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

STATE DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO REASSIGN THIS APPEAL TO THE THREE-JUDGE PANEL

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ARGUMENT

I. State Defendants' Motion Is a Comeback Motion, Not a Request for Reconsideration.

In their Response Brief, Docket Entry 15 ("Response"), Plaintiffs assert that the State Defendants' Motion is actually an untimely motion for reconsideration. Response at 1, 5. That characterization relieves Plaintiffs of their burden to establish that en banc consideration is necessary and misreads this Court's earlier order from the preliminary injunction appeals. The instant motion is properly understood as what the Court calls a "comeback motion," governed by General Order 3.6(b).

In order to construe the current Motion as one for reconsideration, Plaintiffs point to the Court's December 13, 2016 Order in the preliminary injunction appeals. No. 16-16698, Doc. 89. They read that order to suspend Federal Rule of Appellate Procedure 35 (and the corresponding circuit rules) without any party making a motion to that effect and without expressly saying so. This interpretation is an extreme case of "hid[ing] elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001). After all, the parties never exchanged briefing on whether the eventual decision by the trial court would necessarily satisfy the requirements for initial en banc consideration. Indeed, no one knew whether a post-trial appeal would even occur—the parties could have

settled their dispute on remand, or the party that lost at trial might have elected not to contest that outcome. Given this context, it is unreasonable to assume that the Court was subtly dispatching with any briefing on the appropriateness of en banc consideration in a *post-trial* appeal. Yet that is precisely what Plaintiffs' "reconsideration" theory suggests: Defendants should be time-barred from insisting on compliance with Circuit Rules 35-1 through 35-3 for the instant appeal because they did not raise concerns over an unknown future case within 14 days of the December 2016 order. Response at 6; 9th Cir. R. 27-10.

Plaintiffs' approach inverts the burden for obtaining en banc consideration. This Court "rarely" *re*hears cases en banc. R. 35-1 to 35-3 [Adv. Comm. Note (2)]; *see also United States v. Am.-Foreign S.S. Corp.*, 363 U.S. 685, 689–90 (1960) (noting the rare nature of en banc courts). It is even more unusual for an en banc court to hear a matter initially. Mot. 8–9. It is so rare, in fact, that the State Defendants are aware of only three instances in the entire history of this Court in which it took initial en banc review of an appeal. *See* Mot. at 9. Two of those cases occurred so that the Court could reconsider its prior holdings on particular issues of law. *See Cyr v. Reliance Standard Life Ins.*, 642 F.3d 1202, 1204-05, 1207 (9th Cir. 2011) (en banc) (reconsidering Circuit precedent related to ERISA benefits); *United States v. Grisel*, 488 F.3d 844, 845 (9th Cir. 2007) (en banc) (reconsidering the validity of a previous Ninth Circuit decision under an analysis

required by a subsequent Supreme Court decision). The third—and only other—en banc consideration in the first instance occurred because the particular law challenged as unconstitutional *required* the en banc court to decide any questions regarding the law's constitutionality in the first instance. *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 and explaining why the trial court certified the questions of constitutionality to the en banc court), *aff'd*, 453 U.S. 182 (1981).

The cases Plaintiffs cite to show that voting-rights cases are sometimes heard en banc are entirely consistent. Response at 6–7. Every single one of those cases was initially heard by a three-judge panel. The aggrieved party then had its burden of convincing this Court that the panel had departed from other decisions within this Circuit, Fed. R. App. P. 35(a), or conflicts with "authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). None of these cases were heard by the en banc Court in the first instance, and none of them reached en banc consideration via the path Plaintiffs hope to exploit—an order entered in admittedly moot appeals from preliminary injunctions. Plaintiffs ask this Court to blaze new trails. The Court should decline that request.

Comeback motions, on the other hand, are routine. They are specifically contemplated by General Order 3.6(b), which 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). The State Defendants' Motion asks this Court to refer it to the three-judge panel.

