No. 16-16698

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

STATE DEFENDANTS/APPELLEES' SUPPLEMENTAL BRIEF

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Pursuant to this Court's November 21, 2016 Order (Doc. 77), Defendants/Appellees the Arizona Secretary of State's Office, Secretary of State Michele Reagan, and Attorney General Mark Brnovich (collectively, the "State Defendants") submit this Supplemental Brief. Because there is now no reason to award preliminary injunctive relief and a further appeal, if any, will arise on a different record, this Court should vacate the Order to rehear this case en banc (Doc. 68-1) and should remand to the district court for resolution of the merits of Plaintiffs' claims.

INTRODUCTION

The Democratic National Committee, the Democratic Senatorial Campaign Committee, the Arizona Democratic Party, Hillary for America, Kirkpatrick for U.S. Senate, several Arizona voters, and Intervenor Bernie 2016, Inc. (collectively, "Plaintiffs") sought en banc review of this Court's panel decision denying emergency preliminary injunctive relief to bar enforcement of H.B. 2023 on the basis that "[t]here is still time to protect these voters in the November general election." (Doc 60, at 2). Now that the November general election has passed, the need for expedited en banc review no longer exists.

Entertaining en banc review now is like throwing water on a fire that was already extinguished. The brisk pace of this appeal has been unrelenting, a fact that has prejudiced not only the parties' ability to collect facts and craft arguments, but also the Court's opportunity to digest a voluminous record and provide the careful consideration such important matters deserve. The Court should exercise its discretion under the doctrine of prudential mootness to dismiss the en banc

appeal and remand this case to the district court to develop a robust record—including new facts from the first election cycle to occur with H.B. 2023 in effect—rather than create en banc precedent from expedited, simultaneous briefing now that the purpose for Plaintiffs' emergency preliminary injunction has passed.

FACTUAL AND PROCEDURAL BACKROUND

In June 2016, Plaintiffs moved for a preliminary injunction of various Arizona election laws and practices.[1] This appeal arises from Plaintiffs' challenge to a new law, enacted as H.B. 2023 in Arizona's 2016 legislative session. (ER2946). H.B. 2023 is designed to prevent fraud or abuse in the early voting process and ensures that elections officials receive a voter's ballot in the same condition it left the voter's hands, by limiting who may deliver it. (*Id.*) At the same time, H.B. 2023 recognizes that a voter should be able to rely on family members, household members, or caregivers to deliver his or her ballot, and thus permits those people to possess a voter's early ballot and return it to elections officials by mail or in person. (*Id.*)

Arizona law provides for early voting during the twenty-seven days preceding an election. A.R.S. §§ 16-541(A), -542(C). Early ballots are mailed to voters who are on the permanent early voter list or who requested an early ballot before the beginning of the early voting period, no later than twenty-four days before the election. A.R.S. §§ 16-542(C), -544(F). Voters may ask the county

[1] In addition to the State Defendants, Plaintiffs also sued various Maricopa County officials, who have not taken a position on the claims related to H.B. 2023. The Arizona Republican Party and several Republican office holders or candidates intervened as defendants.

recorder to send them an early ballot up until eleven days before an election. A.R.S. § 16-542(E).

Plaintiffs' Motion for Preliminary Injunction of H.B. 2023 (the "H.B. 2023 P.I. Motion") sought an order enjoining:

> Defendants, their officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with them . . . from taking any action to implement, enforce, or otherwise give any effect to . . . H.B. 2023, until such time as the [district c]ourt enters a final judgment on Plaintiffs' claims related to H.B. 2023 in this action.

(ER0169; *see also* ER0077). The next scheduled statewide election is the 2018 primary election, which will occur on August 28, 2018. A.R.S. § 16-206(A). The early voting period for that election will commence on August 1, 2018. A.R.S. § 16-542(C).

