

No. 16-16698

Argued: October 19, 2016, before
Thomas, Chief Judge, and Bea, and Ikuta, Circuit Judges

In the United States Court of Appeals
For the Ninth Circuit

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Defendant-Intervenors/Appellees.

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

JOINT MOTION TO CONSOLIDATE APPEALS

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Pursuant to Rule 3(b)(2), FRAP, the Defendant-Intervenors and the Maricopa County Defendants move this Court for an order consolidating this appeal with a newly-filed appeal (No. 16-16865), involving the same parties and arising out of the same underlying district court proceedings. Consolidation should be granted because it is in the interest of justice, respects judicial economy, and would result in little to no delay.

I. INTRODUCTION

This appeal arises out of the district court's September 23, 2016, order denying Plaintiffs' Motion for a Preliminary Injunction to enjoin H.B. 2023. ER0001-27. Plaintiffs filed a Notice of Appeal on the same date. Dkt. Entry 1. Oral argument on the matter was heard by this Court on October 19, 2016. Dkt. Entry 49.

On October 11, 2016, the district court issued another order in the same underlying case, denying Plaintiffs' Motion for a Preliminary Injunction on Provisional Ballot Claims. *See* Order attached hereto as Ex. A. As with the prior denial to enjoin H.B. 2023, the district court again found that Plaintiffs were unlikely to succeed on the merits of their claims, that they had not shown that the State's rejection of

provisional ballots cast outside of the appropriate precinct would cause them irreparable harm, and that the balance of hardships and public interest weighed against enjoining the practice. *Id.* Plaintiffs filed a second appeal on October 15, 2016, this one based on the district court's October 11, 2016, order. *See* General Docket for No. 16-16865, attached as Ex. B, Dkt. Entry 1.

II. CONSOLIDATION OF PLAINTIFFS' TWO APPEALS IS WARRANTED.

A. Consolidation Serves the Interest of Justice.

To avoid the potential for injustice to the parties and to avoid conflicting decisions, this Court should consolidate the two appeals arising out of the district court proceedings. "When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals." FRAP 3(b)(2). This rule was adopted to encourage consolidation of appeals whenever possible. *See* 1967 Advisory Committee Notes to FRAP 3.

Consolidation is appropriate when jurisdiction over each appeal is proper, and it is "in the interests of justice." *See United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978). Here, the interests of justice dictate that this Court consolidate the Plaintiffs' appeal from the

denial to enjoin H.B. 2023 with their similar appeal from the denial to enjoin Arizona's practice of rejecting out-of-precinct provisional ballots. Both appeals arise from the same district court case regarding Arizona's election practices, and both implicate how the State and local counties administratively prepare for and execute the upcoming November 8, 2016, general election. Similarly, both will challenge the district court's findings that the Plaintiffs have not met their burden for injunctive relief. Most importantly, the same legal principles are at issue for which contradictory orders related to the law will cause confusion so close to the General Election. Therefore, the determination of these issues in one appeal could affect the result in the other appeal.

B. Judicial Economy Weighs Heavily in Favor of Consolidation.

When the appeals court will have to review the same issues in each appeal, consolidation is warranted in the interest of judicial economy. *See California v. Mesa*, 813 F.2d 960, 961 n. 1 (9th Cir. 1987) (consolidating two separate cases on appeal because "they raise the same legal issues"). Here, both appeals raise many of the same legal issues, evaluating Plaintiffs' burden for injunctive relief, the appropriate level of constitutional protections for voters, and states'

ability to develop reasonable regulations for fair and efficient election practices.

Additionally, without consolidation, these appeals will require two separate panels of this Court to review and analyze the same extensive record including information on prior election practices, numerous declarations from voters and election officials, expert reports, detailed legislative history on state statutes, and administrative plans for the upcoming election. Consolidation would eliminate the redundancy of such an effort by this Court, a significant concern under this Court's expedited adjudication timeline with the upcoming election date. It would also prevent separate appellate panels from drawing different, and possibly conflicting, conclusions about the substantial record in the case below.

C. There Will Be Little or No Delay If the Appeals Are Consolidated.

Consolidation of these appeals will result in minimal, if any, delay in the adjudication of these matters. Both appeals are progressing under expedited timelines. In this appeal, all parties simultaneously filed briefs on October 17, 2016, with oral argument held on October 19, 2016. Dkt. Entries 28, 49. Similarly, this Court has ordered

simultaneous briefs to be filed by October 24, 2016 in Case No. 16-16865, with oral argument likely to follow soon after. *See* Ex. B, Dkt. Entry 4. This Court may resolve both appeals in advance of the November 8, 2016, election, meaning that both appeals will be under consideration by this Court within the next two weeks. Therefore, consolidation will not significantly affect either appeal's timeline.

III. CONCLUSION

For the reasons stated above, this Court should consolidate Appeals 16-16698 and 16-16865 arising from the same underlying district court proceedings.

RESPECTFULLY SUBMITTED this 20th day of October, 2016

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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 October 20, 2016. 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/ Brett W. Johnson