No. 19-16308

In the United States Court of Appeals
For the Ninth Circuit

William Price Tedards, Jr., et al.

Plaintiffs/Appellants

v.

Doug Ducey, Governor of Arizona, in his official capacity, et al.

Defendants/Appellees

On Appeal from the United States District Court
For the District of Arizona
No. 2:18-cv-4241-PHX-DJH
Hon. Diane J. Humetewa

APPELLEE'S RESPONSE TO MOTION TO EXPEDITE BRIEFING AND HEARING

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No good cause exists to expedite briefing and oral argument of this appeal under Ninth Circuit Rule 27-12. Advancing briefing by approximately one month, as Appellants request, will not impact whether their claims are moot. Regardless of whether briefing is expedited by one month, and regardless of how this Court ultimately decides this appeal, Arizona voters will have the opportunity to select the person to complete Senator John McCain's term in 2020. Appellants prevented the possibility of any earlier election by delaying this litigation with inaccurate pleadings and voluntary extensions. Under these circumstances, Appellants cannot show "good cause" for this Court to expedite the current appeal.

I. This appeal does not involve any of the types of "good cause" listed in Ninth Circuit Rule 27-12.

Ninth Circuit Rule 27-12 provides three examples of good cause warranting expedited review, none of which applies here. The first two involve incarcerated criminal defendants and are not applicable here. The third occurs when "in the absence of expedited treatment, irreparable harm may occur, or the appeal may become moot." 9th Cir. R. 27-12. Appellants can make neither of these showings.

Appellants cannot establish that their claims face a higher

likelihood of mootness without expedited review. In short order, Arizona voters will have an opportunity to select the person to complete Senator McCain's term in the August 4, 2020 primary election and November 3, 2020 general election. The issue in this appeal is whether the State should be compelled to hold separate primary and general elections at some earlier, arbitrary date for Senator McCain's remaining term.[1] Even if Appellants' request to advance the completion of briefing from December 3, 2019 to November 5, 2019 is granted, those elections would still take place in the same calendar year (2020) as the ones already scheduled. Under either the current schedule or the one proposed by Appellants, this Court would not issue its decision until late 2019, at the earliest.

Appellants have acknowledged that even if this Court rules in their favor, a new election could not be held immediately. *See* Dkt. 15 at 1 (requesting, on December 28, 2018, that election be held no later than

[1] The Arizona Constitution requires, that in advance of a general election, a primary election take place to decide the nomination of candidates for United States Senator. Ariz. Const. Art 7 § 10; *see also* Ariz. Rev. Stat. § 16-301 (providing for the nomination of senatorial candidates in a primary election).

September 5, 2019).[2] Still, Appellants fail to appreciate that State and county election officials would first need to commence the significant planning required for a statewide special election. *See Valenti v. Rockefeller*, 292 F. Supp. 851, 863 (W.D.N.Y. 1968), *aff'd* 393 U.S. 405 (1969) (recognizing that "[i]t is much easier" to administer a special election for a single Congressional district as opposed to a statewide election). Candidate petition signatures would also need to be collected and submitted in the statutorily-mandated time frames. *See* Ariz. Rev. Stat. § 16-313 (requiring that a candidate's nominating papers and nomination petitions for a special primary election be submitted at least 60 days before the election), *see also* Ariz. Rev. Stat. § 16-322 (setting forth petition signature requirement for candidates for the Unites State Senate). Simply, expediting briefing by approximately one month does not change the practical reality that Appellants are asking this Court to order a special statewide election that *might* advance the date to select the person to complete Senator McCain's term by a few months, at most.

On the subject of irreparable harm, Appellants identify no

[2] All docket citations are to the district court proceedings in this case, *Tedards v. Ducey*, No. CV-18-04241 (D. Ariz.).

authority that such harm will occur without an earlier election date. On the contrary, the Seventeenth Amendment expressly provides States with discretion as to the timing of Senate vacancy elections:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That *the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct*.

U.S. Const. amend. XVII (emphasis added). *See also Judge v. Quinn*, 612 F.3d 537, 554 (7th Cir. 2010) (*Judge I*) ("State law controls the timing and other procedural aspects of vacancy elections."); *Valenti*, 292 F. Supp. at 855 ("The Seventeenth Amendment's vacancy provision explicitly confers upon the state legislatures discretion concerning the timing of vacancy elections.").

Appellants nevertheless assert that "the continued abrogation of [their right to vote for United States Senator] is irreparable harm worthy of some expedited treatment." Motion at 2. But the case they cite for this proposition, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013), concerned immigration detention procedures and had nothing to do with voting. While every constitutional claim may be considered subjectively serious, this Court has never indicated that merely invoking the

Constitution entitles a litigant to expedited treatment. The importance of constitutional issues is all the more reason to ensure that they are decided carefully, rather than in haste. *See Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 96 F.3d 471, 473 (10th Cir. 1996) (denying request for expedited review in campaign finance constitutional challenge because "the issues are too important to be resolved in haste."). Appellants' desire to impose extraordinary burdens on the State of Arizona in order to advance by a short duration the election to complete Senator McCain's term does not constitute "good cause" for expediting this appeal.

