No. 16-16698

In the United States Court of Appeals
for the Ninth Circuit

LESLIE FELDMAN; LUZ MAGALLANES; MERCEDEZ HYMES; JULIO MORERA; CLEO OVALLE; PETERSON ZAH, *Former Chairman and First President of the Navajo Nation*; DEMOCRATIC NATIONAL COMMITTEE; DSCC *a/k/a Democratic Senatorial Campaign Committee*; ARIZONA DEMOCRATIC PARTY; KIRKPATRICK FOR U.S. SENATE; HILLARY FOR AMERICA,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE; MICHELE REAGAN, *in her official capacity as Secretary of State of Arizona*; MARICOPA COUNTY BOARD OF SUPERVISORS; DENNY BARNEY, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE CHUCRI, *in his official capacity as member of the Maricopa Board of Supervisors*; ANDY KUNASEK, *in his official capacity as member of the Maricopa Board of Supervisors*; CLINT HICKMAN, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE GALLARDO, *in his official capacity as member of the Maricopa Board of Supervisors*; MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT; HELEN PURCELL, *in her official capacity as Maricopa County Recorder*; KAREN OSBORNE, *in her official capacity as Maricopa County Elections Director*; and MARK BRNOVICH, *in his official capacity as Arizona Attorney General*,

Defendants/Appellees,

ARIZONA REPUBLICAN PARTY; BILL GATES, *Councilman*; SUZANNE KLAPP, *Councilwoman*; SENATOR DEBBIE LESKO; and REPRESENTATIVE TONY RIVERO,

Defendant-Intervenors/Appellees.

On Appeal from the United States District Court
for the District of Arizona
Cause No. CV-16-01065-PHX-DLR

PLAINTIFF-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Appellants provide the following information: (i) the telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties; (ii) facts showing the existence and nature of the emergency necessitating expedited review; (iii) when and how counsel for the other parties and the Clerk's Office were notified and served with the motion; and (iv) whether all grounds advanced in support of the requested relief were available in and submitted to the District Court.

(i) ***Attorneys for the parties.***

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Andrea Lee Cummings M. Colleen Connor MARICOPA COUNTY ATTORNEYS OFFICE 222 N. Central Ave., Suite 1100	***Attorneys for Defendants-Appellees Maricopa County Board of Supervisors, Denny Barney in his official capacity as a member of the Maricopa County Board of***

Phoenix, AZ 85004-2206 Telephone: 602-506-8541 cumminga@mcao.maricopa.gov connorc@mcao.maricopa.gov	***Supervisors, Steve Chucri, in his official capacity as a member of the Maricopa County Board of Supervisors, Andy Kunasek, in his official capacity as a member of the Maricopa County Board of Supervisors, Clint Hickman, in his official capacity as a member of the Maricopa County Board of Supervisors, Steve Gallardo, in his official capacity as a member of the Maricopa County Board of Supervisors, Maricopa County Recorder and Elections Department, Helen Purcell, in her official capacity as Maricopa County Recorder, and Karen Osborne in her official capacity as Maricopa County Elections Director[1] (the "County Defendants")***
Brett William Johnson Colin Patrick Ahler Joy Lisanne Isaacs Sara Jane Agne SNELL & WILMER LLP 1 Arizona Center 400 E. Van Buren Phoenix, AZ 85004-2202 Telephone: 602-382-6000 bwjohnson@swlaw.com cahler@swlaw.com jisaacs@swlaw.com sagne@swlaw.com Timothy Andrew LaSota	***Attorneys for Intervenor-Defendant-Appellees the Arizona Republican Party, Bill Gates, Councilman, Suzanne Klapp, Councilwoman, Sen. Debbie Lesko, and Rep. Tony Rivero (the "Republican Party Defendants")***

[1] Plaintiffs have moved to dismiss the County Defendants below, pursuant to a settlement agreement, but until that motion is granted, they remain parties to this litigation. The County Defendants did not take a position on the legality of HB2023 below.

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(ii) ***The Existence and Nature of the Emergency.***

Appellants certify that an injunction pending appeal and expedited consideration of this appeal is necessary to prevent irreparable harm to Appellants, their members and constituencies, and thousands of other Arizona voters, which will otherwise result from the implementation and enforcement of Arizona's recent law criminalizing ballot collection ("HB2023") in advance of the upcoming November 8, 2016 election.

In recent years, Arizona has strongly encouraged voters to participate in elections by early mail-in ballots, including by establishing a "Permanent Early Voting List" ("PEVL"), which any voter may join to have an early ballot automatically sent to them 27 days before any election in which they are eligible to vote. A.R.S. §§ 16-541, 16-544, 16-542. Voting by early ballot now far surpasses any other means of participating in Arizona's elections. In the last presidential election, nearly 1.3 million voters in Maricopa County alone requested early ballots, and 81% of all who participated voted by early ballot. ER491.

As early voting has increasingly become the way in which Arizonans participate in elections, so, too, have thousands of voters—particularly those in minority communities—come to rely upon neighbors, activists, and campaigns to collect and hand deliver their early ballots, to ensure that they safely arrive by 7

p.m. on Election Day, as required by Arizona law. ER194, 198-99, 200, 204-05, 209-10, 215-16, 219-20, 225-26, 231-32, 239-40, 245-46, 257-58, 264, 267-68, 270-72, 279, 281-82, 286, 288-89, 507-08, 546-48, 552-53, 567-572, 589-91, 594, 596-98, 618-20, 627, 928-29; A.R.S. § 16-548. HB2023 criminalizes this practice, making it a felony for any person to "knowingly collect[] voted or unvoted early ballots from another person," with a presumptive sentence of one year of incarceration and a fine of up to $150,000 plus surcharges. A.R.S. § 16-1005; ER699.