Despite the volume of the excerpts of record submitted to this Court, the trial court record related to Plaintiffs' H.B. 2023 claim was created on an extremely abbreviated schedule. Plaintiffs supported their H.B. 2023 P.I. Motion with the reports of four experts, as well as declarations from more than a dozen lay witnesses. (*See* ER0193-0869). Defendants had only five weeks to conduct depositions of the experts and lay witnesses, obtain rebuttal expert reports, and respond to the H.B. 2023 P.I. Motion. (ER2841 (Minute Entry, Doc. 63)). Indeed, two of the expert depositions took place on the same day, on opposite sides of the country. (*See* ER2990, 3041). In addition, Plaintiffs submitted supplemental expert reports and additional documentary evidence with their reply, which they filed a week before the district court heard oral argument. The district court did not conduct an evidentiary hearing. (*See* ER2850 (Minute Entry, Doc. 147)). In

short, the factual record for the H.B. 2023 P.I. Motion was not fully developed due to the compressed time frame.

The proceedings in this Court occurred under even greater time pressure. On September 23, 2016, the district court denied Plaintiffs' request to enjoin enforcement of H.B. 2023 because they did not show that they would likely succeed on their claims that H.B. 2023 violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301, or the First and Fourteenth Amendments. (ER0014, 21, 23, 25). This Court initially denied Plaintiffs' request for an injunction pending appeal on October 11, 2016. But late on Friday, October 14, 2016, this Court *sua sponte* ordered the parties to brief the merits of Plaintiffs' appeal of the district court's order by Monday, October 17, 2016, and the Court heard oral argument on Wednesday, October 19, 2016. On Friday, October 28, 2016, a divided panel of this Court affirmed the district court's denial of the H.B. 2023 P.I. Motion. (Maj. Op. at 3, 58).

After ordering simultaneous briefing to be filed on Monday, October 31, 2016, this Court, *sua sponte*, issued an order on Wednesday, November 2, 2016, that the case be reheard en banc. (Doc. 68-1, at 2). As Judge O'Scannlain stated in his dissent from the grant of rehearing en banc, the Court's decision "eschew[ed its] normal en banc schedule." (Doc. 68-3, at 2). Indeed, due to the impending election date, the lightning-fast pace continued; memo exchange and voting regarding this Court's decision to grant rehearing en banc occurred over five days, which included a weekend, offering little time for measured consideration.

On November 4, 2016, the Friday before Election Day, this Court entered an injunction pending appeal that would bar enforcement of H.B. 2023 for the four remaining days of the early voting period for the 2016 general election. (Doc. 70-1, at 2). Less than a day later, the Supreme Court stayed that order without explanation. (ER3247). The time for delivery of early ballots to elections officials ended at 7:00 pm on Election Day, November 8, 2016. A.R.S. § 16-548(A). Arizona's 2016 election results are final pursuant to the state-wide canvass held on December 5, 2016. A.R.S. § 16-648.

ARGUMENT

I. Plaintiffs' Emergency Request for Preliminary Injunctive Relief Should Be Denied Under the Doctrine of Prudential Mootness Now That The 2016 Election Is Over.

This appeal, as well as its companion case, have been decidedly rushed to ensure that Plaintiffs had the opportunity to present their claims and obtain meaningful relief for voters participating in the 2016 general election. But the breathless pace at which this case proceeded was driven by Plaintiffs' claim that it was necessary to ensure that it would be possible to fashion meaningful relief before the 2016 general election if they prevailed. Because the election has passed, this reasoning no longer applies. Now, the important constitutional and statutory claims at stake compel that the case be remanded to the district court to provide the parties the opportunity to develop a full factual record and provide the court below and this Court adequate time to review a complete record, hear the parties'

argument, and apply the law to the complete record.[2] *See United States v. (Under Seal)*, 757 F.2d 600, 603 (4th Cir. 1985) (dismissing a case as prudentially moot and noting "the imprudence of deciding on the merits a difficult and sensitive constitutional issue whose essence has been at least substantially altered by supervening events . . . and which in its altered form is now subject to determination in a more appropriate forum and litigation setting").

