IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, Plaintiff-Appellant, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, Defendant-Appellee.	)	C.A. No. 14-15978

SUPPLEMENT TO PLAINTIFF-APPELLANT CENTER FOR COMPETITIVE POLITICS'S MOTION FOR URGENT INJUNCTIVE RELIEF

The Center for Competitive Politics ("CCP") submits this supplemental filing in response to this Court's order that it "explain[] why it has not moved in the district court to enforce that court's stay pending appeal or for violation of that stay…[and] why it has not complied with FED. R. APP. P. 8(a) that it 'must ordinarily move first in the district court for' a stay or injunction pending appeal."

I. The District Court's Stay

CCP did not move for the district court to enforce its stay because the relevant order merely "stay[ed] district court proceedings pending… resolution of Plaintiff's preliminary injunction appeal and until the issuance

of the mandate by the Ninth Circuit." *Center for Competitive Politics v. Harris*, Case No. 14-636 (E.D. Cal. 2014), Stipulation and Order (ECF No. 24) at 2. That stay does not prevent the Attorney General from briefing and arguing this appeal while simultaneously seeking to impose penalties upon CCP. Consequently, while surprised by this development, the Center does not take the position that the Attorney General has violated the stay or otherwise acted in contempt of court.

II. Application of Federal Rule 8(2)(A)(i)

Under the Federal Rules, parties "must ordinarily move first in the district court for…an order suspending, modifying, restoring, or granting an injunction while an appeal is pending." FED. R. APP. 8(a)(1)(C). But the Rules provide an exception when it "would be impracticable" to move first in the district court. FED. R. APP. P. 8(2)(A)(i); *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 411 (5th Cir. 2013). While not defined by the Rule, generally "impracticality does not mean impossibility, but only… difficulty or inconvenience." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-914 (9th Cir. 1964) (citations and quotation marks omitted) (discussing "impracticality" in context of FED. R. CIV. P. 23).

CCP believes that it would be impracticable to first ask the district court for an injunction pending the outcome of this appeal. This is for three reasons.

First, application to the district court would be impracticable given the timeline imposed by the Attorney General. Her recent letter creates a new deadline, 21 days from today, by which CCP must either comply with her demand or face significant consequences. If CCP must file in district court for urgent injunctive relief, with the attendant possibility of an emergency appeal of that court's ruling, it is unlikely that both proceedings could be concluded before the Attorney General's deadline expires. In a similar circumstance, where a political party and its candidates sought access to the Wyoming general election ballot shortly before an election, the Tenth Circuit found "the need for relief [was] so immediate that application in the district court [was] not necessary." *Populist Party v. Herschler*, 746 F.2d 656, 657 n.1 (10th Cir. 1984). That opinion was issued 23 days before the election,[1] suggesting that the Tenth Circuit had more time for its deliberations than the 21 days available here. If that more forgiving timeline was sufficiently "immediate" to excuse application to the district court, the

[1] The opinion was issued October 15, 1984. Election Day that year fell on November 6th. The district court had issued the appealed-from denial of a Temporary Restraining Order on October 4.

"temporal urgency" of CCP's motion should lead to the same result. *Cf. Chemical Weapons Working Group v. Dep't of the Army,* 101 F.3d 1360, 1361 (10th Cir. 1996) (citing *Populist Party,* but finding that insufficient urgency existed where movant requested injunction 49 days after learning facts necessitating court's protection).

Second, it is likely that any application to the district court would be futile. The Attorney General's letter does not change the evidence before the district court. It merely imposes a new, concrete deadline by which CCP must accede to her demand.

The district court declined to issue an injunction because it determined that CCP did "not articulate[] any, objective specific harm that will result to its donors" from disclosure, and even if it had, "based on the evidence before the Court at [that] time, Defendant's request appears to be justified by compelling state interests and is narrowly tailored to achieve those interests." ER 14. The district court similarly found "no legislative record" to support CCP's preemption argument. ER 11. In either case, the Attorney General's new demand letter does not affect the district court's analysis. The district court explicitly determined that compliance with the Attorney General's disclosure regime posed "'no risk of irreparable injury to Plaintiffs' contributors.'" ER 15 (citing *ProtectMarriage.com v. Bowen*, 599

F. Supp. 2d 1197, 1226 (E.D. Cal. 2009)). It does not matter, in the district court's view, whether CCP is forced to disclose its donors on January 10 or, instead, on some other date. That is precisely why it denied CCP's request for an injunction, and why this appeal was originally filed. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996) (where district court had already declined to provide the requested relief, "it would serve little purpose to require another application to the district court"); *Vestron, Inc. v. Home Box Office, Inc.,* 831 F.2d 304 (9th Cir. 1987) (where district court found it lacked jurisdiction, it was impracticable to request a preliminary injunction pending appeal).

Finally, considerations of judicial efficiency weigh in favor of permitting CCP's motion. Both parties and this Court have invested the effort to brief, argue, and review a preliminary injunction appeal. *See United States v. Microsoft Corp.*, 1998-1 Trade Cas. (CCH) P72,154 at 2 (D.C. Cir. 1998) ("While the district court retains power to stay its judgment…it is comparatively impracticable for it to do so when the appeal has progressed so near resolution"). Moreover, returning to district court would require dissolving the present stay of proceedings that was put in place "in the interest of judicial economy and efficiency and to save judicial and party resources." Stipulation and Order at 2. Filing this motion in district court,

especially if that effort is futile and requires a return to this Court, would not further these interests.

The Attorney General chose to unilaterally impose a 30-day deadline, three days after argument and two weeks before Christmas, by which CCP must comply with her demand and potentially moot this appeal. That is too little time for CCP to realistically return to district court, a likely futile effort that will waste scarce judicial resources during an especially inconvenient time of the year. The better course is for this Court to avail itself of Rule 8(a)(2) and protect its ability to give this appeal its full consideration.

CONCLUSION

This Court should entertain Plaintiff-Appellant's urgent motion for an injunction pending appeal under FED. R. APP. P. 8(a)(2).

Respectfully Submitted,

s/ Allen Dickerson

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Date: December 21, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that 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 on December 21, 2014.

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.

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