No. 18-15845

In the United States Court of Appeals
for the Ninth Circuit

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC,
AKA Democratic Senatorial Campaign Committee;
THE ARIZONA DEMOCRATIC PARTY,

Plaintiffs - Appellants,

v.

MICHELE REAGAN, in her official capacity as Secretary of State of Arizona;
MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,

Defendants - Appellees,

THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman;
SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.;
TONY RIVERO, Rep.,

Intervenors-Defendants - Appellees.

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

PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO THE STATE'S MOTION TO RE-ASSIGN THIS APPEAL TO THE THREE-JUDGE PANEL

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Plaintiffs-Appellants the Democratic National Committee, the DSCC, and the Arizona Democratic Party ("Plaintiffs") respectfully request that this Court deny Defendant-Appellees Michele Reagan's and Mark Brnovich's (together, "the State") Motion to Re-Assign This Appeal to the Three-Judge Panel.

I. INTRODUCTION

Although titled as a "motion to re-assign," the State's motion is essentially a motion for reconsideration: the *en banc* Court determined over 17 months ago that it would retain jurisdiction over subsequent appeals in this case. The State's objection at this late date is neither procedurally permissible nor appropriate, and their requested relief—re-assignment to the three-judge panel that was briefly assigned to the case when it was initially appealed at the preliminary injunction stage, and the opinions of which were vacated by the *en banc* Court—will do nothing but further delay resolution of this important case. For these reasons alone, the State's motion should be denied.

In addition, the State provides no cogent basis for the relief that it seeks. All the factors that the State claims weigh in favor of returning this case to the three-judge panel existed at the time the *en banc* Court initially decided to retain jurisdiction. The State's main basis for its request is that the trial record is larger than the preliminary injunction record, but this should be surprising to no one: trial records are almost always more voluminous than preliminary injunction records. And although Plaintiffs do not disagree that they submitted a great deal of evidence in support of their claims below, a record amassed over the course of a ten-day trial

is not outside the normal range of trial records that the judges on this Court regularly review.

Nor is there any basis for the State's implication that it might somehow be useful for a three-judge panel to review the case before an *en banc* panel reviews it: a three-judge panel of this Court does not sit as an interim court between the District Court and the *en banc* Court; they have the same powers and abilities. And, when an *en banc* Court takes jurisdiction over a case after it has been assigned to a three-judge panel, it does not *review* the decision of the three-judge panel, it *re-hears* the case, making its own decisions, rather than passing on the propriety of the decisions of the three-judge panel. Fed. R. App. P. 35. Thus, the size of the record and the fact that an election is scheduled for just a little more than three months from now counsels *in favor* of the *en banc* Court's retention of this matter, so that its review of the record can take place, and any relief it grants can be effectuated, as soon as possible.

Finally, the State's assertion that the merits of the District Court's factual findings will be subject to clear error review ignores that the vast majority of the trial court's relevant factual decisions were made in the *Plaintiffs*' favor. To give just one example, the District Court found all of the Plaintiffs' expert witnesses credible, and found the State's expert witnesses largely *not* credible. Many of the District Court's errors relate to its application of the relevant law to the facts. Thus, there is no reason why the *en banc* Court is not perfectly well-equipped to consider this appeal, and to do so on an expedited schedule, as this Court announced it intended to do over 17 months ago. For all of these reasons, the State's request should be denied.

II. RELEVANT BACKGROUND[1]

Plaintiffs challenge two of Arizona's election laws: (1) Arizona's refusal to count ballots cast out-of-precinct, a practice that disenfranchises *twice as many* minority voters as white voters; and (2) House Bill 2023 ("H.B. 2023"), which criminalized most forms of ballot collection, a method of voting in Arizona particularly relied upon by minority voters (together, "challenged laws"). *See* Am. Findings of Fact and Conclusions of Law, ECF No. 416, *Democratic Nat'l Comm.*, No. CV-16-01065-PHX-DLR (D. Ariz. May 10, 2018) (hereinafter, "Dist. Ct. Op."). Both challenged laws undermine the fundamental right to vote of thousands of Arizona voters.