II. State Defendants' Comeback Motion Is Timely.

The current Motion is timely because it depends on the existence of a new appeal, which Plaintiffs only filed on May 9, 2018, Doc. 414, and then filed their amended notice of appeal on May 10, 2018, Doc. 417. The State Defendants could not have filed their Motion prior to the appeal notice. *See* Fed. R. App. P. 3(a) (providing that "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken *only* by filing a notice of appeal with the district clerk within the time allowed by Rule 4." (emphasis added)). Rather, the State Defendants had to wait to file their comeback motion until there was actually an appeal to be reassigned. *See* Gen. Order 3.6(b) (explaining that "[w]here a new appeal is taken" the en banc court that had retained jurisdiction of it shall decide whether a three-judge panel should hear it in the first instance). As noted above, there was no guarantee that an appeal from the trial would ever occur. The State Defendants did exactly what the Rules require: they waited until Plaintiffs filed their notice of appeal, and they then filed their comeback motion. The Motion is thus timely.

III. This Appeal Is Ill-Suited For En Banc Review.

As explained in the Motion, en banc consideration in the first instance is exceedingly rare and provides an inferior mechanism for resolving the current case. Mot. at 9-11. As the former Chief Judge of the Second Circuit recognized:

> In practice en bancs are time-consuming and cumbersome, and only rarely produce dispositive resolution of major, recurring issues. The proliferation of opinions which is not rare in an en banc decision, usually obfuscates rather than clarifies.

Gilliard v. Oswald, 557 F.2d 359, 359 (2d Cir. 1977) (Kaufman, C. J., with Mansfield, J. and Gurfein, J., concurring).

Plaintiffs' argument in response seems to be that, regardless of the Rules and the poor fit of en banc review in the first instance, time *might* be saved if the en banc Court hears this appeal initially. *See* Response at 7-11. The justification for this potential efficiency is Plaintiffs' "assum[ption] that the non-prevailing party will seek" rehearing en banc. *Id*. at 8. But this assumes far too much.

First, it assumes that the non-prevailing party will ask for en banc review. That is far from assured because of the high bar Ninth Circuit Rule 35-1 sets for such review. More importantly, it assumes that the en banc Court would agree to rehear the case. *See* Response at 8. But Ninth Circuit Rule 35-1 provides that en banc rehearing is only appropriate "[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[.]" (emphasis added). Until there is an "opinion of a panel," there is no way to know whether the opinion will "directly conflict[ ] with an existing opinion by another court of appeals" and *also* "substantially affect[ ] a rule of national application" in which the need for national uniformity is paramount. As a result, there is no way to know at this early date, before the three-judge panel has even considered the appeal—let alone issued its decision—whether there is "a strong possibility" that the Court will decide to rehear this matter en banc.

Finally, Plaintiffs' argument that an en banc court is well-positioned to decide this appeal misunderstands the role of the en banc Court. Plaintiffs do not assert that the district court's order conflicts with precedent from this Court, another circuit court, or the Supreme Court. Rather, Plaintiffs argue that the district court misapplied the law to the facts. Response at 10. Many of their asserted "applications of law" are actually attempts to reverse Judge Rayes's factual findings, which makes en banc review all the less probable. *E.g., id.* ("[Judge Rayes] incorrectly assessed the scale of the burden on affected voters"; "the District Court incorrectly concluded that H.B. 2023 was not intended to make it harder for racial minorities to vote in Arizona"). If the district court's ruling actually conflicted with precedent, it is incumbent on Plaintiffs to say so expressly. That they have not attempted to meet this burden concedes that this appeal has no business commanding the en banc Court's attention.

The Ninth Circuit Rule is clear and irrefutable. This appeal is not now appropriate for en banc review. Accordingly, this Court should refer the appeal to the three-judge panel that heard the related appeals, Case Nos. 16-16698 & 16-16865.

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 23, 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)(C) because this brief contains 1,586 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 23, 2018

/s/ Dominic E. Draye

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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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