The millions of voters on Arizona's PEVL are scheduled to begin receiving their ballots for the November 8th election soon after October 12, 2016, which is less than 21 days away. A.R.S. § 16-542. The criminalization of a means by which thousands of Arizona's voters have participated in past elections abridges—and in some cases, will result in the complete denial of—the fundamental right to vote and chills core First Amendment rights. *See League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LOWV*") ("Courts routinely deem restrictions on fundamental voting rights irreparable injury," because "once the election occurs, there can be no do-over and no redress"), *cert. denied,* 135 S. Ct. 1735 (2015); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("*OFA*"); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge, Md.*, 799 F.2d 137, 140 (4th Cir. 1986). Here, Appellants (which include the Arizona Democratic Party ("ADP"), the national Democratic Party ("DNC") and current presidential and senatorial

campaigns), their individual members and constituents, as well as thousands of other Arizona voters, will experience precisely this type of irreparable, constitutional harm if HB2023 is not enjoined sufficiently prior to the November election.

Further, the Arizona Republican Party has publicly announced its intention to use HB2023 as an excuse to interrogate, follow, and otherwise harass voters who appear at polling locations to drop off multiple ballots. ER2617-18 (ARP training volunteer vigilantes to "follow voters out into the parking lot, ask them questions, take their pictures and photograph their vehicles and license plate" and even call 911 to report a crime in progress if they suspect a violation of HB2023). While HB2023 excepts family members, household members, and professional caretakers from the ban on ballot collection, ER0699, even these voters are at serious risk of harassment and intimidation if the law is not immediately enjoined.

Given the late date of the District Court's order, there is insufficient time to fully brief and hear this matter before Arizona voters begin receiving their early ballots in just a few short weeks. Thus, a ruling from this Court on Appellants' emergency motion for an injunction pending appeal and/or highly expedited consideration of this appeal is needed in less than 21 days to avoid irreparable harm.

(iii) ***Notice to Counsel for Other Parties and Clerk's Office.***

In compliance with Circuit Rule 27-3(a), on October 3 at 10:30 a.m., Sarah Gonski, counsel for Appellants, contacted opposing counsel by phone, advising them of Appellants' intent to file the Emergency Motion. Ms. Gonski spoke with

Andrea Cummings for County Defendants, Sara Agne for the Republican Party Intervenor-Defendants, and Karen Hartman-Tellez for the State Defendants. On October 4, Ms. Gonski emailed counsel for each Appellee a PDF copy of the signed emergency motion, as filed with the Ninth Circuit, which they also would have received through the ECF system.

On October 3, Ms. Gonski contacted the Ninth Circuit Clerk's office at (415) 355-8020 and spoke with a duty attorney at approximately 10:00 a.m. Ms. Gonski informed the duty attorney of the nature of the emergency and that Appellants intended to file an emergency motion for injunction pending appeal and for expedited review as soon as practicably possible. Upon advice of the duty attorney, Ms. Gonski also called the Motions Unit concurrently with the filing of this motion on October 4 to advise them of the filing.

(iv) ***Relief Sought in the District Court.***

The request to expedite this appeal is not relief available in the District Court. All grounds for the request for an emergency injunction pending appeal set forth herein were available in and were presented to the District Court as follows.

HB2023 was signed into law on March 9, 2016. ER699. Appellants initiated this action less than six weeks later by filing a Complaint in the U.S. District Court for the District of Arizona on April 15, 2016, which was amended on April 19. ER28. In an initial scheduling conference on May 10, Appellants stated their readiness to file a motion for preliminary injunction as soon as May 13, but

explained that the motion would benefit from limited expedited discovery. ER103.[2] The District Court granted Appellants' request for expedited discovery and ordered the preliminary injunction motion be filed on June 10, with oral argument set for August 12. ER2837. In setting the remainder of the briefing schedule, the District Court stated that it would attempt to render a decision before the effective date of HB2023, which Appellants initially believed was August 20. *Id*. When Appellants discovered that the effective date was August 6, they requested that the schedule be modified to ensure that the District Court could issue an order before that date. ER903. The District Court granted the request and rescheduled oral argument for August 3. ER80.

Appellants filed a Motion for Preliminary Injunction of HB2023 as scheduled on June 10, ER170, and the District Court heard the matter at oral argument on August 3, but did not render a decision until September 23. ER1.

On September 28, Appellants filed an emergency motion for an injunction pending appeal in the district court as required by Fed. R. App. P. 8(a)(1)(C). ER2640. The following day, the District Court set a briefing schedule requesting Defendants respond by October 3, and Plaintiffs reply by October 5. ER2640. At approximately noon today, October 4, the undersigned received a call from the District Court's law clerk stating that Appellants should not file a reply, because a ruling from the District Court would be issued imminently. At 1:50 p.m. today, the

[2] Appellants' discovery requests were narrow, asking largely that Defendants respond to public records requests made in early April, in advance of the initiation of this litigation. ER106.

District Court issued an order denying Appellants' emergency motion for an injunction pending appeal. ER2818-19.

