

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TIMOTHY A. DeWITT,
Appellant,

9th Circuit Case No. 16-16162
Originating Court Case No. 15-cv-5261 WHA

Oral Argument: November 13, 2017
Merits Panel: Identities Not Known
(Cir. R. 25-4)

vs.

PAUL RYAN, C.C.R.C., et al.,
Appellee(s).

**APPELLANT’S MOTION TO MERITS PANEL OF THREE ARTICLE
III JUDGES TO RECONSIDER SINGLE DEPUTY CLERK’S DENIAL
OF MOTION FOR INJUNCTION, A SUBSTANTIVE MOTION, AT A
TIME WHEN MERITS PANEL HAD ALREADY BEEN SELECTED TO
DETERMINE APPEAL, AND ORAL ARGUMENT HAD BEEN
CALENDARED (FRAP R. 27(b); Cir. R. 25-4)**

The plaintiff and appellant in this action, Timothy A. DeWitt (“Appellant” or “DeWitt”), as provided for in Circuit Rules 25-4 and 27-10 (and FRAP Rule 27(b)), respectfully requests the Merits Panel of this Court reconsider the Clerk’s Order denying Appellant’s motion for preliminary injunction pending appeal. Appellant DeWitt’s motion was a substantive motion, involving the core merits of the appeal, both filed by DeWitt, and denied by the Clerk, at a time when the Merits Panel of three Article III judges had already been selected to determine the appeal (see Dkt. Entry No. 20, July 25, 2017 notice re dates for oral argument before Merits Panel), and denied at a time when oral argument had even been calendared to take place before the Merits Panel on November 13, 2017. (Dkt. Entry No. 22, October 16, 2017.)

On October 16, 2017, the Clerk of the Court, acting through Deputy Clerk Omar Cubillo, entered an Order (Dkt. Entry No. 25) in which it denied, without explanation, Appellant’s Motion for Preliminary Injunction Pending Appeal (Dkt. Entry No. 21) brought

pursuant to this Court’s well-established rules and practices which provide that substantive motions involving the actual merits of the appeal are heard and determined by the Merits Panel for the case when an appeal has been calendared for oral argument before the Merits Panel. In denying Appellant’s motion, the Clerk also in effect announced for the first time its own lesser-included decision not to refer Appellant’s motion to a full merits panel (of Art. III judges), and decide the motion itself. (See, however, the Court’s General Orders, Appendix A (presenting a comprehensive listing of the specific types of motions which may be ruled upon by the Clerk, or other deputized court personnel, and notably, which nowhere mentions or includes *motions for injunction* pending appeal).)

Federal Rules of Appellate Procedure (“FRAP”) Rule 27(b) plainly provides that only “procedural” motions may be ruled upon by court clerks: “Disposition of a Motion for a *Procedural* Order: The court ... may, by rule or by order in a particular case, authorize its clerk to act on specified types of *procedural* motions.” (Emp. supp.) (See also FRAP Rule 8(a)(2)(D) (motions for injunction “will be considered by a panel of the court...”) This Court’s Rules and General Orders (Appendix A), consistent with, and implementing FRAP Rule 27(b), contemplate and require review and disposition of substantive motions for injunction pending appeal by full Art. III judges, rather than deputized non-attorney Court clerks, or other employees or personnel of the Court. Neither Circuit Rule 27-7, nor the Court’s General Orders (Appendix A), contains any authorization for non-attorney clerks, or other court personnel, to act adversely on litigants’ *substantive* motions for injunction pending appeal, which unavoidably center on the underlying substantive *merits* of the case and appeal. The very subject-matter of such motions makes clear the Court’s and Congress’ expectation that such motions would be reviewed and acted upon by full Article III judges. The Circuit Advisory Committee note to Cir. R. 27-7 (published as part of the Court’s Rules) is consistent: “**Procedural Motions.** Most non-dispositive *procedural* motions in appeals or

other proceedings *that have not yet been calendared* are acted on by court staff under the supervision of the clerk, the appellate commissioner, or the chief circuit mediator.” (Emp. Supp.)

