Appeal No. 18-56102

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-Appellees,

v.

MI FAMILIA VOTA EDUCATION FUND, et al.,

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' MOTION TO DISMISS APPEAL AS MOOT AND VACATE UNDERLYING DECISION

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INTRODUCTION AND SUMMARY OF RELIEF REQUESTED

Movants-Appellants Mi Familia Vota Education Fund ("MFVEF"), Rock the Vote ("RTV"), and League of Women Voters of Los Angeles ("LWVLA") respectfully move this Court to dismiss this appeal as moot and vacate the underlying district court opinion. Where, as here, a civil case becomes moot before an appeal can be fully heard, well-established authority dictates that the court should reverse or vacate the judgment below to ensure fairness to the party that is unable, through no fault of its own, to secure appellate review of an adverse decision. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Dilley v. Gunn*, 64 F.3d 1365, 1370 (9th Cir. 1995). That is precisely the situation here.

This appeal concerns the district court's denial of motions by Movants-Appellants under Rule 24 of the Federal Rules of Civil Procedure to intervene in defense of the voting rights of hundreds of thousands of California voters. ER175-771. In the action below, Plaintiffs-Appellees, Judicial Watch, *et al*., sued Dean Logan, the Registrar of Voters of Los Angeles County, and Alex Padilla, the Secretary of State of California, alleging that up to 3.5 million registered voters in Los Angeles County should be purged from the voting rolls. ER197-99 at ¶¶ 40, 54. Movants-Appellants are nonprofit, nonpartisan organizations that work to improve civic engagement and political participation among communities of color, young persons, and other communities in Los Angeles and across California, and

have thousands of members who could be directly affected by widespread voter purges. ER153 at ¶ ¶ 3-8; ER179 at ¶ ¶ 2, 5-6, 8; ER183 at ¶¶ 2-5. Nevertheless, in his decision denying intervention, without a hearing, the district court, Honorable Manuel L. Real, found, among other things, that the legally protected interests of Movants-Appellants and their members bore no relationship to the Plaintiffs-Appellees' claims in this case seeking to remove millions of registered persons from the voting rolls. ER2 at 17-26 (a copy of the Court's order is attached as "Exhibit A").

On August 10, 2018, Movants-Appellants appealed from the district court's denial of their motion to intervene. ER17. While this appeal was pending, on August 31, 2018, the existing parties filed a "Joint Notice of Settlement." The parties did not file an actual settlement agreement, instead requesting 120 days to "finalize" a settlement. (Dist. Ct. Dkt. No. 93, ER6.). On September 5, 2018, the District Court issued an Order of Dismissal, without prejudice to plaintiffs' right to reopen the action within 120 days if a settlement was not finalized. (Dist. Ct. Dkt. No. 94, ER5.) In response to this development, on September 10, 2018, Movants-Appellants filed a motion in this Court to expedite the consideration of their appeal (9th Cir. Dkt. No. 12), but their motion to expedite was denied by a motions panel of this Court on September 19, 2018 (9th Cir. Dkt. No. 26).

On January 3, 2019, the 120th day after the district court's conditional dismissal, plaintiffs notified the Court that the existing parties had in fact settled the case, and filed their settlement agreement. (Dist. Ct. Dkt. No. 96.) As defendant Logan acknowledged in his answering brief on the merits of intervention, because the underlying case has now been dismissed, this appeal is moot. Because Movants-Appellants did not cause or contribute to the mootness of their appeal, the Court should follow well-established practice and dismiss the appeal as moot and vacate the underlying decision that Movants-Appellants appealed.[1]

ARGUMENT

THE COURT SHOULD DISMISS THE APPEAL AND VACATE THE UNDERLYING DECISION BECAUSE THE APPEAL HAS BECOME MOOT THROUGH NO FAULT OF MOVANTS-APPELLANTS

"[A]n appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quoting

[1] Before filing this motion, on January 11, 2019, Movants-Appellants inquired of opposing counsel whether they would oppose this motion. Defendants-Appellees did not respond prior to our filing of this motion. Plaintiffs-Appellees responded by saying that they would not oppose a motion to dismiss the appeal as moot, but that they intend to oppose vacatur of the underlying decision. In the event the Court disagrees that the district court decision should be vacated as moot, Movants-Appellants wish to reserve their right to brief the merits of the intervention appeal.