Only eight days remain before early ballots are sent to PEVL voters. Emergency relief from this Court is plainly necessary to avoid irreparable constitutional harm, as discussed *supra* at iv-vi.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge. Executed in Phoenix, Arizona.

DATED: October 4, 2016.

Respectfully submitted,

By: s/ *Sarah R. Gonski*
Sarah Gonski
Counsel for Original Plaintiffs/Appellants

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiff-Appellants the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America, and Intervenor-Plaintiff/Appellant Bernie 2016, Inc., respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the abovementioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

RULES

TABLE OF AUTHORITIES
(continued)

Page

REGULATIONS

OTHER AUTHORITIES

An injunction is necessary to prevent irreparable harm to Appellants, their members and constituents, and thousands of other voters, which will result from Arizona's criminalization of ballot collection ("HB2023"), a practice relied upon in particular by minorities to exercise their fundamental right to vote. Appellants' appeal of the District Court's refusal to enter a preliminary injunction is highly likely to succeed. To reject the Voting Rights Act ("VRA") claim, the District Court created a brand new threshold test, unsustainable under established precedent, and it similarly ignored controlling authority to reject the constitutional claims. The equities also tip sharply in Appellants' favor. Elections officials have stated they will not enforce HB2023, diminishing the state's interest in effectuating it, but partisan operatives have made plain their intention to use it to harass and intimidate voters. Thus, HB2023 will operate, not as it was purportedly meant to—*i.e.*, to "eliminate the perception of fraud" and "preserv[e] public confidence in the integrity of elections" (justifications unsupported and directly contrary to the record)—but as it was intended, to suppress turnout, particularly of voters less likely to support the majority party (including, specifically, minority voters).

I. PROCEDURAL BACKGROUND

The procedural background of this litigation is set forth *supra* at vii-ix.

II. FACTUAL BACKGROUND

Arizona has a deplorable history of racial discrimination that has permeated every aspect of social, political, and economic life, including restrictions meant to disenfranchise minorities. ER319-42, 984-90. As a result, Arizona was one of only nine states to be brought wholly under the VRA's § 5 as a "covered jurisdiction,"

required to "preclear" changes to its elections laws with the Department of Justice ("DOJ") or a federal court from 1975 until *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), was decided. ER340-41. The effects of centuries of racial discrimination are a present reality for Arizona's minority communities, who suffer marked disparities as compared to the white population in areas such as employment, wealth, transportation, health, and education, ER341, 999-1003. Arizona also lags behind in minority participation in voting. ER376-78.

Early voting has become increasingly dominant in Arizona. Since 2007, any voter may be listed on the "Permanent Early Voting List" and a ballot is sent to them 27 days before any election for which they are eligible. A.R.S. §§ 16-541, 16-544, 16-542. In the last presidential election, nearly 1.3 million voters in Maricopa County alone requested early ballots, and 81% of all who participated did so by early ballot. ER491. As early voting has become the norm, thousands have come to rely on neighbors, friends, organizers, political parties and campaigns to collect their ballots to ensure safe and timely delivery. But ballot collection has become *particularly* critical for minority voters, many of whom live in urban communities where they receive mail but may lack secure outgoing mailboxes, or in rural areas—such as reservations or towns near the Mexican border with Hispanic populations of over 95%—with no mail service at all. ER209-10, 225-26, 246-47, 264, 268, 271-72, 299-300, 339-40, 508, 547-48, 571-72, 994-98, 2223-24. Others lack reliable transportation to vote in person or deliver the ballots themselves; or have economic or personal circumstances that make ballot collection important to their exercise of the franchise. ER194, 198-200, 209-211, 214-16, 219-20, 225-26,

239-40, 245-46, 264, 267-68, 270-72, 279, 281-82, 231-33, 245, 257-58, 286, 339-40, 507-08, 546-48, 571-72, 589-90, 594, 596-98, 618-20, 627, 928-30, 999, 1002.

That ballot collection has been particularly beneficial to Arizona's minority communities is well known, and Republicans have repeatedly tried to restrict it. ER194-99, 246, 258, 267-68, 278. They first had success in 2011, with SB1412. ER194-97. Arizona was then subject to § 5 and State Elections Director Amy Bjelland (who worked with Secretary of State ("SOS") staff and bill sponsor, Senator Shooter, to draft SB1412) admitted to DOJ that SB1412's ballot collection restrictions were "targeted at voting … in predominantly Hispanic areas in the southern portion of the state near the Arizona border" and "[m]any in the [SOS]'s office were worried about the § 5 review[.]" ER2352-53; *see also id.* (FBI and SOS found no fraud, but Bjelland thinks a problem "may result 'from the different way that Mexicans do their elections'"). A Yuma County Recorder's Office employee similarly reported the bill would impact a border town where "almost everyone is Hispanic" and "where people … tend to bring up vote by mail ballots in groups." ER2345. Rep. Ruben Gallego explained, "[t]he percentage of Latinos who vote by mail exploded" in 2010 because "municipalities … reduced their number of polling places and physical early voting locations." ER2341. "This sudden increase in the Hispanic community's use of the vote by mail process caused Republicans to raise accusations of voter fraud," though the claims were revealed to be "baseless." ER2342. SB1412 was "meant to target Hispanic voters who are less familiar with the vote by mail process and are more easily intimidated due to the anti-Latino climate in the state." ER2341. Rep. Gallego described "the

atmosphere in Arizona [as] scary, particularly for minorities," and advised that, "[a]nti-immigrant and anti-Latino sentiment is stronger than ever." ER2342. He explained, "since Hispanics have come to voting by mail later … they are less comfortable with the process and more likely to be dissuaded from using it than others," and "[g]iven that Latinos often do not have as easy access to transportation compared to others, minority voters who are negatively affected by this law will not be able to mitigate its effects as easily [as] others." ER2341. *See also* ER219-20, 239-40, 257-58, 339-40, 999-1003, 2223. He also explained SB1412 "could have a retrogressive effect on" Native Americans. ER2342. Rather than complete preclearance, the Legislature repealed the law. ER198, 2347, 2350.