In addition, no other Order, from the actual Merits Panel of Article III judges now having jurisdiction over this appeal, has been issued which would in any way authorize or delegate the decision on Appellant’s substantive motion for injunction here to a single, non-attorney, deputy clerk of the court, or other deputized court personnel. (See FRAP Rule 27(b).) Simply put, the Court Clerk, especially acting by and through non-attorney deputy clerks, may not obviate or otherwise avoid these basic procedural requirements, based entirely upon its own “lay”, presumptively erroneous, or formally professionally incompetent or unqualified, *legal* interpretations of the Court’s Rules (e.g., FRAP 27(b) & Cir. R. 27-7), or other General Orders of the Court (& Appendix A), to say nothing of the underlying *legal* or *constitutional* merits of a substantive motion for injunction. (See also U.S. Const., art. I, sec. 8, cl. 9, & art. III, sec. 2, cl. 2; Separation of Powers Doctrine (Art. III vs. Art. I), and basic Due Process (e.g., denials by non-attorney clerks of substantive motions for injunctive relief, it’s literally unimaginable, as here, they would ever affirmatively grant on their own, work as unavoidable “one-way ratchets” against moving-party plaintiffs/appellants.)

It should also be noted in this connection that, as early as November 17, 2015, Appellant filed a formal Declination against having this case heard or determined in any respect by a Magistrate Judge in the court below. (Dkt. #4.) Appellant’s formal Declination, already on file in this action, should similarly or likewise be given full force and effect with respect to *non*-Art. III judges, or other analogous court personnel (including non-attorney clerks or staff), in this Court of Appeals.

It should further be noted that Appellant's Motion for Preliminary Injunction Pending Appeal also went completely unopposed by any of the Defendants or Appellees in the case, including the lead defendant in the action, Paul Ryan, the Speaker of the U.S. House of Representatives. Defendant and Appellee Paul Ryan has also expressly declined to file a formal Answering Brief opposing even the ultimate merits of this appeal. (Dkt. Entry No. 14.)

In light of the above considerations, and the imminent, continuing or ongoing nature of the basic Constitutional violations at issue in the motion for injunction (and, yes, the "dispositive" nature of any further delay in the processing of this motion for preliminary injunction pending appeal, with respect to the continuing violations that will continue to occur in the absence of such an injunction), and related irreparable injuries for which there plainly exists no adequate remedy at law, Appellant respectfully requests the Court Clerk refer this Motion to Reconsider his Motion for Injunction Pending Appeal to the full Merits Panel of Art. III judges, before whom oral argument is currently calendared to be heard on Monday, November 13, 2017. The requested referral is specifically contemplated and required by the Court's Rules, well-established practice concerning the processing of non-procedural, substantive motions (FRAP 27(b)) at any time after a Merits Panel of Article III judges has already been selected to hear and determine the appeal (Cir. R. 25-4), and Appendix A of the Court's General Orders (which *does not* include motions for injunction pending appeal among its comprehensive listing of motions which *may* be ruled upon by Court clerks or other personnel under Cir. R. 27-7).

CERTIFICATE OF SERVICE

Case Name: DeWitt v. Ryan, et al. 9th Cir.
Case No.: 16-16162

IMPORTANT: You must send a copy of ALL documents filed with the Court and any attachments to counsel for ALL parties in this case. You must attach a copy of the certificate of service to each of the copies and the original you file with the Court. Please fill in the title of the document you are filing. Please list the names and addresses of the parties who were sent a copy of your document and the dates on which they were served. Be sure to sign the statement below.

I certify that a copy of the APPELLANT’S MOTION TO MERITS PANEL OF THREE ARTICLE III JUDGES TO RECONSIDER SINGLE DEPUTY CLERK’S DENIAL OF MOTION FOR INJUNCTION, A SUBSTANTIVE MOTION, AT A TIME WHEN MERITS PANEL HAD ALREADY BEEN SELECTED TO DETERMINE APPEAL, AND ORAL ARGUMENT HAD BEEN CALENDARED (FRAP R. 27(b); Cir. R. 25-4) (title of document you are filing) and any attachments was served, either in person or by mail (or ECF), on the persons listed below.

Date: October 17, 2017

Timothy A. DeWitt Signature

Name Address Date Served (October 17, 2017)

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