No. 16-16698

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Defendant-Intervenors/Appellees.

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

BRIEF OF DEFENDANT-INTERVENOR ARIZONA REPUBLICAN PARTY OPPOSING REHEARING EN BANC

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FRAP 26.1 Corporate Disclosure Statement

Corporate Defendant-Intervenor Arizona Republican Party ("Party") hereby certifies that there is no parent corporation, nor any publicly held corporation, that owns 10% or more of the stock in the aforementioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

Nothing in Plaintiffs' briefing, the procedural and factual record, or the Dissent justifies en banc rehearing of the Panel Opinion.[1] The Panel's § 2 of the Voting Rights Act ("VRA") and constitutional analyses are consistent with Supreme Court and this Court's en banc precedent, and the Panel additionally confirmed legal consistency with sister circuits. In contrast, the position taken by the Dissent is inconsistent with Supreme Court and this Court's precedent, misconstrues the evidentiary record, and is sharply at odds with other circuit court decisions.

The Panel correctly respected the discretionary role of district courts in weighing evidence, determining findings of fact, and applying well-established legal standards. Rehearing at this point would essentially set up this Court as a *de novo* finder of fact, failing to respect the orderly discretion and deference normally afforded district courts. This Court should decline to rehear this appeal en banc.

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[1] Defendant-Intervenor Arizona Republican Party ("the Party") throughout refers to Plaintiffs and Intervenor-Plaintiff Bernie 2016, Inc., collectively as Plaintiffs. In citations, the Party throughout refers to the Panel Opinion, Doc. 55-1, as "Panel Op." and to the separately paginated Doc. 55-2 (Thomas, C.J., dissenting) as the Dissent.

STANDARD FOR EN BANC REHEARING

The legal, procedural, and factual background of this case exemplifies why it is axiomatic that "[e]n banc courts are the exception, not the rule," as well as why one should *not* be convened here. *See United States v. American–Foreign S.S. Corp.,* 363 U.S. 685, 689 (1960). In fact, by rule and precedent, they "are disfavored and generally are only ordered when there is (1) an intracircuit conflict, or (2) a question of exceptional importance." *United States v. Wylie*, 625 F.2d 1371, 1378 n.10 (9th Cir. 1980) (citing Fed. R. App. P. 35(a) and declining to recommend that the full court consider the appropriateness of an en banc hearing).

There is no conflict here with the Panel's decision within this circuit or without it. *See* Circuit Rule 35-1. And these proceedings do not involve a question of exceptional importance. For a question to be "exceptional," it must be "clearly 'out of the ordinary,' 'uncommon' or 'rare.'" *U.S. v. Koon*, 6 F.3d 561, 563 (9th Cir. 1993) (concurring opinion) *citing* Webster's Third New International Dictionary 791 (1986) (unabridged) (internal citations omitted). Such a question does not exist here. While questions of law related to voting rights and constitutional

issues are always important, those legal questions have already been appropriately resolved here—below and on appeal.[2] Any argument that could be presented in support of en banc review would fail to satisfy the exacting standard warranting such review. The procedural posture of these proceedings further bears that out.

PROCEDURAL POSTURE

Plaintiffs brought this action in April 2016 alleging, among other things, that H.B. 2023, a not-then-in-effect election law banning mass ballot collection, violated Section 2 of the Voting Rights Act and the Fourteenth Amendment to the Constitution. Almost two months later, in June 2016, Plaintiffs moved, based on those claims, to preliminarily enjoin H.B. 2023, which was still not in effect.[3] Discovery, motion practice, and oral argument ensued, and on September 23, 2016, the district court denied Plaintiffs' motion.

The district court found Plaintiffs unlikely to succeed on the

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[2] Indeed, they have been narrowed significantly as well. Plaintiffs have dropped pursuit of their theory of 'partisan fencing,' (Panel Op., at 15 n.7) and even the Dissent agrees that "the district court did not abuse its discretion in denying a preliminary injunction" based on Plaintiffs' First Amendment associational rights claim (Dissent, at 11 n.4).

[3] The law took effect on August 6, 2016, and has remained so. Despite that, Plaintiffs have never come forth with additional evidence about its impact.

merits of their claims, that they had not shown that H.B. 2023 would cause them irreparable harm (or shown anything beyond speculation that H.B. 2023 would prevent anyone from voting), and that the balance of hardships and public interest weighed against enjoining the law. Plaintiffs appealed, and the district court's decision was affirmed on October 28, 2016. The now-effective law has been in place, without issue, for nearly three months, including for Arizona's most recent Primary Election, and has now been upheld by both the district court and this Court.