Mootness can be a jurisdictional prerequisite, but it also provides an equitable mechanism for courts to refrain from acting when there are strong reasons that militate against a decision, including when circumstances have changed since the beginning of the litigation. *See Deutsche Bank Nat'l Trust Co. v. F.D.I.C.*, 744 F.3d 1124, 1135 (9th Cir. 2014) (explicitly adopting the doctrine of prudential mootness to permit the dismissal of an appeal if circumstances had changed since the beginning of the litigation). The 2016 general election, which provided the impetus for the Plaintiffs' request for preliminary injunctive relief,

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[2] Indeed, members of this Court urged against rehearing en banc for that very reason:

> A second serious problem is that we risk creating a mess of current law by trying to produce a ruling under self-imposed time pressure. The en banc court could render a decision in the next five days in hopes of enjoining Arizona's law before election day and then deal with the consequences of its decision later. Or, it could take whatever time it deems necessary to gain a thorough mastery of the record, to hear oral argument from the parties, and to write a considered opinion in plenty of time for the next election. This case has an extensive record and could potentially set an important precedent.

(Doc. 68-3, at 3-4 (O'Scannlain, J., dissenting)).

has passed. The circumstances have changed. This appeal should be remanded to the district court as prudentially moot. Such a remand is in the interest of justice and judicial economy for two reasons.

A. Because This Appeal Is Prudentially Moot, Remand Furthers the Interests of Justice and Judicial Economy.

First, the rushed nature of the litigation and the appeals process prevented the parties from fully developing the factual record. Plaintiffs filed two preliminary injunction motions on June 10, 2016, just seven weeks before oral argument on the H.B. 2023 P.I. Motion. Plaintiffs included four expert reports (ER 357-452 (Expert Report J. Rodden, PhD); ER 453-480 (Expert Report M. Yang, PhD); ER 315-317 (identifying the Expert Reports of D. Berman and A. Lichtman as exhibits 1 and 2, respectively, in support of Plaintiffs' H.B. 2023 P.I. Motion)), and fourteen declarations from fact witnesses, (ER 193-201 (Decl. of S. Gallardo); ER 193-201 (Decl. of T. Anderson); ER 208-212 (Decl. of S. Pstross); ER 213-217 (Decl. of R. Friend); ER 218-222 (Decl. of R. Parraz); ER 223-229 (Decl. of L. Gillespie); ER 230-236 (Decl. of I. Danley); ER 237-241 (Decl. of J. Larios); ER 243-252 (Decl. C. Fernandez); ER 253-262 (Decl. of R. Gallego); ER 263-275 (Decl. of M. Quezada); ER 276-284 (Decl. of K. Clark); ER 285-292 (Decl. of K. Gallego); ER 293-305 (Decl. of S. Healy)), in support of the H.B. 2023 P.I. Motion. Second, the 2016 election cycle was the first to be subject to the requirements of H.B. 2023. The millions of votes cast in this year's primary and general elections provide new and pertinent information about whether H.B. 2023 infringes the right to vote or disparately impacts minority voters.

Due to the important precedential nature of en banc review, the district court should be allowed to fully consider all relevant facts about H.B. 2023, including data from the 2016 election cycle, which is the only empirical evidence demonstrating the actual effect of H.B. 2023 on voters.[3] The interests of justice will thus be best served by allowing the district court to consider the effect of H.B. 2023 on an actual election. *See, e.g.*, *Patterson v. Ryan*, 338 F. App'x 727, 728-29 (9th Cir. 2009) (remanding for fuller factual development in light of changed circumstance created by intervening authority); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1114 (9th Cir. 1989) (explaining that "the interests of justice would be served by remanding this claim to the district courts for further consideration[,]" because "the factual record is insufficiently developed for us").

Remand serves the interests of justice because it will give the parties the opportunity to properly develop their arguments, along with the factual record, for the courts' consideration. The remarkably unusual procedure employed in this case deprived the parties of this opportunity. This appeal went from the Opening Brief before a panel of this Court, through en banc briefing, and to the United States Supreme Court for a decision on an emergency stay application, in a breathtaking period of only *nineteen days*. Briefing for these appeals has been so rushed that the preliminary injunction motion being appealed in the companion case was not included anywhere in 4,075 pages of excerpts of record originally

[3] Indeed, Plaintiffs provided no statistical data showing that H.B. 2023 had a disparate impact on minority voters and the district court found their anecdotal evidence unpersuasive. (ER 10).

submitted to this Court. This was an oversight, no doubt. But it is an oversight that illustrates the rushed nature of this appeal, and the prejudice to the parties that the rush created.