This matter first came before this Court in September 2016, when the Plaintiffs appealed from two separate orders of the District Court that denied Plaintiffs' motions to preliminarily enjoin the enforcement of H.B. 2023 and Arizona's practice of refusing to count out-of-precinct ballots in their entirety, even for races in which the voter is otherwise eligible to vote.[2] Those appeals were heard

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[1] For a fuller discussion of the procedural history of this case, see Plaintiffs' Motion to Expedite, Dkt. 5.

[2] Plaintiffs initially brought suit in April 2016, six weeks after the passage of H.B. 2023 and five months before it was to go into effect. To facilitate speedier review of the motion for injunction of H.B. 2023 and purportedly to render a decision before its effective date, the district court bifurcated the two claims and ordered separate briefing schedules. Nonetheless, it did not issue a decision on H.B. 2023 until September 23, 2016, nearly seven weeks *after* the law took effect and just six weeks prior to the 2016 general election. It did not issue an order denying an injunction on Plaintiffs' out-of-precinct claim until October 11, 2016, just three weeks before the general election. Plaintiffs immediately sought expedited relief on appeal and the *en banc* Court affirmatively found that the delay was not attributable to Plaintiffs who, the court found "pursued expedited consideration of their claims at every stage of

by a three-judge panel, which affirmed the District Court's decisions, in each case issuing split 2-1 decisions, with Chief Judge Thomas explaining in dissents why he would have reversed the District Court. Order, ECF No. 55 at 59-87, *Feldman, et al. v. Ariz. Sec'y of State*, No. 16-16698 (9th Cir. 2016) ("*Feldman I*"); Order, ECF No. 33-2 at 1-33, *Feldman, et al. v. Ariz. Sec'y of State*, No. 16-16865 (9th Cir. 2016) ("*Feldman II*").

The Court quickly voted *sua sponte* to rehear both preliminary injunction appeals *en banc*. *See* Order, ECF No. 68, *Feldman I*; Order, ECF No. 34, *Feldman II*. On November 4, 2016, the *en banc* Court issued an injunction pending appeal on Plaintiffs' request for preliminary injunctive relief on H.B. 2023. *Feldman I*, ECF No. 70-1. That order was issued four days before the 2016 general election and was stayed by the U.S. Supreme Court pending final disposition of the appeal. Order Granting Application to Stay, *Arizona Sec. of State's Office, et al. v. Feldman, Leslie, et al.*, No. 16A-460 (2016). The *en banc* Court never reached the merits of the out-of-precinct voting issue, due to concerns about *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *See Feldman II*, ECF No. 36 at 3. When the *en banc* Court stayed the preliminary injunction appeals pending the entry of a final judgment in the District Court, it expressly declared it would "***retain jurisdiction over any subsequent appeal***." *Feldman I*, ECF No. 89; *Feldman II*, ECF No. 57.

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the litigation," *Feldman I*, ECF No. 70-1 at 6. After the 2016 election, when parties returned to the District Court on the merits, the District Court again set elongated timelines, frequently at the State's request, and over Plaintiffs' objections.

In the same order, the *en banc* Court directed the District Court to expedite proceedings, but the District Court did not set trial until October 2017, and then did not issue a decision until May 10, 2018, nearly seven months after trial and a full 17 months after it was ordered to expedite consideration of this case. Plaintiffs appealed the next day, and sought an injunction pending appeal at the District Court. The District Court denied the motion for injunction pending appeal as to out-of-precinct voting, but requested additional briefing regarding H.B. 2023. Briefing will conclude today (May 22), but the District Court has not stated when it expects to issue a decision.

In sum, having once again pursued expedited consideration at every stage, Plaintiffs nonetheless find themselves in a familiar position: Arizona's primary election is scheduled to take place a mere three months from now, on August 28, and the general election will follow shortly after on November 6, 2018. Once again, time is of the essence

A. The *en banc* Court should not revisit its decision to retain jurisdiction over this urgent and important matter.

Seventeen months ago, the *en banc* Court correctly determined that there was good cause to retain jurisdiction over all further proceedings in this case, and it should reject the State's belated invitation to reconsider that decision. Proceeding as an *en banc* Court is the best way to ensure speedy and efficient resolution of the exceptionally important issues presented in this appeal.