On appeal to this Court, Plaintiffs never filed their opening brief early (*see* Doc. 3 (allowing for answering brief by deadline set or 28 days after service of opening brief, whichever is *earlier*)). Instead, Plaintiffs' failure to expedite their own appeal led to an extraordinarily compressed and unusual process before this Court. Simultaneous briefs were due 71 hours after a *sua sponte* motions Panel order expediting the appeal, with argument occurring 40 hours after that. (A similarly expedient schedule was then immediately set on the appeal of the denial of a preliminary injunction on Plaintiffs' out-of-precinct voting regulation claims, which arise out of the same district court case and

were argued and submitted to the same Panel.)[4]

Just over 72 hours after the companion appeal was argued and submitted, and about 18 hours after the Panel decision in this appeal, another *sua sponte* order issued for briefing as to whether this appeal should be reheard en banc. This is that briefing.

I. REHEARING THIS MATTER EN BANC TO REDETERMINE ARIZONA ELECTION LAW IN THE DAYS BEFORE THE NOVEMBER 8 ELECTION IGNORES AND CONTRADICTS THE SUPREME COURT'S UNANIMOUS DIRECTION TO THIS COURT IN *PURCELL*.

Hasty action in election matters and rushed consideration of the important issues and interests at stake is exactly what *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) warned against. The Court's consideration of this appeal may be moving very briskly down the path of precisely what the unified per curiam *Purcell* order counseled avoidance of in these situations: "Court orders affecting elections,

[4] Post-initial-motions briefing and the district court's hearings, and thus rulings, on Plaintiffs' motions for preliminary injunctions related to their H.B. 2023 and provisional ballot claims were bifurcated by the district court at Plaintiffs' request. This was ostensibly because Plaintiffs desired a ruling before H.B. 2023's August 6, 2016, effective date. Plaintiffs never requested a ruling from the district court, however, let alone an expedited ruling, and instead allowed H.B. 2023 to take effect. Inexplicably, Plaintiffs did not present any additional evidence on H.B. 2023's impact after it took effect.

especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

Justice Steven's thoughtful concurrence—in a case with election law requirements described as "novel," which H.B. 2023 is not—explains why the imminent General Election should go forward with H.B. 2023 in effect:

> Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality. At least two important factual issues remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements. Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.

See id. at 6 (Stevens, J., concurring).

The lineage of cases related to *Purcell* answers the question of whether this case should be reheard en banc. Panel Op., at 13-15. It should not be. Under even more relaxed time constraints than those here (18 days prior to the election versus the just *eight* days to go here), the Supreme Court held, and directed this Court, that courts should

refrain from interfering with election laws so close to an election, for a variety of good reasons. *Purcell*, 549 U.S. at 4-5. When this occurred, this Court's reversal of a district court's preliminary injunction denial was overturned and the district court was then able to develop a more complete record for review. *Id.*; *see also Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

Upon appeal of that final decision, this Court determined that the law should be held, based on the record and the same legal standards applied by the Panel majority here. *See Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010); *Gonzalez v. Arizona*, 677 F.3d 383 (2012) (en banc). With emotions high this close to an election, it is eminently more reasonable for a record to be established under sensible state laws as they currently stand, rather than unwisely disturbing them in the days before a General Election. *See Purcell*, 549 U.S. at 6.

II. THIS CASE IS NOT OF EXCEPTIONAL IMPORTANCE.

Despite Plaintiffs' briefing and the Dissent's framing, no question of law here is of exceptional importance, particularly at this stage of the proceedings. *Contra* Dissent, at 3. Moreover, the questions of law presented are now well settled. The Panel recognized that the district

court adhered to Supreme Court precedent in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008), which recognizes that minor inconveniences and the requirement that voters directly take part in the foundation of democracy are not only appropriate, but necessary. Panel Op., at 37, 43.

The issue, then, is not whether the applicable legal tests were applied appropriately (which they were here), but how the district court weighed the facts and considered the evidence in applying the legal tests. Panel Op., at 24, n.11, 43. However, such factual determinations are left within the discretion of the district court. Panel Op., at 24 n.11. As determined by the Panel, the district court did not abuse its discretion. Rather, it correctly weighed the totality of the circumstances for the §2 claim and the stated burden in the constitutional claims in making its decision.

There is nothing "exceptional" about H.B. 2023 at all. As referenced repeatedly by the Dissent, early voting certainly has become the norm in Arizona. Dissent, at 1. Although the Panel correctly distinguished between mail-in voting and third-party ballot collection, Panel Op., at 44, n.21, the Dissent did not take into consideration the

fact that state laws regulating the mail-in voting practice have not been modernized to be similar to the well-reasoned and legally recognized protections afforded to in-person voting. ER1043 *citing* A.R.S. § 16-515 (no electioneering within 75 feet of polling place); A.R.S. § 16-580 (only one person per voting booth at a time with similar exceptions to H.B. 2023).