II. Appellants fail to cite any authority that supports expediting this appeal.

Appellants repeatedly invoke *Hamamoto v. Ige*, 881 F.3d 719 (9th Cir. 2018), which they contend "raised a similar challenge under the Seventeen Amendment." Motion at 1. This is incorrect. *Hamamoto* involved a challenge to a temporary Senate appointment filed just *five days* before the vacancy election to fill that same Senate seat. *Hamamoto*, 881 F.3d at 721. The plaintiffs in that case did not seek a preliminary injunction. *Id.* Because the case was filed so soon before the vacancy election (such that plaintiffs' claims could not be resolved before

that election), the district court held that the plaintiffs' claims were moot before any proceedings in this Court. *Id.* at 722. In affirming, this Court rejected the argument that the same issue was "capable of repetition, yet evading review," and cited Ninth Circuit Rule 27-12 to show how a prospective challenger to a temporary Senate appointment might be able to obtain relief before a Senate vacancy election. *Id.* at 723 (internal quotations and citation omitted).

Nothing in *Hamamoto* supports expedited review of this appeal. The Senate vacancy election in *Hamamoto* had already taken place, thus mooting not only the substantive issues in that case but also the procedural question of whether to expedite. Indeed, expediting the timeline as requested in *Hamamoto* would have made even less sense than expediting the appeal here. But, the case ultimately has no relevance beyond repudiating the capable-of-repetition argument and demonstrating that sometimes election lawsuits become moot because new elections inevitably follow.

Appellants also cite "the *Judge v. Quinn* Trilogy" from the Seventh Circuit, which they contend "ordered expedited relief to ensure" that a Senate vacancy election took place. Motion at 2. This ignores that the

permanent injunction affirmed in *Judge v. Quinn*, 624 F.3d 352 (7th Cir. 2010) (*Judge III*), required that a Senate vacancy election take place on the *exact same date* as the November 2010 general election. *See Judge III*, 624 F.3d at 354. Such relief is consistent with the State of Arizona's plan to allow Arizona voters to select the person to complete Senator McCain's term on the same dates that those voters will have the opportunity to make their other selections in the August 2020 primary election and November 2020 general election. Appellants further ignore that the "*Judge v. Quinn* Trilogy" actually arose out of a completely different situation; specifically, the refusal of the Illinois Governor to issue a writ of election following the resignation of former Senator Barack Obama. *See Judge I*, 612 F.3d at 556: *Judge III*, 624 F.3d at 355. Here, there is no dispute that Governor Ducey issued a writ of election less than two weeks after the passing of Senator McCain. *See* Dkt. 69 at 2. Neither of the cases Appellants cite lends support to their demand for special treatment in this appeal.

III. Because Appellants delayed the proceedings below, they cannot show good cause for expediting the current appeal.

Appellants also cannot show good cause to expedite this appeal, as required by Ninth Circuit Rule 27-12, because they did not take

appropriate actions below that would have likely resulted in a quicker decision from the district court.

First, in their original complaint and original preliminary injunction motion (dated November 28, 2018), Appellants wrongly asserted that Governor Ducey did not issue a writ for a vacancy election following the death of Senator McCain. Dkt. 69 at 7 n.10. But Governor Ducey did in fact issue a writ on September 5, 2018, several months before the filing of the original complaint. *Id.* at 2. This error required Appellants to file an amended complaint and to withdraw their initial preliminary injunction motion, thus resulting in one month of avoidable delay. *See id.* at 7 n.10; *see also* Dkt. 11. There is no good cause for Appellants to avoid the consequences of this error by recouping the same month at the appellate level.

Second, after filing their renewed preliminary injunction motion on December 28, 2018, Appellants did not ask the district court for an expedited briefing or hearing schedule. Instead, Appellants asked for, and received, an *extension* of time to file their reply brief in support of their preliminary injunction motion. Dkt. 25. Furthermore, the reason that the district court did not set an earlier date for the preliminary

injunction hearing is because Appellants' counsel represented they had "a number of conflicts from February through early April 2019." Dkt. 69 at 1-2 n.2.

Third, at the preliminary injunction hearing, Appellants were unable to articulate the specific relief to be included in a preliminary injunction order, let alone identify *when* they needed the district court to issue that order in order to provide effective relief. When the district court asked Appellants to "specifically" describe what they wanted the court to do, Appellants vaguely requested that Governor Ducey be required to come forward with some indeterminate "plan" for a Senate vacancy election at some unspecified future date. Ex. A (April 12, 2019 Tr.) at 44:17-45:12. Appellants also suggested that they might file objections to this plan, but again provided no specificity as to when this might occur. *Id*. Had Appellants given the district court a clear answer as to when they believed a Senate vacancy election should take place, as well as when a preliminary injunction should issue in order to make the election possible, their Motion to Expedite might have been unnecessary.

If Appellants are correct that the timing of the Senate vacancy election creates an actual risk of irreparable harm to Arizona voters (and

the district court correctly ruled it does not), then Appellants should have taken appropriate action below to obtain an expedited ruling from the district court on their preliminary injunction motion. Having failed to do so, Appellants cannot demonstrate good cause for this Court to expedite the current appeal.

CONCLUSION

Appellants cannot show good cause for expediting this appeal. Even if there is some risk of Appellants' case becoming moot by not advancing briefing by a month, that possibility is a function of their losing arguments, mismanagement, and delay in the court below. This Court should deny the Motion to Expedite.

DATED this 1st day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d), I certify that:

This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this response contains 2,345 words.

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 Century Schoolbook 14-point font.

DATED this 1st day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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 this 1st day of August, 2019.

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