The prejudice is real, not merely conjectural. Due to the breakneck schedule of this appeal, every substantive brief to this Court was submitted simultaneously (Doc. 28, 56, 77). Rather than responding to the actual arguments that were made in the briefs, the parties' "opportunity to be heard" was an exercise in talking over each other on paper. *See, e.g., Heinz v. C.I.R.*, 770 F.2d 874, 876 (9th Cir. 1985). This inequity was further compounded by the fact that the parties had only three calendar days to draft the briefing on the merits and an additional two days to prepare for argument. (Doc. 28). These procedural irregularities limited the parties' ability to fully explore and develop the facts and arguments involved, and eliminated the opportunity for the parties to respond to their opponents' arguments. Justice will therefore be served by dismissing this appeal and remanding to the district court for further development of the facts and arguments at a normal pace.

Additionally, judicial economy is served by returning this matter to the district court for adjudication on the merits. Now that the election is over, the Court should refrain from using scarce en banc resources to consider issues that may be materially altered by new factual developments. Because preliminary injunctive relief is only available to preserve the court's ability to render a meaningful decision on the merits, *Canal Auth. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974), the Court's resources would better be served by allowing the court below to consider the constitutionality and legality of H.B. 2023.

If this Court expends its judicial resources to consider the H.B. 2023 P.I. Motion, that will not end the matter. The challenge to H.B. 2023 must still be litigated on the merits. That litigation will undoubtedly involve a much different factual record than the one before this Court. Indeed, the merits litigation will provide the first opportunity to consider the actual effect of H.B. 2023 upon an election. As a result, any decision the en banc Court reaches on *this* factual record may provide little or no guidance to the district court when it considers the merits, since the court below will be considering significantly different facts. Accordingly, judicial economy is served by dismissing this appeal and remanding. *See DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011) (noting that "due to the 'limited scope of our review . . . our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits' and that such appeals often result in 'unnecessary delay to the parties and inefficient use of judicial resources.'") (quoting *Sports Form Inc. v. United Press Int'l, Inc.*, 686 F.3d 750, 753 (9th Cir. 1982); *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998) (recognizing that when a preliminary injunction has been appealed, judicial economy may be served by remanding to the district court for initial disposition of new procedural developments); *see also Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999) (explaining that "as a matter of judicial economy" cases should be remanded to the district court, "which is already familiar with the record[,]" when additional fact-finding is warranted).

B. Because the Appeal Is Prudentially Moot, Plaintiffs Cannot Show the Irreparable Harm Necessary for a Preliminary Injunction.

To succeed on a preliminary injunction motion, plaintiffs must show they are "likely to suffer irreparable harm *in the absence of preliminary relief*[.]" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). Plaintiffs' allegations of harm focused on the rapidly approaching 2016 general election. The impending election was, indeed, one of the central reasons the en banc Court provided for granting Plaintiffs' requested relief. (*See, e.g.*, Doc. 80-2, at 4 (Reinhardt, J., concurring) ("Judge O'Scannlain . . . asks, 'Why the rush?' Here is one answer: a presidential election is just one week away, and the franchise of a potentially decisive number of voters depends upon our decision."). But now, the election has passed, along with Plaintiffs' claims that they (or other voters) would suffer irreparable harm in the 2016 general election. Accordingly, Plaintiffs cannot show the requisite threat of irreparable harm necessary for an injunction to issue. The changed circumstances brought about by the completion of the 2016 election has obviated Plaintiffs' claims of irreparable harm and so rendered preliminary injunctive relief inappropriate. *See, e.g., Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm.").

II. The En Banc Court Should Not Stay Proceedings Pending Entry of Judgment on the Request for Permanent Injunctive Relief.

The reasons that support this Court not rehearing this case en banc now also support vacating the en banc order, instead of staying it. "An en banc hearing or

rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Indeed, en banc review in the Ninth Circuit is markedly more limited than review allowed under Rule 35 because the Ninth Circuit Rules require that the panel decision "directly conflicts with an existing opinion by another court of appeals *and* substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1 (emphasis added). In other words, the Ninth Circuit exercises its discretion to rehear a case en banc if the decision both creates an intra- or inter-circuit split and raises a pressing national issue.