In addition, multiple other jurisdictions—26 other states, in fact—restrict third-party collection of ballots. ER1053, n.18, *citing* Cal. Elec. Code § 3017 (2016); Colo. Rev. Stat. Ann. § 1-7.5-107; Nev. Rev. Stat. §§ 293C.330, 293C.317; N.M. Stat. Ann. §§ 1-6-10.1, 1-20-7, 3-9-7.[5] Most of those punish it criminally. In fact, Arizona is one of *fifteen states* that attach a felony penalty to violations of their anti-ballot-harvesting laws.

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[5] *See also* Ala. Code § 17-11-18; Ark. Code §§ 7-5-403, 7-5-411; Conn. Gen. Stat.§ 9-140b; Ga. Code Ann. § 21-2-385; Ind. Code §§ 3-11-10-1, 3-14-2-16(4); La. Stat. Ann. § 18-1308 (2015); Me. Stat. tit. 21-a §§ 753-b, 754-A; Mass. Gen. Laws ch. 54 § 92; Mich. Comp. Laws § 168.764a; Miss. Code Ann. § 23-15-719; Mo. Rev. Stat. § 115.291; N.H. Rev. Stat. Ann. § 657:17; N.J. Rev. Stat. §§ 19:63-27, 19:63-16; N.C. Gen. Stat. § 163-231; Ohio Rev. Code § 3509.05; Okla. Stat. Ann. tit. 26 §§ 14-108 (2014), 14-113.2, 14-115.1; 25 Pa. Stat. and Cons. Stat. Ann. § 3146.6; S.C. Code Ann. §§ 7-15-310, 7-15-385 (prohibiting collection by a candidate or campaign staff); Tenn. Code Ann. § 2-6-202; Tex. Elec. Code Ann. §§ 86.006, 86.0051; Va. Code Ann. §§ 24.2-705, 24.2-707, 24.2-709(A); W. Va. Code § 3-3-5.

See ER2084; Ark. Code § 7-1-104; Cal. Elec. Code § 18403; Conn. Gen. Stat. § 9-359; Ga. Code Ann. § 21-2-574; Ind. Code § 3-14-2-16(4); Mich. Comp. Laws § 168.932; Mo. Rev. Stat § 115.304; N.C. Gen. Stat. § 163-226.3; N.J. Rev. Stat. § 19:63-28; N.M. Stat. Ann. §§ 1-6-9, § 1-6-10.1, § 1-20-7; Ohio Rev. Code § 3599.21; Tex. Elec. Code Ann. § 86.006(g).

Thus, it is not exceptional for a state legislature to normalize election laws when advances in voting convenience are made. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 2016 WL 4437605, at *1 (6th Cir. 2016) (noting that adopting plaintiffs' theory of disenfranchisement would discourage states from ever innovating to "increase[e] early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances").

As neither the Court's opinion nor the law at issue is novel or exceptional, en banc rehearing would be inappropriate. As noted in the concurrence in *U.S. v. Burdeau*, 180 F.3d 1091, 1092 (9th Cir. 1999), if en banc review is taken here, then this Court would also have to take en banc multiple other cases solely to "tell a State what law it should adopt

in its own sovereign capacity" or to "offer[ ] unsolicited advice to the other branches of government." (internal citations omitted).

III. THE PANEL MAJORITY'S DECISION CREATED NO CIRCUIT SPLIT, AS SISTER CIRCUITS HAVE BEEN STEADILY ADOPTING A TWO-PART FRAMEWORK FOR § 2 VOTE-DENIAL CLAIMS.

Recently, as noted by the Panel, Panel Op., at 19-21, sister circuits have been steadily adopting a two-part framework for vote-denial claims under § 2 of the Voting Rights Act—a framework consistent "with Supreme Court precedent, [this Court's] own precedent, and with the text of § 2." Panel Op., at 21 (citing *Ohio Democratic Party*, 834 F.3d 620, at **13-14 (petition for rehearing en banc denied in --- F.3d ----, 2016 WL 5939925 (6th Cir. Oct. 6, 2016)); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014) (adopting the test "for the sake of argument"); *see also Gonzalez*, 677 F.3d at 405-06.

A. The Panel's Section 2 and Constitutional Applications are Consistent With The Most Recent Evolutions of Law in This Area.

In adopting that test, the Panel affirmed the district court's factual finding that Plaintiffs failed to provide evidence on the first

prong and did not address whether the record evidence satisfied the second prong. *See* Panel Op., at 35, 35 n.19.[6] The Panel thus could not have created any new or inconsistent law as to that element.

