

No. 16-16698

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

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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.*

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

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**PLAINTIFF-APPELLANTS' RESPONSE TO DEFENDANTS' JOINT  
MOTION TO CONSOLIDATE**

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## I. INTRODUCTION

Defendant-Intervenor the Arizona Republican Party, along with Maricopa County Defendants (collectively, “Defendants”), have moved this Court for an order consolidating this appeal with a separate appeal (No. 16-16865) that arises out of the same underlying case. Doc. 50. Plaintiffs take no position on the motion,<sup>1</sup> but instead urge the Court to assign the separate appeal to whichever panel can hear and decide the matter most expeditiously. Because the out-of-precinct claim that is at issue in this appeal involves a separate issue and separate record, and was decided separately by the District Judge, it could be determined by a separate panel without wasting judicial resources or risking conflicting orders. Given the imminence of the election and the presently ongoing early voting period, Plaintiffs seek assignment to whichever panel can consider the issue fastest, whether it be the existing panel or a new one.

## II. FACTUAL BACKGROUND

Two of Arizona’s election practices are under challenge, with a major election looming just 18 days away. Arizona voters deserve a swift resolution.

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<sup>1</sup> Although the Ninth Circuit Advisory Committee Note to Rule 27-1(5) directs moving parties to “make every attempt to contact opposing counsel before filing any motion” to ascertain their position and to “either inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position,” Defendants did not do so in this instance and made no attempt to contact counsel for Plaintiffs.

In this case, Plaintiffs allege that Arizona’s rejection of ballots cast out-of-precinct (OOP) and recent criminalization of ballot collection, a popular voting method, violates Section 2 of the Voting Rights Act and the First and Fourteenth Amendments. While the two claims allege violations of the same provisions of law, the issues present largely divergent factual records, with little overlap. *See generally* Excerpts of Record Volumes 1-12, Case No. 16-16698, Doc. 35; Excerpts of Record Volumes 1-19, Case No. 16-16865, Doc. 2. The issues were briefed separately in the district court.<sup>2</sup> And the district court ruled on them in separate orders. Further, the legal issues on appeal are distinct; the district court’s two orders suffer from different legal errors which present divergent issues on appeal.

Additionally, the timeline by which relief is necessary differs. Plaintiffs’ HB2023 claim needs a near-immediate resolution; early ballots began going out on October 12, and Plaintiffs, their members and constituents, and thousands of voters across Arizona are subject to ongoing deprivations of their constitutional rights because HB2023 currently prohibits them from engaging in their typical “get out

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<sup>2</sup> Separate briefing was ordered to accommodate Defendants’ request for an elongated briefing schedule, which resulted in a ruling mere weeks before the upcoming general election and precipitated the emergency nature of the instant proceedings. Plaintiffs sought a faster schedule in the District Court, but Defendants and Intervenor opposed, stating that they needed more time, and that a ruling later in the election cycle would not create implementation problems for the State.

the vote” efforts. In contrast, the counting of OOP ballots occurs post-election. Relief is needed urgently to ensure that election officials across Arizona receive appropriate guidance on whether to count OOP ballots, or segregate them to ensure that they can be counted after the election if needed. However, the irreparable harm that will be inflicted on Plaintiffs by Arizona’s policy of rejecting OOP ballots wholesale will not occur until the post-election canvass.

At bottom, Plaintiffs urge the Court to determine the issues as expediently as possible to provide certainty for all parties to this suit and to voters across Arizona. If consolidation of the appeals will facilitate a swift resolution, Plaintiffs do not oppose. But if consolidation will delay the Court’s ability to hear and resolve both issues, Plaintiffs respectfully request that the issues on appeal are considered separately here, as they were in the district court.

### **III. CONCLUSION**

For the reasons stated above, this Court should assign this appeal to the panel who can decide the matter most expeditiously.

RESPECTFULLY SUBMITTED this 20th day of October, 2016.

*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 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/ Sarah R. Gonski*