This Court's Order granting rehearing en banc does not state the reason supporting its decision, but Judge Reinhardt's concurrence indicates that he viewed this as "an urgent case of extraordinary importance." (Doc. 68-2, at 1). The Court does not identify a circuit conflict that would warrant en banc rehearing in the Orders granting rehearing en banc or the injunction pending appeal. *See United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (vacating order for rehearing en banc as improvidently granted after determining that two decisions of the Circuit were not in conflict). Now that the election has passed, the urgency that guided the Court's decision has dissipated.

Furthermore, this interlocutory appeal does not meet the strict requirements to satisfy the "exceptional importance" prong of en banc review because the panel and the district court applied the correct legal standards. At best, the dissent

disagrees with the district court's application of the law to the record. (Dis. Op. at 5 (noting that "the district court misapplied the analysis required by" the *Anderson/Burdick* balancing test), at 20 (criticizing the district court's assessment of Plaintiffs' evidence concerning discriminatory impact under § 2)). Any purported error in the application of the law to the record would not affect a rule of national application. *See* 9th Cir. R. 35-1; *see also Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 915 (4th Cir. 1983) ("In fact-dispositive cases, even if the controlling legal principles are of the greatest significance, rehearing en banc simply to consider a suggestion of panel error in its review of trial court findings of predicate facts is not warranted under the procedure.") (Phillips, J., dissenting); *United States v. Collins*, 462 F.2d 792, 802 (2d Cir. 1972) (vacating order for rehearing en banc as improvidently granted when issue before the court was factual).

The district court's decision was based on a factual record that was hastily developed out of procedural necessity. Indeed, due to the short time between the filing of the preliminary injunction motion and the commencement of early voting for the 2016 general election, little formal discovery occurred. Moreover, the district court heard oral argument before H.B. 2023's effective date, so neither party was able to gather evidence regarding its actual effects.

Full development of the factual record is particularly important in this case. This Court has stated that "[b]ecause a § 2 analysis requires the district court to engage in a 'searching practical evaluation of the past and present reality,' a district court's examination in such a case is 'intensely fact-based and localized.'" *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc) (quoting

Thornburgh v. Gingles, 478 U.S. 30, 45 (1986) and *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (some internal quotation marks omitted)). And as Justice Stevens stated in his separate concurrence in *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006):

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

The same considerations apply here. To rule on Plaintiffs' claim for permanent injunctive relief, the district court will need a fully developed factual record upon which to conduct the required "intensely fact-based" inquiry. That record will differ from the one presently before this Court. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1006 (9th Cir. 2003) (cautioning against rehearing en banc to decide an issue that is not dispositive) (Rymer, J., concurring).

Notably, the pending en banc proceedings are actually impeding resolution of this case. After the parties stipulated to a schedule for further proceedings, the district court consulted with the parties in late October, and entered a stay of proceedings pending this Court's en banc rehearing and decision. (ER 4087-88). Vacating the order granting rehearing en banc will permit the parties to conduct discovery and present the merits of the case to the district court for trial, if necessary, and a ruling on the request for permanent injunctive relief.

The district court's ruling on permanent injunctive relief will be based on a different factual record than this Court considered in October. If the unsuccessful party appeals that ruling, this Court will need to consider the new record. As such, staying proceedings in this Court will have little effect. If there is an appeal following the district court's ruling on a permanent injunction, the issues presented could be completely different from those raised on the preliminary injunction. In the event the members of this Court disagree with a future panel's decision on those future issues, the Court can vote to rehear the case en banc then.

CONCLUSION

For the foregoing reasons, this Court should vacate the Order to rehear this case en banc and remand to the district court for further proceedings.[4]

Respectfully submitted this 5th day of December, 2016.

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[4] To the extent that this Court is concerned about the effect of reinstating the panel decision, it may deem that opinion the "law of the case but otherwise nonprecedential." *N. Arapaho Tribe v. Wyoming*, 429 F.3d 934, 935 (10th Cir. 2005) (vacating order granting rehearing en banc as improvidently granted).

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by this Court's November 21, 2016 Order (Doc. 77). The Brief contains 4,364 words, excluding the portions exempted by Fed. R. App. P. 32(f). The Brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Kara Karlson

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 December 5, 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.

s/ Susan Peterson