In 2013, the Republican-controlled Legislature enacted HB2305, banning partisan ballot collection and requiring others to complete an affidavit stating they returned the ballot. HB2305 (2013). Violation was a misdemeanor. *Id*. Shortly after enactment, citizen groups organized a successful referendum effort, collecting more than 140,000 signatures, positioning HB2305 to go to a vote of the people. ER971. It was then repealed on party lines. ER198-99, 278, 267. Now-SOS Reagan admitted repeal was to avoid referendum; she hoped parts of HB2305 would be reintroduced a la carte. ER630-31. *See also* ARIZ. CONST. art. 4, pt. 1, § 1(6)(C), (14) (restricting enactment of future legislation after referendum).

That is what Rep. Ugenti-Rita did in 2016, when she introduced HB2023, which makes the "knowing[] collect[tion] of voted or unvoted early ballots from another person … a class 6 felony," punishable by up to a year in jail and $150,000

fines. ER699.[3] Several representatives of minority communities argued HB2023 disproportionately burdens those voters. ER278-79, 281. They testified about its impacts on urban communities, where minority voters may lack access to a secure outgoing mailbox, as well as on specific rural minority communities, urging the Legislature to consider "[the predominantly Hispanic community of] San Luis" and the Tohono O'odham Nation, which both lack home mail delivery. ER247; *see also* ER225-26, 231-33, 244-46, 264, 268, 271-72, 289, 300, 506, 511-13, 2227-29, 2223-24.[4] Ugenti-Rita dismissed these concerns as "not my problem." ER510. When a representative of Native American communities described "what it's like to live … sometimes 40 miles away from the nearest post office box," and advised that "over 10,000" voters could be disenfranchised, many legislators *laughed*. ER511-13. *See also* ER513 ("The convenience of having a car …. The convenience of walking to a post office …. The fact that you can open your front door … and … leave … mail there and somebody will pick it up is not afforded to everybody."). HB2023 proponents repeatedly indicated these voters were lazy, desiring "special treatment," or not taking "responsibility": "They certainly take care of themselves in other situations, so I don't know why we have to spoon-feed and baby them over their vote." ER532-33, 542-43, 576-77, 1073-74.

[3] The only exceptions are elections by certain special taxing districts, or ballots collected by a family or household member, or professional caregiver. *Id*.

[4] In San Luis where, in 2010, the population was 98.7% Hispanic or Latino, there are 12,498 post office boxes, but no home mail delivery, and 1,900 of the Tohono O'odham Nation's members lack home delivery. ER247-48, 506, 589-90. These voters are "miles and miles away from the post office" and check their boxes "weekly or … biweekly." ER247, 2228. They do not have mass transit, taxi service, or "blue boxes … where you can drop your mail." ER504.

Although some claimed HB2023 was needed to combat fraud, no one could identify a single, concrete example it could have prevented. *See* ER205, 268-70, 279-80, 517-18, 522, 578, 580-82, 586, 609, 613, 616-17, 622, 976-80.[5] Instead, they resorted to rumors and speculation. ER279-80.[6] Ultimately, Ugenti-Rita admitted HB2023 "doesn't … tackle" "fraud": it "is about an activity that *could potentially lead to* [fraud]." ER600 (emphases added); *see also* ER526-28 (admitting she has no examples of fraud that could have prevented and "[HB2023] doesn't directly address fraud…. [B]allot fraud, electoral fraud, is already addressed all over [the elections code]"); ER602-03 ("lots of folks … believe [fraud] is happening"); ER269-70, 279. Yet, several amendments that could have addressed fraud by less burdensome means were rejected. *See* ER269-70, 279, 701-02 (rejected amendment permitting collection if voter and collector sign affidavit that ballot was collected with permission, voted and sealed when collected, and collector will deliver by Election Day); ER205, 268-69, 701-02 (rejected amendment permitting collection with tracking receipt); ER268-69, 557-63 (rejected amendment to count ballots postmarked by Election Day); ER270-71, 564-77 (rejected amendment to reduce penalty to a misdemeanor).

[5] Arizona had already long since criminalized ballot collection fraud. *See* A.R.S. §§ 16-1005(a)-(f); *see also* A.R.S. § 16-545.

[6] Arguments that fraud may have gone undetected ignore safeguards that made ballot collection fraud difficult to commit. ER196. Voters can confirm ballot delivery online, ER215, 225-26; hand-delivered ballots are verified, ER196, 621-22; and many collectors voluntarily implement additional security measures. ER205-06, 215, 220, 226, 929.

On February 4, 2016, the House passed HB2023 voting 34 for, 23 against. ER704. All but one Republican supported, all Democrats opposed. *Id.* It passed the Senate on party lines on March 9, and was signed into law that day. ER249, 269, 278.