The dissent does not argue that the Panel acted contrary to the two-part framework adopted by other circuits. The dissent instead argues against a *per se* rule that a plaintiff must provide some quantitative or statistical evidence at the first prong. *See* Dissent, at 13-17.[7] The Panel expressly declined, however, to resolve this legal issue. Panel Op., at 28.[8] The Panel instead affirmed based on the

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[6] Other circuits have taken a similar approach to § 2 claims. *See Ohio Democratic Party,* 2016 WL 4437605, at *15; *Frank*, 768 F.3d at 755 (declining to adopt second prong of § 2 test when claim failed at first step, in that challenged law did not deprive minority voters of equal opportunity to vote).

[7] For example, the dissent asserts that the district court acted contrary to *Veasey* by stating that quantitative or statistical evidence should be provided to establish the first prong of a § 2 claim. Dissent, at 16. But that is not correct. Although the Fifth Circuit in *Veasey* did not require comparative quantitative data on voter turnout, *Veasey*, 830 F.3d at 260, the plaintiffs in that case actually presented significant statistical data on the number of minorities that lacked the necessary photo ID to vote in Texas and evaluated over 100,000 records. *See id.* at 250-51. Here, the district court's factual determination that Plaintiffs failed to establish a likely disparate impact from H.B. 2023 was not based on a lack of voter turnout data. *See* Panel Op., at 27 n.13.

[8] The Panel did correctly recognize, however, that *Gonzalez,* as well as § 2 decisions from other circuits, show that quantitative or statistical

district court's alternate holding—a factual determination, based on a "review [of] *all* evidence in the record," that Plaintiffs "did not show that the burden of H.B. 2023 impacted minorities more than non-minorities." *Id.* (emphasis added); *see also id.* at 28-33 (explaining in detail why factual findings supporting alternate holding were not clearly erroneous).

The dissent also argues that the Panel erred by testing the opportunities of minorities to vote "against 'other members of the electorate who are 'similarly situated,'" rather than against "the voting population as a whole." Dissent, at 18. But that contention is factually incorrect. As the Panel recognized, Plaintiffs' failure to provide any comparative evidence on the categories of voters that Plaintiffs alleged would be most affected by H.B. 2023 prevented the district court from assessing the impact of this law on minorities against the voting population as a whole. *See* Panel Op., at 30-31. For example, the district court could not possibly ascertain whether the burden of an early ballot collection law on voters in rural communities would be

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"evidence is typically necessary to establish a disproportionate burden on minorities' opportunity to participate in the political process." Panel Op., at 27; *Veasey*, 830 F.3d at 244 ("courts regularly utilize statistical analyses to discern whether a law has a discriminatory impact").

disproportionately felt by minorities without any information on the non-minority voters in rural communities. *See id.* In the absence of comparative evidence, the district court simply had no way of knowing whether "these categories of [rural] voters were more likely to be minorities than non-minorities." *Id.* at 30*; see also Gonzalez*, 677 F.3d at 405 (to establish § 2 violation, plaintiff must provide proof that the challenged regulation causes "'some relevant statistical disparity between minorities and whites'") (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). This was well within the district court's discretion in weighing the presented evidence and should not be disregarded now.

B. Rehearing En Banc to Adopt the Dissent's Construction of the Law on Section 2 Would Create a Circuit Split.

While the Panel acted in accordance with other circuit authorities on § 2, the reasoning of the dissent would actually create a circuit split. According to the dissent, once the plaintiffs asserting a § 2 claim put forth some evidence of any "burden on minority voters," opposing parties must then bear the "burden of rejoinder." Dissent, at 21. No other circuit has recognized such a rule, which would relieve plaintiffs of the burden to show an actual *disproportionate* impact on minority

voters caused by the specific voting practice being challenged and as compared to the other members of the electorate. *See* 52 U.S.C. § 10301(b).

Such an outcome would be inconsistent with the decisions of this Court, the Supreme Court, and other circuits. This Court has explained that "[S]ection 2 *plaintiffs* must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" *Salt River*, 109 F.3d at 595 (emphasis added). Similarly, the Supreme Court has stated that "*Plaintiffs* [in § 2 cases] must demonstrate that, under the totality of the circumstances, the [challenged] devices result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (emphasis added). Recent § 2 decisions from other circuits are in accord. *See Ohio Democratic Party*, 2016 WL 4437605, at *14 (plaintiffs have "burden of establishing that [challenged law] results in a racially disparate impact actionable as a violation of Section 2."); *Veasey*, 830 F.3d at 243-44 ("Plaintiffs must show . . . that the challenged law imposes a burden on minorities.").[9]

[9] *See also* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 476 (2015) ("[G]iven that § 2 forbids the denial or abridgement of the vote on account of race, it is reasonable

As the Fifth Circuit explained, "[t]he plaintiffs bear the burden of proof in a VRA case, and any lack of record evidence on VRA violations is attributed to them." *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009). This Court should decline any invitation to adopt, through en banc review of factual findings subject to an abuse of discretion standard, an entirely burden-shifting framework for § 2 claims.

