No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DEMOCRATIC NATIONAL COMMITTEE; et al.,
Plaintiffs-Appellants,

v.

MICHELE REAGAN, in her official capacity as Arizona Secretary of State;
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendants-Appellees,
and
ARIZONA REPUBLICAN PARTY; et al.,
Intervenor Defendants-Appellees.

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

DEFENDANTS' MOTION TO REASSIGN THIS APPEAL TO THE THREE-JUDGE PANEL

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INTRODUCTION

Defendants-Appellees Secretary of State Michele Reagan and Attorney General Mark Brnovich ("Defendants") move for an order assigning this appeal to the three-judge panel that decided two earlier appeals in this case, both of which concerned the denial of a preliminary injunction. Case Nos. 16-16698 & 16-16865.

Since the resolution of those appeals, Judge Rayes of the District of Arizona has conducted a three-week trial on the merits and issued an extensive opinion rejecting all of Plaintiffs-Appellants' claims. *See* ECF No. 3, Ex. A.

Defendants respectfully request that the Court reassign this appeal to the merits panel that initially decided Plaintiffs' two prior appeals from denials of preliminary injunction. Because no panel opinion exists in this appeal, there is no intra-circuit conflict and no conflict with Supreme Court authority; and while the appeal involves important issues, it has not resulted in a panel decision that conflicts with another circuit court decision. *See* Fed. R. App. P. 35(b) (explaining requirements for en banc hearing or rehearing); 9th Cir. R. 35-1 (explaining this Court's demanding standard). This appeal does not satisfy the rigorous standards for en banc rehearing, let alone en banc consideration in the first instance. If the panel were to issue an opinion that created the type of division described in Rule 35(b), rehearing en banc would be available in the usual course.

BACKGROUND

In a lawsuit filed in 2016, Plaintiffs challenged two Arizona election laws: (1) certain provisions of Arizona House Bill 2023 ("H.B. 2023") that combat so-called "ballot harvesting" by "restrict[ing] the collection of voters' early ballots to family members, household members, certain government officials, and caregivers," *Feldman v. Ariz. Sec'y of State's Office*, 841 F.3d 791, 794 (9th Cir. 2016) (O'Scannlain, J., dissenting) (*Feldman I*); and (2) a state law "which required each voter who votes in person to cast his or her ballot at the precinct polling station at which the voter was registered to vote (the 'precinct vote rule')," *Feldman v. Ariz. Sec'y of State's Office*, 842 F.3d 613, 616–17 (9th Cir. 2016), *reh'g en banc granted*, 840 F.3d 1164 (9th Cir. 2016) (*Feldman II*). The district court declined to enjoin enforcement of either law, and two separate appeals followed.

A. The H.B. 2023 Appeal, No. 16-16698

In the H.B. 2023 appeal, Plaintiffs sought, and a motions panel "unanimously denied," an "emergency motion for an injunction pending appeal." *Feldman I*, 841 F.3d at 794 (O'Scannlain, J., dissenting). But on the merits panel's own motion, an expedited appeal ensued. *Id.* "In fourteen days a merits panel received briefing, heard oral argument, and issued an opinion affirming the district court and denying the request for a preliminary injunction by a two to one

majority." *Id.* The merits panel issued its order on October 28, 2016. 16-16698, ECF No. 55. "The case was called en banc the same day the opinion was issued," and "memo exchange and voting took place over five days." *Feldman I*, 841 F.3d at 794 (O'Scannlain, J., dissenting).

On November 2, 2016, the Court ordered that the case be reheard en banc. *Feldman I*, 841 F.3d at 791. Two days later—and just four days before election day in 2016 and more than three weeks into the early voting period—the en banc Court reconsidered the decision to deny Plaintiffs' motion for an injunction pending appeal, and entered that injunction. *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) (*Feldman III*). The Supreme Court of the United States stayed the injunction the following day. *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016).

B. The Precinct-Vote-Rule Appeal, No. 16-16865

The precinct-vote-rule appeal proceeded at a similarly frenzied clip. In the nine days after Plaintiffs filed their notice of appeal, the parties fully briefed, and the Court heard oral argument on, Plaintiffs' emergency motion for an injunction pending appeal. Case No. 16-16865, ECF Nos. 1–32. A merits panel affirmed the district court's decision refusing to preliminarily enjoin the precinct vote rule on November 2, 2016. *Id.*, ECF No. 33. Chief Judge Thomas dissented. *Id.* On November 4, the Court granted en banc review. *Id.*, ECF No. 35. The en banc

Court denied Plaintiffs' motion for an injunction pending appeal the same day. *Id.*, ECF No. 36.