III. STANDARD FOR INTERIM RELIEF

To obtain an injunction pending appeal, Appellants must demonstrate either (1) "a probability of success on the merits and the possibility of irreparable injury," or (2) "that serious legal questions are raise and that the balance of hardships tips sharply in [their] favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). This Court has granted interim relief where constitutional issues are raised shortly before an election. *See, e.g., Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003); *The Daily Herald Co. v. Munro*, 758 F.2d 350, 354 (9th Cir. 1984); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 768-69, 777 (9th Cir. 1990).

IV. ARGUMENT

This presents the classic case for an injunction pending appeal. Appellants are highly likely to succeed on the merits and, absent an emergency injunction, serious, irreparable harm to fundamental constitutional rights will result. This appeal also raises serious legal questions going to the heart of our representative democracy, and the balance of hardships tips sharply in Appellants' favor. For the same reasons, there is good cause to expedite the appeal. *See* 9th Cir. Rule 27-12.

A. HB2023 Violates § 2 of the VRA

Appellants are highly likely to succeed on their § 2 claim. A law violates § 2 when it (1) imposes a discriminatory burden on members of a protected class, and

(2) viewed in light of "the totality of the circumstances," interacts with social and historical conditions such that members of that class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). *See also Veasey v. Abbott*, No. 14-41127, -- F.3d --, 2016 WL 3923868, at * 17 (5th Cir. July 20, 2016). Because § 2 prohibits "abridgement" as well as denial of voting rights, 52 U.S.C. § 10301(a), plaintiffs need not show that the practice makes voting *impossible* for minorities—only that it makes voting disproportionately more *burdensome*. *Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986). The number of voters effected is irrelevant. It is sufficient "that 'any' minority voter is … denied equal electoral opportunities." *LOWV*, 769 F.3d at 244 (quoting 52 U.S.C. § 10301(a)).

Appellants presented substantial evidence to meet their burden of demonstrating by a preponderance they are likely to prove HB2023 violates § 2.[7] *See* ER175-184. Rather than evaluate that evidence, the District Court invented a new test, declaring § 2 requires proof of disparate impact by "quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." ER8. As the District Court acknowledges, *see* ER9, no court has ever before so found, and for good reason. It

[7] The District Court also erroneously considered not whether Appellants were *likely* to prove their claims, but whether they had done so. *See* ER8. *See also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953). Worse, it failed to assess which way the preponderance of the evidence points. *See Farrakhan v. Gregoire*, No. 96-076, 2006 WL 1889273, at *3 (E.D. Wash. July 7, 2006), *rev'd and remanded on other grounds*, 590 F.3d 989 (9th Cir. 2010).

flies in the face of the Supreme Court's admonition that courts must be mindful that "Congress enacted the [VRA] for the broad remedial purpose of rid[ding] the country of racial discrimination in voting," and interpret it to "provide[] the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and quotation marks omitted). Thus, in § 2 vote dilution cases, courts have rejected arguments that there is only one way for plaintiffs to meet their burden. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993) (plaintiff may prove case "with a variety of evidence, including lay testimony or statistical analyses"); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320-21 (10th Cir. 1996) (same); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) ("[W]here a … lack of data prevents … statistical analysis, a court should rely on other totality of the circumstances to determine if the electoral system has a discriminatory effect"). When jurisdictions covered by § 5 bore the burden of proving changes to election laws had neither the purpose nor effect of denying or abridging the right to vote on account of race, DOJ did not require statistical proof, recognizing that, often, it is not available. *See* Procedures for the Admin. of § 5, as amended, 28 CFR Ch. 1, Part 51, Subpart C – Contents of Submissions, §§ 51.26-.28. *See also* ER2314-33 Similarly, here, the "practical evaluation" of the "past and present reality," that this Circuit requires, *Gonzalez v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012), necessarily includes that statistics on ballot collection are not available *because Arizona voluntarily elected not to keep them*. ER205, 268-69, 701-02.

The District Court's new requirement would read an unsustainable loophole into § 2. A state could give literacy tests to predominately minority voters, but insulate itself from § 2 by not tracking the voters tested. The *en banc* Fifth Circuit rejected a comparable argument in *Veasey v. Abbott*, where defendants contended that § 2 plaintiffs must show reduced turnout to prevail. 2016 WL 3923868, at * 29. The court disagreed, recognizing it would "present[] problems for pre-election challenges … when no such data is yet available," and "[m]ore fundamentally" would run contrary to § 2's text, which prohibits abridgement as well as denial. *Id*. Such a requirement, the court recognized would "cripple" the VRA. *Id*. at *30.

Not only is the District Court's construction dangerous to the integrity of the VRA, its analysis in the alternative, in which it "[a]ssum[es], *arguendo*, that a § 2 violation could be proved using non-quantitative evidence," ER10, is deeply flawed. It dismisses out of hand the many declarations submitted from community activists with extensive, personal knowledge about ballot collection's real-life beneficiaries as "anecdotal" and "not compelling," ER10, and ignores unrefuted evidence that HB2023's proponents knew that ballot collection was crucial to minorities, but pursued legislation restricting the practice despite of, and indeed, in some cases *because of* the disproportionate use by the same. And, reflecting a troubling evidentiary double standard, the District Court presumed white voters were equally burdened, ER11—though there is *no* evidence showing that white voters used ballot collection in numbers comparable to minority voters—and blindly credited the state's contention that HB2023 "is a prophylactic measure intended to prevent absentee voter fraud" and "eliminates the perception of fraud,"

ER19, despite *no* evidence that it is necessary to prevent fraud, or justify anyone's "perception" that it may be. ER196, 205, 268-70, 279-80, 517-18, 522, 526-28, 545, 578, 580-82, 586, 600, 609, 613, 616-17, 622, 635-94, 696, 871-72, 976-80.