IV. REHEARING THIS MATTER EN BANC WOULD REFLECT INSUFFICIENT DEFERENCE TO THE DISTRICT COURT AND TO THE ABUSE-OF-DISCRETION STANDARD.

Declining to rehear this appeal en banc is further supported (if not compelled) by this Court's precedents governing standard-of-review selection. The federal judicial system is structured so that the district court has the greatest competence and opportunity to assess the factual record, particularly in election law matters with an imminent General Election that may supplement the record. *See Purcell*, 549 U.S. at 6 (Stevens, J., concurring); *Harman v. Apfel*, 211 F.3d 1172, 1176 (9th Cir. 2000); *see also Frank v. Walker*, 769 F.3d 494, 499 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing en banc) ("We, as 'the

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that plaintiffs be required to make a threshold showing they are disproportionately burdened by the challenged practice, in the sense that it eliminates an opportunity they are more likely to use or imposes a requirement they are less likely to satisfy.").

Court of Appeals,' are required to weigh . . . considerations specific to election cases,' and to 'give deference to the discretion of the District Court,' and we must do this because the Supreme Court tells us to.") (citing *Purcell*, 549 U.S. at 4).

The review attempted by the dissent cannot be squared with this Court's and Supreme Court precedent on the proper standard of review.[10] *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 557-62 (1988); *United States v. Hinkson*, 585 F.3d 1247, 1263 n.23 (9th Cir. 2009) ("It would make no sense to review the district court's factual finding under a standard other than the abuse of discretion standard . . . If we attempted a de novo review of that factual finding, we would be straying far from our role as an appellate court."); *see also Rita v. United States*, 551 U.S. 338, 362-63 (2007); *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) ("[A]s long as the district court got the law right, it will not be reversed simply because

[10] Selection of the appropriate standard is of such importance that the Supreme Court recently granted certiorari solely to resolve the question arising where this Court departed from eight sister circuits in selecting the appropriate standard of review. *See McLane Co. v. EEOC*, 2016 WL 1366460, at *1 (U.S. Sept. 29, 2016) (granting certiorari limited to the standard-of-review question).

the appellate court would have arrived at a different result if it had applied the law to the facts of the case.").

Specifically, and as properly recognized by the Panel, the abuse-of-discretion standard is "limited and deferential," and a Panel only "reverse[s] the district court's decision if it was based on an erroneous legal standard or clearly erroneous findings of fact." *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053 (9th Cir. 2013) (noting standard and affirming denial of preliminary injunction); *Sw. Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam) (same). Where, as here, the Panel "reviewed the briefs and the excerpts of record, heard oral argument, and considered the matter thoroughly," its conclusion "that the district court did not abuse its discretion in denying Appellants' motion for a preliminary injunction" need not be reheard en banc. *See Western Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012).

Put differently, the "denial of a preliminary injunction lies within the discretion of the district court. . . ." *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011) (denying petition for rehearing en banc after affirming district court's denial of preliminary injunction on

constitutional claim). On denying rehearing en banc in *DISH Network Corp.*, the Court noted the long-contemplated risk—likely elevated in election law cases with an election imminent—that at times "parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation[.]" *Id.* (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982)).

The Court counseled, however, that due to the "'limited scope of our review . . . our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits'" and that such appeals often result in "'unnecessary delay to the parties and inefficient use of judicial resources.'" *DISH Network Corp.*, 653 F.3d at 776 (quoting *Sports Form, Inc.*, 686 F.2d at 753). Rehearing en banc would only compound those risks, particularly with a General Election days away. *See DISH Network Corp.*, 653 F.3d at 773 (denying rehearing en banc). Of course, as it did here, any preliminary injunction appellate review arrives with the "necessary caveat" that the Panel's opinion was "not an adjudication on the merits." *See id.* at 776; Panel Op., at 11-12. Rehearing en banc based on

a dissent that seeks an adjudication on the merits of Plaintiffs' claims would throw into disarray Supreme Court and this Court's precedent on selecting the proper standard of review.

When selecting the proper standard, this Court chooses "between the *de novo* and abuse of discretion standards by balancing the peculiar need of a full appellate review, against the argument that the district court's . . . determination requires the exercise of discretion and therefore is due the correlative level of deference on review." *Harman*, 211 F.3d at 1176. Here, the choice was clear—the district court is in the best position to review and find facts. *See Pierce*, 487 U.S. at 560 ("Even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense.").

