remaining Plaintiffs and the parties responding to this Court's order regarding mootness.

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 v. Ariz. Sec'y of State*, No. 16-16698 (9th Cir. Nov. 2, 2016); Order, ECF No. 34, *Feldman v. Ariz. Sec'y of State*, No. 16-16865 (9th Cir. Nov. 4, 2016). The *en banc* Court quickly issued an injunction pending appeal on Plaintiffs' request for preliminary injunctive relief with respect to HB 2023. Order, ECF No. 70-1, *Feldman*, No. 16-16698 (9th Cir. Nov. 4, 2016). That order was issued four days before the election and was stayed by the U.S. Supreme Court pending final disposition of the appeal. Order Granting Application to Stay, *Ariz. Sec'y of State's Office v. Feldman*, No. 16A460 (Nov. 5, 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* Order at 3, ECF No. 36, *Feldman*, No. 16-16865 (9th Cir. Nov. 4, 2016).

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). Order, ECF No. 89, *Feldman*, No. 16-16698 (9th Cir. Dec. 13, 2016); Order, ECF No. 57, *Feldman*, No. 16-16865 (9th Cir. Dec. 13, 2016). In both instances, it directed the District Court to expedite the proceedings in this 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).[2] Thus, despite the *en banc* Court's 2016 directive that this matter be expedited, as well as Plaintiffs' continued diligence in prosecuting this matter, at all stages seeking expedient resolution of their claims, 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 coming elections: the primary election scheduled for August 28, and the general election scheduled for November 6, 2018.

Accordingly, Plaintiffs noticed their appeal of the District Court's final judgment on the merits in this case the day after judgment was entered. *See* Notice of Appeal, ECF No. 414, *Democratic Nat'l Comm.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 9, 2018).[3] The merits appeal was assigned case number 18-15845 and is captioned *Democratic Nat'l Comm., et al. v. Reagan, et al.*, No. 18-15845 (9th Cir.). Plaintiffs are taking steps to expedite the merits appeal, and have outlined those steps in detail in a motion to expedite appeal which is being filed today under the

[2] After issuing its Findings of Fact and Conclusions of Law on May 8, 2018, *Democratic Nat'l Comm.*, ECF No. 412, No. CV-16-01065-PHX-DLR, the District Court amended its findings and reissued them on May 10, 2018, *id.* at ECF. No. 416.

[3] Plaintiffs also filed an Amended Notice of Appeal on May 10, 2018. Am. Notice of Appeal, ECF No. 417, *Democratic Nat'l Comm.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 10, 2018).

case number assigned to the merits appeal. *See Democratic Nat'l Comm. v. Reagan*, No. 18-15845 (9th Cir.).

RESPECTFULLY SUBMITTED this 18th day of May, 2018.

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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