The District Court also erred in failing to consider the disparities that make ballot collection critical for minority voters to have equal access to Arizona's elections, in which voters now participate overwhelmingly by early ballot. These socio-economic disparities are highly relevant to the question of whether HB2023 has a disparate impact, and are necessarily part of the "practical evaluation" of the "past and present reality" that must be considered. *Gonzalez*, 677 F.3d at 406; *see also NAACP v. McCrory*, No. 16-1498, -- F.3d --, 2016 WL 4053033, at *17 (4th Cir. July 29, 2016) ("These socioeconomic disparities establish that no mere 'preference' led African Americans … to disproportionately lack acceptable photo ID."); *Veasey*, 2016 WL 3923868, at *20; *LOWV*, 769 F.3d at 245 ("In assessing both [the disparate impact and causal] elements, courts should consider the 'totality of the circumstances'") (quoting *Ohio State Conf. of the N.A.A.C.P. v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014). The District Court's conclusion that other means of voting "alleviate[]" HB2023's burdens, ER16-17, ignores that Arizona's history of discrimination and its continued impacts make these alternatives less accessible to minorities. That is the very essence of what § 2 is meant to protect against.

Because the District Court erred in applying the first part of the § 2 test, it did not reach the second. But Appellants more than satisfied that element as well, introducing substantial evidence supporting eight of the nine Senate Factors:

- Arizona has a long history of racial discrimination, extending to every area of social, political, and economic life, that has continued in recent decades (*Factors 1 and 3*). ER319-42, 984-90, 1011; *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970); *Gonzalez*, 677 F.3d at 406-07.

- The effects of Arizona's systemic racial discrimination in areas such as education, employment and public life persist today, profoundly impacting social, economic, and political life for its minority citizens as reflected in disparate poverty rates, depressed wages, higher levels of unemployment, lower educational attainment, less access to transportation, residential transiency, and poorer health (*Factor 5*). ER231, 233-34, 264, 272, 286, 319-42, 364-69, 984-90, 999, 1006-07. These disparities make participation in elections more burdensome, because they contribute to unfamiliarity with the voting process and increase the "cost of voting." *See e.g.*, ER215, 219-20, 225, 231-32, 627, 928-29. *Veasey* 2016 WL 3923868, at *32. Ballot collection alleviated many of these burdens, making it easier for these voters to exercise their right to vote. *See, e.g.*, ER204-05, 209-10, 215-16, 225-26, 231-33, 239-40, 257-28, 267-68, 288-89, 514-31, 552-53, 594, 928-29.

- Arizona's history of discrimination and its continued effects are reflected in official lack of responsiveness to minority populations (*Factor 8*), ER340-41, 1006-07, observable even in the consideration of HB2023. There was extensive legislative testimony about the disparate impacts of HB2023, *supra*, but HB2023's supporters dismissed these hardships as "not [their] problem," ER510, 863, 867-68, or as voters asking to be "babied," ER542; or abdicating "responsibility to cast their vote." ER542, 576-77, 532-33.

- Arizona has a history of racially polarized voting, and politicians have relied and continue to rely on both explicit and subtle appeals to racial prejudice (*Factors 2 and 6*). ER336-39, 990-93, 1004-05.[8] Subtle racial appeals were even a part of the consideration of HB2023 and predecessor legislation.[9] The effect of this veiled racial animus "is to lessen to some degree the

[8] In August, Donald Trump made another speech in Phoenix full of racial appeals. ER2657 n.4.

[9] In 2015, the Legislature considered SB1339, which would have limited collection to two ballots. ER971. Supporters cited a blog by a county Republican Party Chair, who claimed the law was justified by a video of a Hispanic man returning ballots, described as a "thug." ER978. In the HB2023 debates proponents referred to pictures that "[y]ou have seen," likely meaning this video. ER545.

opportunity of [the State's minority populations] to participate effectively in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 40.

- The overall rate of electoral success for minority candidates (*Factor 7*) "has been minimal in relation to the percentage of these groups as part of the general population." *Id*.; *see also* ER341, 1005-06.

The justifications for HB2023 are also tenuous (*Factor 9*). Despite having pressed for some form of this legislation for years, its proponents were unable to identify even one concrete example of fraud in Arizona that HB2023 could have guarded against. *See supra*; ER976-80, 2537-38; *see also Veasey*, 2016 WL 3923868, at *32. Instead, they resorted to rumor and speculation, or argued it was sufficient that people believed fraud was occurring or could occur. *See, e.g*., ER600-03. But this is belied by the concerted effort by voters to repeal a *less strict* version of HB2023 by referendum (HB2305) just three years prior, which the Legislature then repealed to *avoid* a vote of the electorate. *See, e.g*., ER246, 267-28, 278, 611-12, 630-33. It also fails to explain why amendments were rejected that would have protected against concerns about fraud and brought HB2023 into rough conformity with HB2305, *i.e*., by permitting ballot collection with signed affidavits, or reducing penalty to a misdemeanor. *Compare* HB2305 (2013) *with* HB2023 (2016); *see also* ER248, 270-72, 281-82, 564-77.

