

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

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

Attorneys for Plaintiffs-Appellants Leslie Feldman, Luz Magallanes, Mercedes Hymes, Julio Morera, Cleo Ovalle, Former Chairman and First President of the Navajo Nation Peterson Zah, the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America:

Daniel C. Barr
Sarah R. Gonski
PERKINS COIE LLP
2901 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Joshua L. Kaul
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com

Attorneys for Intervenor-Plaintiff/Appellant Bernie 2016, Inc.:

Roopali H. Desai
Andrew S. Gordon
D. Andrew Gaona
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue
Suite 1200
Phoenix, Arizona 85004
Telephone: (602) 381-5478
RDesai@cblawyers.com
AGordon@cblawyers.com
AGaona@cblawyers.com

Malcolm Seymour
GARVEY SCHUBERT BAKER
100 Wall Street, 20th Floor
New York, New York 10005-3708
Telephone: (212) 965-4533
MSeymour@gsblaw.com

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,¹ 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.

¹ 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.² 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

² 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

Daniel C. Barr (AZ# 010149)
Sarah R. Gonski (AZ# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)
Bruce V. Spiva (WDC# 443754)
Elisabeth C. Frost (WDC# 1007632)
Amanda R. Callais (WDC# 1021944)
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com

Joshua L. Kaul (WI# 1067529)
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

*Attorneys for Plaintiffs Leslie Feldman,
Luz Magallanes, Mercedes Hymes, Julio
Morera, Cleo Ovalle, Former Chairman
and First President of the Navajo Nation
Peterson Zah, the Democratic National
Committee, the DSCC, the Arizona
Democratic Party, Kirkpatrick for U.S.
Senate, and Hillary for America*

s/ Roopali H. Desai (with permission)

Roopali H. Desai (# 024295)

Andrew S. Gordon (# 003660)

D. Andrew Gaona (# 028414)

COPPERSMITH BROCKELMAN PLC

2800 N. Central Avenue, Suite 1200

Phoenix, Arizona 85004

Malcolm Seymour

GARVEY SCHUBERT BAKER

100 Wall Street, 20th Floor

New York, New York 10005-3708

Telephone: (212) 965-4533

MSeymour@gsblaw.com

Attorneys for Intervenor-Plaintiff

Bernie 2016, Inc.

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