Appeal Nos. 18-56102, 18-56105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDICIAL WATCH, INC., *et al.*,

Plaintiffs-Appellees,

v.

DEAN C. LOGAN, *et al.*,

Defendants,

v.

MI FAMILIA VOTA EDUCATION FUND, et al.,

Movants-Appellants,

v.

CALIFORNIA COMMON CAUSE,

Movants-Appellants.

On appeal from the United States District Court
for the Central District of California
No. 2:17-cv-08948-R-SK
The Honorable Manuel L. Real

MOVANTS-APPELLANTS' JOINT REPLY BRIEF

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INTRODUCTION

The oppositions to the Motion to Expedite have largely lost track of the relief being sought on this motion – which is simply to move up the dates of the briefing schedule and argument of this case. The parties' arguments against expediting the appeal are based primarily on their view of the merits of whether intervention should have been granted – such as whether the state Defendant is an adequate representative of their interests, and whether the availability of a collateral challenge to a judgment or settlement is an adequate basis to deny intervention. Those arguments should be resolved in the briefing of this appeal on the merits, not on this motion to expedite the appeal.

If anything, the parties' united effort to prevent this appeal from being heard only underscores exactly why the appeal should be expedited. Disposition of the case below without Movants-Appellants' involvement may result in the implementation of processes that threaten voters they serve. Accordingly, the question of whether Movants-Appellants were improperly denied intervention should be resolved on its merits, on an expedited schedule, so as to preserve their opportunity to protect their interests in this case.

I. THE COURT SHOULD EXPEDITE THE APPEAL.

A. The Appeal Is Not Moot.

The county Defendant, and notably only the county Defendant, argues this appeal is moot. In support of its argument, county Defendant cites *United States v. Ford*, 650 F.2d 1141, 1142-43 (9th Cir. 1981), in which this Court dismissed as moot a proposed intervenor's appeal of the denial of its intervention motion because the underlying action had been dismissed. The holding in *Ford*, however, does not apply to the present appeal because, and as this Court noted, the underlying action in Ford was *dismissed with prejudice* after the district court granted the government's voluntary dismissal motion. (*Id*.at 1142.) There was thus no action left in which to intervene. *Cf. League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1301 (9th Cir. 1997) (holding that appeal of denial of intervention was not moot where "[f]irst and foremost, as of the date this opinion was filed, the district court had not yet entered a final judgment in the case").

Here, there has been no final judgment and resolution of the underlying action. Instead, on August 31, 2018, the parties filed a Joint Notice of Settlement and requested 120 days to finalize the settlement, specifically informing the court they would return once the settlement is finalized and executed to request the court's approval of "a stipulated order which dismisses this case with prejudice." (Joint Notice of Settlement, Dist. Ct. Dkt. No. 93 at 1:11-12.) On September 5,

2018, the district court, seemingly *sua sponte*, issued an order dismissing the case "*without prejudice* to the right, upon good cause shown within 120 days, to reopen the action *if* the settlement is not consummated." (Order of Dismissal, Dist. Ct. Dkt. No. 94 at 1:21-22 (emphasis added).) The Court further indicated that it would retain jurisdiction to enforce the settlement if one is reached by the parties.

Therefore, should Movants-Appellants succeed on appeal and be granted intervention, there is still a case to defend. Settlement negotiations are ongoing, the parties do not intend to request dismissal with prejudice unless a settlement is executed, and the district court's dismissal was without prejudice and contemplated that the matter could be reopened (rather than re-filed) if a settlement is not consummated. (*See, e.g.*, *McGuckin v. Smith*, 974 F.2d 1050, 1053 (9th Cir. 1992) (holding that in analyzing the finality of a judgment, the inquiry in the Ninth Circuit "is whether the decision 'ends the litigation and leaves nothing more for the court to do'" and noting that "[u]sually, a dismissal without prejudice does not do so") (citations omitted); *see also Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1432 (9th Cir.1984) ("A dismissal without prejudice opens the door to renewed contest. A dismissal with prejudice brings the contest to a close.")

Certainly, it is not uncommon for negotiations between the parties to fall apart, requiring the court to step back in or for litigation to resume. *See United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002) (noting that parties had returned

to court after four months of failed private settlement negotiations). Moreover, even if a settlement agreement is finalized, the parties have indicated that they will request, and the Court has indicated that it will accept, continuing jurisdiction for purposes of enforcement. In those circumstances, intervention may still be appropriate for purposes of any proceedings with respect to enforcement of the settlement.

This is presumably why neither the state Defendant nor Plaintiffs-Appellees raise mootness in their opposition to this motion to expedite. Neither party intended to release their claims or defenses unless and until a settlement is finalized and executed.

If anything, the suggestion that this appeal could become moot before this Court hears it provides further support for the request to expedite. *See* Ninth Circuit Rule 27-12 (defining "good cause" for expediting to include that "in the absence of expedited treatment . . . the appeal may become moot"). If this Court were to conclude that an executed settlement and dismissal with prejudice would moot the instant appeal, Movants-Appellants could lose their ability, through no fault of their own, to obtain reversal of a very harmful decision on intervention—a decision whose flawed reasoning suggests that Movants-Appellants have no

interests to protect when a lawsuit seeks the purging of potentially millions of registered voters (*see* Dist. Ct. Dkt. No. 76).[1]

For these reasons, there is a live controversy in which Movants-Appellants seek to intervene, and mootness does not provide a ground for denying the motion to expedite the appeal.