B. HB2023 Violates the Fourteenth Amendment

The District Court also made a number of errors in its *Anderson-Burdick* analysis, causing it to significantly understate HB2023's burdens on First and Fourteenth Amendment rights, give too much deference to the state's proffered interests, and conclude incorrectly that HB2023 is likely to be found constitutional.

The District Court was wrong to state HB2023 "does not eliminate or restrict any method of voting, it merely limits who may possess, and therefore return, a voter's early ballot," ER16; in fact, HB2023 *criminalizes* a means through which voters *cast* early ballots. The District Court also ignored clear evidence that, without ballot collection, many would not have been able to vote in prior elections. *See* ER204-06, 210-11, 226, 232-33, 239, 929, 2236-37. It follows that the elimination of ballot collection will prevent voters from casting ballots in the upcoming election. *See also Veasey*, 2016 WL 3923868, at *32 ("[I]ncreasing the cost of voting decreases voter turnout—particularly among low-income individuals, as they are the most cost sensitive.") (citation omitted).

The District Court also erred in its discussion of the burdens imposed on specific groups of voters. *See Pub. Integrity All. v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at *3 n.2 (9th Cir. Sept. 2, 2016) (en banc) (court may consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"). In writing that Arizona's election regime "alleviates" many of HB2023's burdens through other voting options, ER16-17, the District Court failed to recognize that those alternatives are more burdensome for the voters who were reliant upon ballot collection than the simple act of handing a ballot to a ballot collector. It also overlooked that forcing voters to learn about these alternative (and in some cases obscure) methods of voting shortly before an election imposes a real burden and will result in voter confusion and thus disenfranchisement. Nor is there any evidence in the record indicating these alternatives will offset the burdens

imposed by HB2023; on the contrary, even several of the declarants *in this case* are confused about the limited exceptions to the ballot collection ban. *See* ER17 n.8.

The District Court also incorrectly concluded that HB2023 does not burden associational rights, undervaluing the expressive significance of participation, and assisting others in participating, in the political process—activities at the core of the First Amendment's protections. Through ballot collection, individuals and organizations convey they support the democratic process, are committed to having others participate in it (including those who have difficulty voting), and are willing to invest resources to this end. Thus, ballot collectors convey that voting is important *not only with their words but with their deeds*. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006); *cf. Coal for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 398-99 (8th Cir. 1985) (organization had standing where members were prevented from registering voters); *People Organized for Welfare & Emp't Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 170 (7th Cir. 1984). And, to the extent that individuals or organizations (such as ADP) engage in ballot collection to assist in the election of a particular candidate or party candidates, they express their support for and further their association with that candidate or party. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("freedom to engage in association for the advancement of beliefs and ideas is . . . the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"). *See also* ER232-33.[10]

[10] In finding otherwise, the District Court relied solely on a 2-1 decision from the Fifth Circuit authored by Judge Edith H. Jones, *Voting for America, Inc. v. Steen*,

The District Court made several additional errors in assessing the state's interests in HB2023 and in balancing those interests against its burdens on voting. It is not correct that "[l]aws that do not significantly increase the usual burdens of voting do not raise substantial constitutional concerns." ER15 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)). *Crawford* itself explained that, "[h]owever slight th[e] burden [on voting] may appear, … it must be justified by []legitimate state interests sufficiently weighty to justify the limitation." 553 U.S. at 191 (controlling op.) (internal quotation marks omitted). Likewise, the District Court erred in assuming the state's proffered interests outweigh HB2023's burdens because they are "important regulatory interests." ER19. This is inconsistent with the Supreme Court's instruction that courts must not "apply[] any 'litmus test' that would neatly separate valid from invalid restrictions" and instead must "make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190; *cf. Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("[T]he

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732 F.3d 382, 388 (5th Cir. 2013), finding that "the smorgasbord of activities comprising voter registration drives" does not involve "expressive conduct or conduct so inextricably intertwined with speech as to require First Amendment activity." HB2023 by contrast, does not regulate a "smorgasbord of activities." It does one thing: prohibits a means of voting and getting out the vote. It is not remotely equivalent to "camping" as expressive activity (to use the *Steen* court's analogy, *id*. at 389). Further, the regulations at issue in *Steen* did not *prohibit* third-party voter registration, only regulated it. *Id*. at 393. And the court's conclusion that, based on the Supreme Court's decision in *Crawford*, "Texas need not show specific local evidence of fraud … to justify preventive measures" in election laws, *id*. at 394, (a conclusion that the District Court also relied upon, *see* ER20), cannot be sustained following the Fifth Circuit's *en banc* decision in *Veasey*. *See* 2016 WL 3923868, at *31 ("[T]he articulation of [fraud as] a legitimate interest is not a magic incantation a state can utter to avoid a finding of disparate impact.").

state's important regulatory interests are *generally* sufficient to justify *reasonable, nondiscriminatory* restrictions") (emphases added).