After the 2016 election, the Court ordered the parties to file supplemental briefs explaining whether the election made the appeals moot and, if not, what relief was available. *Id.*, ECF No. 43; Case No. 16-16698, ECF No. 77. Following the parties' supplemental briefing, the Court stayed en banc proceedings pending the entry of a final judgment in the district court on Plaintiffs' request for permanent injunctive relief and ordered that the en banc Court retain jurisdiction over any subsequent appeal, which would be consolidated with the H.B. 2023 and precinct-vote-rule preliminary injunction appeals. The parties now agree that these appeals are moot in light of the district court's final decision on the merits. *See* Case No. 16-16698, ECF Nos. 94, 95, 96.

C. Trial Court Proceedings

On February 24, 2017, the district court issued a scheduling order to ensure an expeditious process through trial. Case No. 2:16-cv-01065-DLR, ECF No. 265. The scheduling order required expedited discovery, which included an estimated 40 total depositions and up to 40 requests for production of documents, be completed within 90 days. Defendants accommodated the goal of expedited resolution by waiving the opportunity to file any dispositive motions. *Id.*, ECF No. 264.

Following a three-week bench trial, the district court rejected all of Plaintiffs' claims on the merits. Ex. B, Case No. 2:16-cv-01065-DLF, ECF No. 416 ("Final Trial Order") at 83. The district court's 83-page order is firmly grounded in long-established, authoritative precedent.

The district court discussed the many ways that Arizonans may vote, the generous 27-day early voting period allowed by Arizona law, and the other conveniences that Arizona makes available, including Arizona's first-in-the-nation online voter registration portal and Permanent Early Voting List. *Id.* at 12–13. The order is replete with factual findings that reflect Judge Rayes's careful attention to the many witnesses who appeared before him. The court found that, in light of the variety of convenient options to vote, Plaintiffs could not demonstrate that H.B. 2023's restrictions on ballot collection present either an unconstitutional burden or a burden that would prevent minority voters from effectively participating in the electoral process. *See, e.g.*, *id.* at 22 (finding that the evidence showed that, at most, a few thousand early voters out of millions could have been impacted by H.B. 2023 and that burden was less than the burden of actually going to the polls on election day); *id.* at 56–58 (analyzing Plaintiffs' evidence and ultimately finding that "Plaintiffs' circumstantial, qualitative evidence is insufficient to establish a cognizable disparity under § 2.").

The district court utilized a similar analysis to determine that Arizona's long-standing requirement that voters cast ballots in their precincts also did not present an unconstitutional burden or prevent minority voters from electing the candidate of their choice. *Id.* at 40–41 (reviewing evidence showing a vanishingly small, decreasing number of voters cast out-of-precinct ("OOP") ballots and the many, convenient methods Arizona voters can use to find their precinct shows the prohibition on counting OOP ballots does not constitute a severe burden); *id.* at 65 ("Considering OOP ballots represent such a small and ever-decreasing fraction of the overall votes cast in any given election, OOP ballot rejection has no meaningful disparate impact on the opportunities of minority voters to elect their preferred representatives.").

Because H.B. 2023 and the precinct vote rule put only minimal burdens on voters, the district court found that the State's important interests were more than sufficient to justify the restrictions. *Id.* at 36, 47–48. The district court's decision in this case is wholly consistent with the Constitution, the Voting Rights Act ("VRA"), and authoritative precedent.

Plaintiffs timely appealed.

ARGUMENT

General Order 3.6(b) governs "Comeback Cases" and provides that, "[w]here a new appeal is taken following a remand or other decision by an en banc

court, . . . [t]he en banc court will decide whether to keep the case or refer it to the three judge panel." Gen. Order 3.6(b). Here, the en banc Court ordered that it would "retain jurisdiction over any subsequent appeal, which will be consolidated with" the H.B. 2023 and precinct-vote-rule preliminary injunction appeals. Case No. 16-16698, ECF No. 89; Case No. 16-16865, ECF No. 57. That "subsequent appeal" has now arrived, and the parties agree that the preliminary injunction appeals are now moot. ECF Nos. 94, 95 ,96. Defendants respectfully move for an order referring the present appeal to the three-judge merits panel. If necessary, that referral could carry an instruction to proceed as expeditiously as possible.[1] This appeal does not, however, merit en banc consideration in the first instance.

"En banc courts are the exception, not the rule," and "are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689–90 (1960). Thus, under Rule 35 of the Federal Rules of Appellate Procedure, "[a]n 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

[1] Plaintiffs recently moved for expedited consideration of their appeal. ECF No. 5 (filed May 18, 2018). While Defendants do not consider such treatment necessary, they note that expedited review is logistically (and, likely, decisionally) more straightforward for a three-judge panel than for the en banc Court.

court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). "[A] proceeding presents a question of exceptional importance if," for example, "it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Only these "narrow grounds . . . support en banc consideration" under the federal rules, which impose "rigid standards" for en banc review. Fed. R. App. P. 35(b) (1998 adv. comm. notes).