The standard for appellate review is "'[a]n essential characteristic of [the federal court] system.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 (1996) (alterations in original) (citations omitted). The Supreme Court has recognized "that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Salve Regina Coll. v. Russell*, 499 U.S.

225, 238 (1991) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)).

Indeed, the choice between *de novo* review and review for abuse of discretion often determines the outcome. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot" is a "practical difference in outcome depending upon which standard is used."). Here, the selected standard was correct, the outcome—certainly at the preliminary injunction stage of the litigation and with the General Election almost a week away—was correct, and the litigation should be allowed to proceed in the district court without need for rehearing en banc.

Related to that better record still to be generated here post-General Election is the Dissent's mistaken assertion that the district court's factual findings should not be given deference due to a lack of evidentiary hearings conducted to this point. Dissent, at 3 n.1. It is simply not true that "most of the record is undisputed, and the parties' submissions were by affidavit." *See id.* Instead, very limited discovery and depositions were conducted, including of a few representatives of named Plaintiffs and their experts. The district court expressly relied on deposition testimony from the Executive Director of the Arizona

Democratic Party and a well-known ballot collector. ER0008-9, 0018. And, the district court was in the best position to do such an expedited review of the limited factual record, as appropriately acknowledged by the Panel. Rehearing en banc is not called for under this scenario.

Specifically, the district court weighed the evidence presented here and did not abuse its discretion. *See Hinkson*, 585 F.3d at 1263 n.23 (district court in best position to weigh evidence and make factual findings and proceeding otherwise under an abuse-of-discretion standard would "make no sense"). Several factual scenarios cited by the Dissent are tied to Arizona's anomalous March 2016 Presidential Preference Election where Maricopa County experimented with a vote-centers model. Nothing in the record shows that Arizona has substantially reduced the number of polling places for its upcoming General Election, and even Plaintiffs have noticed settlement of those claims.

The district court also weighed the evidence and found that nothing showed that "voting by ballot collection has become a critical means for minority voters to cast their ballots," as the Dissent opines. ER0011, 0017; *see also* Dissent, at 2. The district court found that

Plaintiffs failed to present evidence of a single rural voter without transportation to a post office for themselves, a family member, caregiver, or household member to convey their early voted ballot. ER0019.

The Dissent cites examples of minority voters from Arizona's Indian tribes as potentially affected by H.B. 2023, but—despite named Plaintiff Peterson Zah being a former president of the Navajo Nation—he never gave a declaration in this case to support Plaintiffs' claims. Neither did any tribal-member voter come forward, at any point in the record below, to say they would be unable to vote due to H.B. 2023 or that their right to vote would be burdened. The district court noted that there is evidence in the record that minority and tribal voters are taken advantage of by ballot-harvesters. ER0012; ER2116-17.

The Dissent's conception of ballot-collection as a "practical necessity" and that minority voters are dependent upon it is directly contradicted by the deposition testimony of a well-known ballot collector, and the district court noted this. ER0018; *see also* ER0010-11, 0014. Contrary to the Dissent's gloss of "nothing there," Dissent, at 9-10, specific instances of fraud leading to H.B. 2023's regulation of the

practice were also noted by the district court and the Panel. ER0012-13; Panel Op., at 50 n.22; *see also* ER2352-53.

While the Dissent makes the charged assertion that Arizona has "criminalized one of the most popular and effective methods by which minority voters cast their ballots," if that were true, there would be some evidence in the record showing that. There is none, so the Dissent cites none.

V. THE PANEL WAS MINDFUL OF AND EXPRESSLY MAINTAINED UNIFORMITY IN ELECTION LAW DECISIONS OF THIS CIRCUIT.

A. The Panel's Section 2 of the VRA Analysis is Consistent with *Gonzalez*, *Salt River*, and *Farrakhan*.

This Court previously addressed "vote denial" claims under § 2 of the VRA, 52 U.S.C. § 10301, in (1) *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc); (2) *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); and (3) *Salt River*, 109 F.3d at 595. The Panel here faithfully applied those authorities in affirming the district court's factual determination that Plaintiffs had failed to show a likelihood of success on their § 2 claim.