The District Court compounded these errors by applying rational-basis review. *See* ER21. As this Court explained *en banc* earlier this month, "*Burdick* calls for neither rational basis review nor burden shifting." *Pub. Integrity All.*, 2016 WL 4578366, at *4. Courts must conduct a "balancing and means-end fit analysis." *Id.*; *accord Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015). Under the proper standard, the District Court should have found that the means-end fit between HB2023 and its purported interests is weak, at best, and its purported goals could have been achieved through less burdensome means. *See NAACP*, 768 F.3d at 547 ("[T]he state must articulate specific … interests, and explain why the … restriction … actually addresses" them); *OFA*, 697 F.3d at 434 (restriction likely unconstitutional where "no evidence" to support "vague" state justifications); *Common Cause*, 800 F.3d at 928 (7th Cir. 2015) ("[T]he interests identified by the State can … be served through other means, making it unnecessary to burden the right to vote."); *accord Burdick*, 504 U.S. at 434 (balancing must "tak[e] into consideration" extent to which "interests make it necessary to burden the plaintiff's rights") (citation and quotation marks omitted).

C. Appellants Will Suffer Irreparable Harm Absent An Injunction

"Courts routinely deem restrictions on fundamental voting rights irreparable injury," recognizing that, "once the election occurs, there can be no do-over and no redress." *LOWV*, 769 F.3d at 247; *see also Elrod*, 427 U.S. at 373; *Melendres*, 695

F.3d at 1002; *OFA*, 697 F.3d at 436; *Salerno*, 792 F.2d at 326; *City of Cambridge*, 799 F.2d at 140.[11]

Appellants, their individual members and constituents, as well as thousands of other voters, will experience precisely this type of irreparable harm if HB2023 is not immediately enjoined. In concluding to the contrary, the District Court relied on the deposition of Sheila Healy, ADP's current Executive Director. *See* ER25. But Defendants deposed Ms. Healy in her personal capacity; they did not notice a 30(b)(6) deposition of ADP. ER2674-75, 2681-82.[12] And Appellants proffered substantial evidence that thousands—including their core constituencies and members—rely on ballot collection to vote and will be harmed absent an injunction. *See, e.g.*, ER203-06, 210-11, 216, 219, 225-27, 231-33, 240, 246-49, 259, 267, 271-72, 281-82, 289, 294, 928-30. The District Court erred in disregarding and minimizing that evidence.

D. The Balance of the Equities Tip Sharply In Appellants' Favor

The District Court's conclusion that "the balance of hardships and public interest weigh against" an injunction was largely derivative of its incorrect conclusions on the merits, and is likely to be overturned for the same reasons. It also erred in failing to assess whether Appellants raised serious questions on the merits and the balance of the hardships tips in their favor. *See All. for the Wild*

[11] A case that raises "serious questions" or "colorable" claims as to constitutional rights also necessarily involves the risk of irreparable injury. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002); *Assoc. Gen. Contractors of Calif., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

[12] At the time, Ms. Healy had been employed at ADP for less than a year and had not participated in a general election with ADP. ER2678.

Rockies v. Cottrell, 632 F.3d 1127, 1132, 1135 (9th Cir. 2011) ("Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction[.]"). At the very least, serious questions have been raised. And "[t]he public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) (citation and quotation marks omitted).

Nor will the state suffer material harm if an injunction is issued. First, it has no interest in enforcing unconstitutional laws. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). The District Court's conclusion that the state is irreparably injured when it is enjoined from effectuating its statutes, ER26, has been rejected by circuit courts throughout the country, including *this* Court. While individual justices have expressed that view in orders issued from chambers, "[n]o opinion for the [Supreme Court] adopts this view." *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014). Indeed, it is unclear why a state has any interest in *effectuating* a law that is distinguishable from the interests that the law serves. Second, it is unclear whether Arizona *will* enforce the law even if it *can*. In response to public records requests and in public statements, county recorders have advised they do not intend to do so. *See, e.g.*, ER870-72, 2617-18. And the SOS has failed to provide elections officials with guidance on the issue. ER493-501. At the same time, the Arizona Republican Party publicly confirmed plans to train volunteers to demand identifying information from voters dropping off multiple ballots, encouraging volunteers to follow suspected violators out into parking lots,

interrogate them, record their license plates, and even call 911. ER2617. These efforts are plainly intended to have a chilling effect on their targets' constitutional rights and are fundamentally incompatible with the freedom of expression that our democratic system affords. These harms to voters are imminent and profound, and plainly outweigh any purported harm suffered by the state.

E. Expedited Review Is Appropriate

For the same reasons discussed above, expedited relief is appropriate. *See* 9th Cir. R. 27-12 (a motion to expedite is justified upon "good cause," which includes cases in which "in the absence of expedited treatment, irreparable harm may occur or the appeal may become moot"). In the absence of a ruling from this Court in advance of the early voting period, which begins on October 12, Appellants will suffer irreparable harm to their fundamental constitutional rights. Transcript preparation has been completed. The undersigned is advised that, of the County Defendants, Helen Purcell consents to expedited review, but County counsel has not been able to obtain the position of the County Board Appellees because that can only be done through public meetings. The State and Republican Party Appellees do not consent to expedited review.

V. CONCLUSION

For the reasons outlined above, and pursuant to Federal Rule of Appellate Procedure 8 and Circuit Rule 27-3, the Court should grant this Motion and enter an order enjoining HB2023 pending the resolution of this appeal.

RESPECTFULLY SUBMITTED this 4th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document 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 October 4, 2016. 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

/s Sarah R. Gonski

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The brief contains 5,821 words and 20 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*

General Information

Court	United States Court of Appeals for the Ninth Circuit; United States Court of Appeals for the Ninth Circuit
Federal Nature of Suit	Civil Rights - Voting[3441]
Docket Number	16-16698

Notes

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