This Court's rules set the bar for an en banc hearing even higher. Circuit Rule 35-1 provides that "[w]hen the opinion of a panel 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, the existence of such conflict is an appropriate ground for petitioning for rehearing en banc." 9th Cir. R. 35-1 (emphasis added.)

While this Court "rarely" rehears cases en banc, 9th Cir. R. 35-1–35-3 [adv. comm. note (2)], it almost never hears a case en banc initially. This Court has granted initial en banc review only to reconsider its precedent on a specific issue of law. *See Cyr v. Reliance Standard Life Ins.*, 642 F.3d 1202, 1204-05, 1207 (9th Cir. 2011) (en banc) (noting that after initially denying Cyr's request for en banc review, the Court granted it after briefing to reconsider its precedent "as to which

parties may be sued as defendants" in actions for ERISA benefits and transferring the case back to the three-judge panel to resolve other issues raised); *United States v. Grisel*, 488 F.3d 844, 845 (9th Cir. 2007) (en banc) (noting the Court took the case en banc "to reexamine the validity of *United States v. Cunningham*, 911 F.2d 361 (9th Cir. 1990) . . . under the analysis required by *Taylor v. United States*, 495 U.S. 575 (1990)"). This Court granted initial en banc hearing in one other case to avoid addressing the constitutionality of a provision of the Federal Election Campaign Act that required the circuit courts to hear en banc "'all questions of constitutionality of th[e] Act.'" *Cal. Med. Ass'n v. Fed. Election Comm'n*, 641 F.2d 619, 631-32 (9th Cir. 1980) (en banc) (quoting 2 U.S.C. § 437h), *aff'd*, 453 U.S. 182 (1981).

The current appeal, which follows a full trial on the merits, certainly does not meet this Court's criteria for initial en banc hearing. There is no panel opinion at all in this appeal, much less one that conflicts with this Court's precedent or another court's decision and presents a pressing national issue. Furthermore, neither party asks this Court to reconsider an issue from its earlier precedents that would require resolution en banc. And no statute mandates en banc review. The interests at play in this case are no different from those implicated in every voting case, meaning that they are important but not exceptionally so.

Finally, it makes little sense to assign this complicated, fact-intensive case to the en banc Court. The district court evaluated the credibility of eight expert witnesses who opined on topics ranging from 100 years of Arizona history to complex statistical analyses. The district court also analyzed voting patterns from the 2016 election—the first election in which H.B. 2023 was enforced, which data was not available to this Court when it considered the preliminary injunction appeals. *See, e.g.*, *id.* at 22–22 (determining that approximately 20% of Arizona voters voted in-person in 2016 and were unaffected by H.B. 2023, and that only a few thousand mail-in ballots were collected by third parties before H.B. 2023 took effect); *id.* at 28–30 (analyzing trial testimony demonstrating that voters who had previously used ballot collection were able to vote without it in 2016). The district court also analyzed information on polling-place selection and OOP voting, concluding that 2016 continued the trend of an "ever-dwindling subset of [OOP] voters." *Id.* at 45; *see also id.* at 39–40 (explaining the statewide drop in OOP ballots that continued through 2016); *id.* at 44 (providing survey results indicating that 94% of Arizonans "thought it was very easy or somewhat easy to find their polling place").

None of these facts were available to this Court in the previous appeal, and all of them are entitled to significant deference. *United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009) ("We review for clear error the district court's factual

findings in connection with a bench trial."). The three-judge panel should have an opportunity to decide in the first instance whether, on this voluminous record, Judge Rayes committed clear error. Because the standard of review makes that conclusion very unlikely, this Court should decline to hear the case en banc in the first instance. *See Newdow v. U.S. Congress*, 328 F.3d 466, 469 (9th Cir. 2003) (Reinhardt, J., concurring in the denial of rehearing en banc and noting that the most reasonable construction of Fed. R. App. P. 35(a) limits en banc consideration to cases that are both of exceptional importance and incorrect), *rev'd sub nom., Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

Defendants have contacted counsel for Plaintiffs and Intervenors. Intervenors consent; Plaintiffs oppose assignment to the three-judge panel.

CONCLUSION

Defendants respectfully request that the Court assign this appeal to the merits panel that initially decided the two prior appeals in this case. This appeal does not merit initial en banc consideration.

Date: May 21, 2018

/s/ Dominic E. Draye

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 2,525 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: May 21, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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