Mills v. Green, 159 U.S. 651, 653 (1895)). In the context of an appeal from an order denying leave to intervene, where "there is no longer any action in which appellants can intervene, judicial consideration of the question would be fruitless." *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981).

Movants-appellants appealed the district court's intervention decision in order to, if successful, intervene and defend against what the plaintiffs alleged to be violations of the National Voter Registration Act (NVRA). Because the existing parties have now finalized a settlement, however, there remains no plaintiff against whom Movant-Appellants could pose a defense. Therefore, the case has now entered a stage where "the underlying litigation is over" and this Court "cannot grant [Movants-Appellants] any 'effective relief' by allowing [them] to intervene now." *W. Coast Seafood Processors Ass'n v. Nat. Res. Def. Council, Inc.*, 643 F.3d 701, 704 (9th Cir. 2011). Without effective relief to offer, the Court should dismiss this appeal as moot. *Id.*

When a civil case becomes moot on appeal, "the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear, Inc.*, 340 U.S. at 39. The Supreme Court has described reversal or vacatur as "'the duty of the appellate court'" because such action "eliminates a judgment, review of which was prevented through

happenstance." *Id.* at 39-40 (quoting *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936)).

Courts focus on "fairness" principles in deciding whether the decision that has become moot should be vacated. *Dilley v. Gunn*, 64 F.3d 1370. "The relevant inquiry 'is whether the party seeking relief from the judgment below caused the mootness by voluntary action.'" *Id.* at 1371 (quoting *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994)). If the party seeking relief did not cause the appeal to become moot, vacatur should be granted. *Id.* "[T]he key question is whether the live case was resolved by the strategic decision of the appealing party rather than mere happenstance." *Marshack v. Helvetica Capital Funding LLC*, 495 F. App'x 808, 810 (9th Cir. 2012) (internal quotations omitted).

The circumstances of this appeal are in accordance with the "established practice" of vacatur. *Munsingwear, Inc.*, 340 U.S. at 39. *See, e.g.*, *GATX/Airlog Co. v. U.S. Dist. Court for N. Dist. of California*, 192 F.3d 1304, 1308 (9th Cir. 1999) (vacatur granted where mootness was brought about by the independent action of a third party); *Marshack v. Helvetica Capital Funding LLC*, 495 F. App'x 808, 810 (9th Cir. 2012) (vacatur granted where trustee-appellant initiated sale resulting in mootness, but did so in the ordinary course of his duties, not with the intention of mooting his case).

Particularly instructive here is the decision in *Alfa Int'l Seafood, Inc. v. Ross*, No. 1:17-CV-00031 (APM), 2018 WL 3819045 (D.D.C. Aug. 10, 2018), which applied *Munsingwear* to vacate the denial of a motion to intervene because the underlying case had become moot before the appeal on intervention could be heard. There, conservation groups had been denied intervention in a case where plaintiffs (seafood importers) challenged a federal regulation on fish imports. While the denial of the intervention motion was on appeal, summary judgment was granted to the government, and plaintiffs chose not to appeal. In vacating the denial of the conservation groups' motion to intervene, the court explained:

> Plaintiffs' decision not to appeal the adverse summary judgment decision had the effect of mooting the Groups' appeal of the intervention order. The Groups therefore were not responsible for rendering their appeal unreviewable. . . . [T]he concern underlying *Bancorp* that parties may seek to "manipulate the judicial system by rolling the dice in the district court and then washing away any unfavorable outcome through use of settlement and vacatur" is not present here. *See Humane Soc. of U.S. v. Kempthorne*, 527 F.3d 181, 186 (D.C. Cir. 2008) (internal quotation marks and alterations omitted). Again, the Conservation Groups' appeal was mooted for reasons outside their control; thus, they cannot be accused of attempting to game the system.

Id. at 4-5.