The State's motion "to re-assign" the case is in fact an untimely motion for reconsideration of the Court's prior jurisdictional decision. But it fails to meet—or

even mention—the requirements for a successful motion for reconsideration. *See* 9th Cir. R. 27-10 (a motion for reconsideration shall be filed within 14 days of the order to be reconsidered); *see also id.* (motion for reconsideration "shall state with particularity the points of law or fact with, in the opinion of the movant, the Court has overlooked or misunderstood"). It also fails to provide any sufficient basis for making a different decision under the current circumstances.

Motions for reconsideration "are disfavored by the Court and are rarely granted," and "[t]he filing of such motions is discouraged." Cir. Advisory Committee Note to Rule 27-1(4). Here, moreover, the State has known *for 17 months* that the *en banc* Court retained jurisdiction over the appeal. *See* Dkt. *Feldman I*, ECF No. 89 (dated December 13, 2016); *Feldman II*, ECF No. 57 (same). The time to re-litigate this issue was nearly a year and a half ago—not in the middle of emergency proceedings, with major elections quickly approaching.

In any event, the Court was correct to retain *en banc* jurisdiction over the appeal, because this is precisely the type of "exceptional[ly] important" case that merits *en banc* consideration. Fed. R. App. P. 35(b). This Court has a long history of granting *en banc* review to consider constitutional or Voting Rights Act challenges to state election laws. *See Pub. Integrity All., Inc. v. City of Tucson*, 820 F.3d 1075, 1076 (9th Cir. 2016) (granting rehearing *en banc* to consider whether Tucson election law violated Equal Protection Clause); *Padilla v. Lever*, 463 F.3d 1046 (9th Cir. 2006) (granting rehearing *en banc* to consider whether school district recall petitions were subject to Voting Rights Act provision regarding translation of election materials); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (giving *en*

banc consideration to whether Washington's felon disenfranchisement law violated Voting Rights Act); *Geary v. Renne*, 2 F.3d 989 (9th Cir. 1993) (granting rehearing *en banc* to consider facial constitutionality of California Elections Code); *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (granting *en banc* review to equal protection challenge to California's term limits for state officeholders); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (granting *en banc* review to consider equal protection challenge to use of "punch-card" balloting machines in California initiative and gubernatorial recall elections).

The State does not explain why it believes the Court erred in initially granting *en banc* review. Instead, it blithely dismisses the issues in this case as "important but not exceptionally so." State Mot. at 9. But a venerable line of authority suggests otherwise. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (the right to vote is a "precious" and "fundamental" right); *Wesberry v. Sanders*, 376 U.S. 1, 17, (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined[.]"); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative of all rights").

Given the critical issues in this case implicating the most fundamental of rights, the Court correctly determined that this case merited—and still merits today—consideration by the *en banc* Court.

B. Returning this case to the three-judge panel would delay, not streamline, consideration of this appeal.

The State's brief avoids acknowledging the most important implication of its motion: delay. Returning this case to the three-judge panel that was first assigned to

the preliminary injunction appeals would almost certainly extend the timeline for final resolution of this appeal by necessitating an additional round of briefing after the three-judge panel's decision (regardless of the result), as it is reasonable to assume that the non-prevailing party will seek *en banc* review. And, under such circumstances, and given the prior proceedings in this case, there plainly is a strong possibility that the full Court is likely to again vote to re-hear this case *en banc*. Fed. R. App. P. 35(b) (*en banc* consideration is appropriate for questions "of exceptional importance").

In elections cases, delay is not merely inconvenient; it can act as a total bar to relief (at least with respect to particular elections). The implications of the "*Purcell* doctrine" are highlighted by the procedural history of this very case. The *en banc* Court did not reach the merits of the out-of-precinct ballot issue because of concerns about timing under *Purcell*. *See Feldman II*, ECF No. 36 at 3. And although the Supreme Court did not explain its reasons for staying the *en banc* Court's injunction pending appeal of H.B. 2023, the fact that it issued the stay just three days prior to the election strongly suggests that, there also, *Purcell* was critical. Order Granting Application to Stay, *Arizona Sec. of State's Office, et al. v. Feldman, Leslie, et al.*, No. 16A-460 (2016).