Indeed, the Panel specifically explained that under *Gonzalez* and *Salt River*, the "first prong" of § 2 requires a plaintiff to "show that the

challenged voting practice results in members of a protected minority group having less opportunity than other members of the electorate to participate in the political process."[11] Panel Op., at 21 (citing *Gonzalez v. Arizona*, 677 F.3d at 405 and *Salt River*, 109 F.3d at 595). The Panel also cited *Salt River* for the rule that ""a bare statistical showing of disproportionate impact on a racial minority"' is not sufficient to show the requisite disparate impact. Panel Op., at 22 (citing *Salt River*, 109 F.3d at 595 (emphasis omitted).). "Rather, 'Section 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" *Id.*; *see also Gonzalez*, 677 F.3d at 405 ("[A] § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification causes that disparity, will be rejected.") (citing *Salt River*, 109 F.3d at 595). Proof of this

[11] This requirement of disparate impact follows from the statutory text of § 2, as well as Supreme Court precedent. *See* 52 U.S.C. § 10301(b) ("A violation . . . is established if, based on the totality of circumstances . . . members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."); *Gingles*, 478 U.S. at 44 n. 8 (similar).

causal connection is "*crucial*" to a § 2 claim. *Gonzalez*, 677 F.3d at 405 (*citing Salt River*, 109 F.3d at 595) (emphasis added).

Here, in assessing the first prong of § 2, the Panel concluded that the district court did not clearly err in finding, as a factual matter, that Plaintiffs failed to put forth evidence to show a causal connection between H.B. 2023 and any disproportionate result on minorities. *See* Panel Op., at 35. In particular, the Panel discussed the record evidence and then explained why, as the district court found, that evidence provided no insight into the comparative effect of H.B. 2023 on minorities and non-minorities. *See id.* at 28-33. Because the district court's factual finding that there was a lack of proof of disparate impact "was not '(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record,'" the Panel held that "the district court did not abuse its discretion in finding Feldman was unlikely to succeed on her Voting Rights Act claim." Panel Op., at 35-36 (quoting *Hinkson*, 585 F.3d at 1262 (en banc)).

The Panel properly gave deference to the district court's factual finding that Plaintiffs failed to show a likely disparate impact, again following *Gonzalez* and *Salt River*. In both cases, this Court recognized

that because "a district court's examination in [a § 2] case is '*intensely* fact-based and localized,'" appellate courts should "therefore '[d]efer[ ] to the district court's *superior* fact-finding capabilities.'" *Gonzalez*, 677 F.3d at 406 (quoting *Salt River*, 109 F.3d at 591) (alterations in original; internal citations omitted; emphasis added). Accordingly, this Court "review[s] for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2." *Gonzalez*, 677 F.3d at 406 (citing *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000)); *see also* Panel Op., at 23-24 (discussing clear error standard applicable to § 2 claims); *id.* at 28 (same).

The Panel also acted in accordance with *Gonzalez* by declining to address whether the record evidence satisfied the "second prong" of a § 2 claim—namely, whether "the challenged law interacts with social and historical conditions that have produced discrimination to cause minorities to have fewer opportunities to participate in the electoral process." Panel Op., at 23. The Panel (and the district court) had no need to analyze the second prong since Plaintiffs failed to put forth evidence at the first step that H.B. 2023 will cause a disproportionate

result. *See id.* at 35, 35 n.19. Similarly, this Court in *Gonzalez* "did not have occasion to reach this second step because the plaintiff had adduced no evidence of a causal connection between the challenged photo ID law and a disproportionate burden on minorities." *Id.* at 23.

This Court further explained in *Gonzalez* that the presence of some "*Gingles* Factors"[12] in Arizona, such as "Arizona's general history of discrimination against Latinos and the existence of racially polarized voting," which is almost exactly what Plaintiffs are proposing here, could not overcome plaintiffs' inability to show that the specific challenged practice caused any discriminatory result. *Gonzalez*, 677 F.3d at 407; *see also* Panel Op., at 34 (discussing *Gonzalez*). Consistent with that holding, the Panel here explained that "evidence of differences in the socioeconomic situation of minorities and non-minorities does not satisfy the first prong of the § 2 test" because they do not show that "the restriction on third-party ballot collection"—the actual voting practice

[12] The *Gingles* Factors are "a non-exhaustive list of nine factors (generally referred to as the 'Senate Factors' because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making [a] totality of the circumstances assessment" for § 2 claims. *Gonzalez*, 677 F.3d at 405 (citing *Gingles*, 478 U.S. at 44-45).

being challenged in this case—"causes minorities to have less opportunity to vote than non-minorities." Panel Op., at 33.[13]

Because the Panel had no need to address the second prong of § 2, it could not have acted contrary to this Court's decision in *Farrakhan,* which concerns the required showing at the second step. Specifically, in *Farrakhan*, this Court explained that "under *Salt River* and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances." *Farrakhan*, 338 F.3d at 1019.