Here, too, this appeal was mooted solely by the decision of the plaintiffs and defendants to enter into settlement, not by any action of Movants-Appellants, who played no role in the settlement or its negotiations. Therefore, the mootness of this

appeal occurred by "mere happenstance", *see Munsingwear*, yet the decision of the parties to settle prevents appellate review of the district court's intervention order.

Judge Real's order denying intervention, if it stands without appellate review, threatens significant harm to Movants-Appellants. The decision rests on deeply flawed reasoning and could apply to almost any lawsuit seeking to restrict access to the registration rolls in which Movants-Appellants would have a significant interest in participating. Judge Real's decision opined that that Movants-Appellants and their members suffer no potential injury to their interests as long as Plaintiffs-Appellees alleged that their lawsuit sought only to remove *ineligible* voters from the voter rolls, because Movants-Appellants seek to prevent only the wrongful removal of *eligible* voters. This reasoning entirely misunderstands the critical issue involved in cases such as this. It flows from the fundamentally false presumption that there is a perfect system for identifying when an otherwise lawfully registered voter has become ineligible to vote by virtue of some event, such as a move or death, and that there can be no controversy over the accuracy of such systems and procedures. As Movants-Appellants sought to demonstrate below, the methods for identifying and confirming when a registered voter has somehow become ineligible to vote are far from perfect. Indeed, in jurisdiction after jurisdiction a variety of so-called voter list maintenance programs whose stated aim was the removal of *ineligible* voters have resulted in the

wrongful removal of *eligible*, registered voters from the voter rolls. Such removal programs have been shown to have a particularly disparate impact on the marginalized voters Movants-Appellants represent, and Movants-Appellants therefore have a significant interest in protecting these voters from wrongful disenfranchisement. To leave standing a district court decision that denies these realities threatens serious harm to the ability of Movants-Appellants to protect their interests, and those of their members, in future cases where these same interests may be implicated.

As established by the authorities cited above, principles of fairness dictate that the parties opposing appeal, who are the same parties that decided to settle, ought not to be allowed unilaterally to moot and insulate the district court's order from review. Because Movants-Appellants have been prevented from appealing the district court's intervention decision for reasons outside of their control, vacatur should be granted. *See Bancorp.*, 513 U.S. at 25.

CONCLUSION

This appeal was mooted by the decisions of the parties opposing this appeal. Because those decisions were beyond Movants-Appellants' control, this Court should dismiss the appeal and vacate the underlying decision denying Movants-Appellants' motion to intervene.

Dated: January 11, 2019

DEMOS

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Dated: January 11, 2019

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Attorneys for Movants-Appellants Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles

Exhibit A

NO JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDICIAL WATCH, INC.; et al., Plaintiffs, v. DEAN C. LOGAN; et al., Defendants.	CASE NO. CV 17-8948-R ORDER DENYING MI FAMILIA VOTA EDUCATION FUND, ROCK THE VOTE, LEAGUE OF WOMEN VOTERS OF LOS ANGELES, AND CALIFORNIA COMMON CAUSE'S MOTIONS TO INTERVENE

Before the Court is Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles's ("Intervenors") Motion to Intervene, filed on April 17, 2018, and California Common Cause's ("CCC") Motion to Intervene, filed on May 14, 2018. (Dkts. 31, 43). Having been briefed by all parties, this Court took the matters under submission on May 31, 2018.

Plaintiffs bring this action under Section 8 of the National Voter Registration Act of 1993 ("NVRA"). Defendants Dean Logan, Los Angeles County's Registrar-Recorder/County Clerk, and Alex Padilla, California's Secretary of State, act in their official capacities to represent the State of California. Plaintiffs allege that California has failed to follow the policies and practices required for maintaining voter registration rolls—written records of eligible, registered voters—by not removing ineligible voters from the rolls. As a result, Plaintiffs seek a court order requiring Defendants to develop and enforce a general program aimed at making reasonable efforts to remove ineligible voters from Los Angeles County's registration rolls.

The Intervenors are three nonpartisan voter engagement organizations that target voters in Los Angeles County and California to improve voter registration efforts. The Intervenors concentrate on engaging members of the Latino community, mobilizing young voters, and encouraging people of color and low-income Americans to participate in the voting process. CCC is a nonprofit organization that aims to involve more citizens in the political process by assisting and mobilizing voters. Intervenors and CCC move to intervene as defendants.