B. EXPEDITING THE APPEAL AFFORDS THE BEST OPPORTUNITY TO PROTECT AGAINST IRREPARABLE HARM TO THE INTERESTS OF MOVANTS-APPELLANTS.

For similar reasons, the state Defendant and Plaintiffs-Appellees are incorrect in arguing that a reversal of the district court's order on intervention can have no impact in protecting the Movants-Intervenors' interests.

Again, this argument overlooks the reality that this case is not closed and that litigation may resume, as explained above in Part A. The practical relief available to Movants-Appellants if intervention is granted will depend on the posture of the case at the time the appeal is resolved. In the event litigation resumes when the 120-day period to negotiate a settlement ends, Movants-Appellants will be able to determine how best to protect their interests as parties at that stage of the litigation.

[1] Moreover, if the county Defendant believes this appeal is moot, he will have a full opportunity to include that argument in his appellate brief on the merits, which further underscores that this argument is not a basis to deny the motion to expedite the appeal.

In arguing that the potential for irreparable harm to Movants-Appellants' interests is insufficient to warrant expediting the appeal, Plaintiffs-Appellees suggest that a motion to expedite should require Movants-Appellants to meet the same standards for showing irreparable harm as they would have to meet if they were asking this Court for a preliminary injunction against the same action by Defendants. Dkt 21-1 at 8. In support of their argument, Plaintiffs-Appellees cite *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 412 (9th Cir. 2015), which involved a typical application of the standards for a preliminary injunction in a typical setting – in that case, an injunction that would have prohibited the City of Seattle from raising the minimum wage that certain restaurant franchisors must pay to their employees. To obtain such pre-trial relief, a party must meet the standard four-part test that this Court uses, which includes a showing that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Id.* at 399.

Here, Movants-Appellants are not asking for a preliminary injunction, but merely for their appeal to be expedited. Such modest relief should not require more than the showing Movants-Appellants have made here -- that expediting the appeal is necessary to preserve the opportunity to have their interests protected in a meaningful way.

In his opposition, the state Defendant incorrectly asserts that "Under this Court's rules, the only 'good cause' sufficient to prevail on a motion to expedite is

a showing that 'irreparable harm may occur or the appeal may become moot,'" citing Ninth Circuit Rule 27-12. Dkt. 22 at 6. In fact, Ninth Circuit Rule 27-12 states that good cause to expedite an appeal "includes *but is not limited to* situations in which . . . irreparable harm may occur or the appeal may become moot." Moreover, 28 U.S.C. sec. 1657(a), on which this motion is also based, contains no requirement of irreparable harm but provides that "good cause" to expedite an appeal is shown "if a right under the Constitution of the United States or a Federal Statute . . .would be maintained in a factual context that indicates that a request for expedited consideration has merit."

That is precisely the situation here. This case involves the constitutionally protected right to vote. Expediting the appeal will ensure Movants-Appellants' interests are protected by allowing the appeal to be resolved before the proceedings below are completed.

C. OTHER ARGUMENTS ADVANCED BY THE PARTIES TO OPPOSE THE MOTION TO EXPEDITE ARE BASED ON THE MERITS OF THE ISSUE BEFORE THE COURT AND SHOULD BE ADDRESSED IN THE MERITS BRIEFING.

Defendant Padilla argues that the motion to expedite should be denied because he should be considered an adequate representative of Movants-Appellants' interests under this Court's precedents on intervention as of right. Dkt. No. 22, at 6-9. Plaintiffs-Appellants argue that the availability of a collateral action to challenge any settlement should prevent Movants-Appellants from playing any

role in this case. Dkt. No. 21-1, at 15. Both of these are questions to be determined on the merits briefing of the appeal of the denial of intervention, not on a motion to expedite the briefing. The parties' reliance on such arguments to oppose expediting the appeal only underscores why it makes sense to expedite the briefing in this case: so that this Court can determine whether intervention was properly denied on the basis of full briefing on a time frame that will permit the appeal to be resolved in time for Movants-Appellants to participate in the case.

Moreover, the state Defendant's argument that Movants-Appellants do not independently have the power to prevent a settlement between the parties simply proves too much. The question in this appeal is whether intervention was improperly denied. If the possibility of settlement between the original parties were enough to deny intervention, no motion to intervene would ever succeed, at least outside the context of actions where court approval is legally required. Moreover, if Movants-Appellants become parties to the proceedings, Defendants would be permitted to consult with Movants-Appellants – whose interests they are now attempting to represent – without breaching any requirement of settlement confidentiality. Thus, Defendants posture in their opposition regarding exclusion of Movants-Appellants may very well change if Movants-Appellants are allowed into the action and can offer valuable evidence and legal theories that would inform any settlement or other resolution of the action.

II. THE MOTION TO EXPEDITE IS TIMELY.

Only the county Defendant argues that the motion to expedite should be denied on grounds of undue delay. Denial on that basis would be improper. The only case Defendant cites regarding timeliness, *Nader v. Land*, 115 Fed. Appx 804 (6th Cir. 2004), is clearly distinguishable. In that case there was no change in circumstances whatsoever between the time the notice of appeal was filed and the time the motion to expedite was filed six weeks later. In contrast, here the notice of settlement filed by the parties on August 31, 2018, and subsequent dismissal of the case on September 5, 2018, substantially changed the circumstances and prompted Movants-Appellants' request to expedite the appeal.

CONCLUSION

For the foregoing reasons and the reasons outlined in Movants-Appellants' Emergency Motion to Expedite, this Court should expedite the briefing, argument, and review of this appeal.

Dated: September 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 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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