With major statewide elections quickly approaching, time is of the essence once again. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress."). It would be troubling indeed for history to repeat itself here if procedural delays, and not consideration of the substantive merits of Plaintiffs' claims, render

relief unavailable to voters across Arizona for another election. Efficient resolution of this case is not only in Plaintiffs' best interest, but also plainly serves the interest of the State.

The State has identified no benefits to consideration by the three-judge panel that would meaningfully offset the cost of the resulting delay. The decisions of the three-judge panel assigned to the earlier appeal were vacated and do not govern this case. State Mot. at 9. Thus, there is no reason to disturb the Court's 17-month-old decision that *en banc* review is appropriate here.

C. The *en banc* Court is well-positioned to consider the issues on appeal, which center primarily on errors of law, not fact.

Many of the issues in this appeal will center primarily on errors of law. The District Court correctly found that H.B. 2023 criminalized most forms of a method of voting that was disparately used by minority voters, Dist. Ct. Op. 62, and was primarily used to "increase electoral participation by otherwise low-[turnout] voters," Dist. Ct. Op. 16.[3] It also correctly determined that there is no evidence of ballot collection fraud in Arizona and no evidence of widespread public perception that fraud is occurring. Dist. Ct. Op. 34. Regarding out-of-precinct ballots, the District Court correctly concluded that minority voters are *twice as likely* as white voters to be disenfranchised by Arizona's rejection of out-of-precinct ballots. Dist. Ct. Op. 64-65. The District Court determined that many Senate Factors are present in Arizona and that "past discrimination in Arizona has had lingering effects on the

[3] The District Court and some witnesses at trial used the phrase "low-efficacy voters" to refer to voters who turned out at low rates.

socioeconomic status of racial minorities," Dist. Ct. Op. 74. It found that racial appeals have been prominent in Arizona, including in the context in the passage of a predecessor bill to H.B. 2023. Dist. Ct. Op. 72-73. The record here is similar to—but stronger than—the record that the *en banc* Court found sufficient to establish a likelihood of success on the merits on Plaintiffs' *Anderson-Burdick* and Voting Rights Act claims at the preliminary-injunction stage of this case.

Nonetheless, the District Court erroneously concluded that neither challenged practice violates the Constitution or the VRA because it incorrectly applied the law. It acknowledged that *Anderson-Burdick* requires a "means-fit" analysis, but then appears to have improperly applied rational basis review. *See* Dist. Ct. Op. 36-39. It incorrectly assessed the scale of the burden on affected voters. Dist. Ct. Op. 33, 45. Despite finding that the line of legislation ultimately culminating in H.B. 2023 was conceived in the context of racially polarized voting, "unfounded and often farfetched allegations of ballot collection fraud" that were "demonstrably false," and a "racially-tinged video," the District Court incorrectly concluded that H.B. 2023 was not intended to make it harder for racial minorities to vote in Arizona, in violation of the Fifteenth Amendment. It then concluded that neither challenged practice violates the Voting Rights Act because of an erroneous view of the causality requirement in Section 2. Dist. Ct. Op. 75.[4] The size of the factual record does not

[4] This list is meant to be illustrative only; it is not an exhaustive summary of the errors in the District Court's reasoning, nor does it constitute waiver of any issues on appeal.

affect this Court's ability to remedy these and other legal errors and to grant the relief that the law requires.

CONCLUSION

The issues implicated by this appeal are issues of exceptional importance and urgency, and they affect the fundamental rights of Plaintiffs and voters across Arizona. The *en banc* Court correctly determined more than 17 months ago that it should retain jurisdiction over this appeal. The Court should deny the State's untimely, procedurally improper, and unsupported motion to re-assign this case to the three-judge panel.

RESPECTFULLY SUBMITTED this 22nd day of May, 2018.

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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 May 22, 2018. 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/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief contains 2,976 words and 11 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*