Applicants for intervention under Federal Rule 24(a)(2) must meet a four part test: "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action." *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006).

In evaluating timeliness, courts consider "the state of the proceeding, prejudice to the other parties, and the reason for and length of the delay." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). Here, both the Intervenors and CCC filed their motions before any hearings or rulings on substantive matters. Accordingly, this factor favors intervention. *See id.*

The requirement of a significantly protectable interest is generally satisfied when the interest is protectable under some law and there is a relationship between the legally protected interest and the claims at issue. *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003). "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Id.* Here, Intervenors and CCC have a legally protected interest to ensure that eligible voters maintain their right to vote and remain on the voter rolls. However, there is no relationship between this interest and the claims at issue. Plaintiffs request that Defendants reasonably attempt to remove *ineligible* voters from the voter rolls. Removing ineligible voters from the voter rolls will not affect eligible voters' rights. Accordingly, Intervenors and CCC do not satisfy the second prong.

An applicant's ability to protect his or her interest is impaired or impeded if, in the absence of the applicant's intervention, the applicant is "substantially affected in a practical sense by the

determination made in an action." *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Here, Intervenors and CCC are not substantially affected by the outcome of this action as it pertains to only *ineligible* voters. The Intervenors and CCC speculate that eligible voters risk wrongful removal from voter rolls. Should that occur, Intervenors and CCC may bring a separate, private cause of action to vindicate these voters' rights. Intervenors and CCC's rights will not be harmed if ineligible voters are removed from the voter rolls. Accordingly, Intervenors and CCC do not satisfy the third prong.

The fourth part of the test assesses whether the existing parties adequately represent an applicant's interest. To determine the adequacy of representation, courts consider "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Arakaki*, 324 F.3d at 1086. "There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention." *Id.*

Here, Defendants are government officials charged with enforcing state election laws and promoting voter registration to eligible voters. They share the same interest as Intervenors and CCC in protecting eligible voters' right to vote. Defendants have specifically stated that they intend to represent and defend the voting interest that Intervenors and CCC claim in their motions. That the Intervenors and CCC may approach litigation differently than Defendants does not justify intervention. Because Intervenors and CCC have not made a compelling showing to the contrary, the presumption that Defendants will adequately represent the citizens of California applies. As Intervenors and CCC fail to meet all four prongs of the test for intervention as of right, their motions to intervene are denied.

"Where a party may not intervene as a matter of right, the trial court may consider whether permissive intervention is appropriate." *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326,

1329 (9th Cir. 1977). An applicant who seeks permissive intervention must prove that it meets three threshold requirements: (1) it shares a common question of law or fact with the main actions; (2) its motion is timely; and (3) the court has an independent basis for jurisdiction over the applicant's claims. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention. In exercising its discretion, the district court "must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties." *Id.*

Intervenors and CCC do not meet the threshold requirements because they do not share a common question of law or fact with the underlying action. Here, Plaintiffs are suing Defendants to enforce the NVRA and remove ineligible voters from the voter rolls. By contrast, Intervenors and CCC are concerned with *eligible* voters being wrongfully removed from the list. There is no reason that eligible voters would be removed from voter rolls if Plaintiffs are successful. In fact, it is purely speculative that eligible voters would be injured by ordering compliance with the NVRA. Additionally, the proposed intervenors are likely to delay the main action as the case would expand to six defendants. Accordingly, this Court denies permissive intervention for Intervenors and CCC.

IT IS HEREBY ORDERED that Mi Familia Vota Education Fund, Rock the Vote, and League of Women Voters of Los Angeles' Motion to Intervene is DENIED. (Dkt. 31).

IT IS FURTHER ORDERED that California Common Cause's Motion to Intervene is DENIED. (Dkt. 43).

Dated: July 12, 2018.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-1 because it contains 2,468 words and does not exceed 20 pages. The brief also complies with the requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because it is prepared in Times New Roman (14 pt) proportional type. Microsoft Word is the word-processing software that was used to prepare the brief.

/s/ Anna Do
Anna Do

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2019, 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.

Dated: January 11, 2019

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