Here, because the district court concluded, as a factual matter, that Plaintiffs had not put forth evidence to show any likely discriminatory impact from H.B. 2023, the district court (and, by extension, the Panel) had no reason to address whether an alleged impact, unsupported by evidence, was "attributable to racial

[13] The Panel correctly noted that "although H.B. 2023 was in effect for all but the first three days of early voting for the Primary Election, the record does *not* include *any* testimony by minority voters that their ability to participate in the political process was affected by the inability to use a third-party ballot collector." Panel Op., at 33 (emphasis added).

discrimination in the surrounding social and historical circumstances." Indeed, the dissent does not cite *Farrakhan*, much less argue that the Panel created any inconsistency with that decision.

The dissent instead contends that the district court failed to follow *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011), by not placing a "burden of rejoinder" on the State Defendants. Dissent, at 20-21. This is not correct. No burden of rejoinder could apply unless and until Plaintiffs put forth actual evidence that H.B. 2023 would likely cause a disproportionate impact on minorities. The district court concluded as a factual matter that Plaintiffs failed to make such a showing, and the Panel properly gave this finding deference.[14]

Plaintiffs and the dissent can merely express disagreement with the district court's factual finding that the record evidence did not

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[14] Additionally, the Panel correctly noted a § 2 plaintiff cannot meet its burden of proof by simply showing some "burden on minorities," as the dissent asserted. Panel Op., at 35 n.18. The statutory text of § 2 instead requires a plaintiff to prove that minorities "have *less opportunity than other members of the electorate* to participate in the political process." 52 U.S.C. § 10301(b) (emphasis added). Thus, "is not enough for the plaintiff to make 'a bare statistical showing of disproportionate *impact* on a racial minority'; rather, 'Section 2 *plaintiffs* must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" Panel Op., at 35 n. 18 (quoting *Salt River*, 109 F.3d at 595).

include proof of a likely disparate impact from H.B. 2023 and the Panel's deference to those findings, but that disagreement provides no basis for en banc review.

B. The Panel's Constitutional Analysis Follows and Faithfully Applies this Court's Recent and Important En Banc Decision, *Public Integrity Alliance, Inc. v. City of Tucson.*

There is simply no support in the record for the dissent's statement that the district court improperly employed a rational basis review of Plaintiffs' Fourteenth Amendment claim.[15] While Plaintiffs did assert as much in their brief before this Court, the district court's order actually properly employs the flexible *Anderson-Burdick* balancing test, cites to those decisions, and also to *Ohio Democratic Party*, 834 F.3d 620, 2016 WL 4437605, at *5, which did the same.[16]

Moreover, the district court was aware of and had before it in the record this Court's recent en banc decision in *Public Integrity Alliance, Inc. v. City of Tucson*, --- F.3d ----, 2016 WL 4578366 (September 2,

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[15] The Dissent, at 4 n.2, incorrectly claims that the Panel stated that "the district court was not required to conduct a means-end fit analysis here." Regardless, the district court and the Panel conducted that proper analysis. ER0015; Panel Op., at 49-50. That critique does not support rehearing here.

[16] The district court, as did the Panel, also noted that Plaintiffs bring a disfavored facial challenge to H.B. 2023. ER0015; Panel Op., at 41.

2016), which clarified the applicable test, *before* it issued its H.B. 2023 ruling. Defendants jointly filed the *Public Integrity Alliance, Inc.*, en banc decision with a notice of supplemental authority, ER2620-30, and Plaintiffs *responded*, ER2631. The district court conformed its analysis to the test as set forth in *Public Integrity Alliance, Inc.*, and the Panel affirmed as required under the applicable standard of review. ER0015; Panel Op., at 49-50. Rehearing en banc as to Plaintiffs' constitutional claims is unnecessary.

CONCLUSION

The district court made reasonable determinations based on the record before it. Then, the Panel appropriately affirmed. This is what the unanimous Supreme Court direction in *Purcell* says to do. 549 U.S. at 5-6 ("Given the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction . . . ."). Rehearing en banc specifically is not. *Id.* at 5 (noting that rehearing en banc "can consume further valuable time," and that it "was still necessary, as a procedural matter" for this Court "to give deference to the discretion of the District Court.") Rehearing en banc should be declined.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Intervenor states it is aware of Case No. 16-16865 pending before this Court, in which Plaintiffs appealed the district court's October 11, 2016, order denying them preliminary injunctive relief on their provisional ballot claims. That case was argued and submitted on October 26, 2016.

Dated: October 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set by the Order dated October 29, 2016 and with the formatting requirements of Fed. R. App. 32, and Circuit Rules 32-3 and 35-4, as modified by Court Order, because this brief contains 6,978 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 proportionally spaced typeface using Microsoft Word 2010 Century font size 14.

Dated: October 31, 2016

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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 October 31, 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.

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