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
No. CV-16-01065-PHX-DLR

APPELLANTS' OPENING BRIEF

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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.

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Arizona ("District Court") had original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1357, because this case raises federal claims under § 2 of the Voting Rights Act of 1965 ("VRA"), as amended, 52 U.S.C. § 10301, and for violations of the 1st and 14th Amendments, cognizable under 42 U.S.C. § 1983. The District Court denied Appellants' motion for a preliminary injunction on September 23, 2016, ER1, and Appellants timely filed a notice of appeal that same day, ER2636. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in holding that Appellants are unlikely to succeed on the merits of their claims that HB2023 violates § 2 of the VRA and the 1st and 14th Amendments? Specifically,

A. Did the District Court err in creating a new threshold evidentiary test under § 2 of the VRA, whereby the only means by which plaintiffs may prove that a challenged law disparately burdens minority voters is by direct quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on the voting method eliminated by the law?

B. Did the District Court err in overlooking Appellants' unrefuted evidence—including both statistical and non-quantitative evidence—that HB2023 will disparately impact minority voters in its VRA analysis?

C. Did the District Court err in failing to consider HB2023's disparate impacts on specific minority communities in its VRA analysis?

D. Did the District Court err in its analysis of Appellants' equal protection claims by failing to consider the burdens that HB2023 imposes on the specific groups of voters most likely to be impacted by it?

E. Did the District Court err in applying the "means-fit" analysis applicable to elections laws in equal protection challenges by accepting the State's purported interest in preserving the integrity of elections against "perceptions" of fraud and concluding that interest outweigh the actual burdens on voters' rights?

2. Did the District Court err in finding that the remaining *Winter* factors did not favor preliminary relief? Specifically,

A. Did the District Court err in concluding that Appellants could only show irreparable harm if they could identify which or how many voters would be burdened as a result of the challenged practice?

B. Did the District Court err in failing to analyze Appellants' motion under the "serious questions" test in its balance of the equities analysis?

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, the primary authorities pertinent to this case are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

Appellants challenge legislation enacted by the Arizona Legislature in March 2016, which makes it a felony to "knowingly collect[] voted or unvoted early ballots from another person." H.B. 2023, 52nd Leg., 2d Reg. Sess. (Ariz.

2016) ("HB2023"), *codified as* A.R.S. § 16-1005(H)-(I); ER699.[1] Although claiming it was necessary to combat "the perception of fraud" and "preserv[e] public confidence in the integrity of elections," ER19-20, HB2023's proponents could not produce a shred of credible evidence in support of those claims. At the same time, they rejected amendments that would have addressed their purported concerns, without imposing HB2023's significant burdens on fundamental constitutional rights. The result is a patently unconstitutional law that will make it more difficult for sections of Arizona's population to vote. Indeed, while elections officials have confirmed they have no intention of enforcing HB2023, the Arizona Republican Party (which voluntarily intervened as a Defendant in this case) is training poll watchers to use it to interrogate and intimidate voters. Unless the decision below is reversed and an injunction immediately entered, HB2023 will operate, not as it was justified—*i.e.*, to guard against imagined or "perceived" threats of fraud—but as it was intended, to suppress turnout, particularly of (the disproportionately minority) voters less likely to support the majority party.

II. FACTUAL BACKGROUND

A. Arizona's History of Discrimination and its Continuing Effects

Arizona has a long history of racial discrimination that has permeated every aspect of social, political, and economic life, including voting restrictions meant to disenfranchise minorities. ER319-42, 984-90. As a result, in 1975, Arizona became

[1] The law includes an exemption for very narrow, limited categories of people who may collect and deliver ballots, including individuals who collect ballots for special taxing district elections, a family or household member, or a medical or healthcare caregiver in specific institutions. A.R.S. § 16-1005(H)-(I).

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. ER340. For the next 38 years, Arizona voters enjoyed protection in election practices and procedures as a result of this federal oversight. This lasted until June 25, 2013, when the U.S. Supreme Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), invalidating the formula for identifying covered jurisdictions, effectively suspending application of § 5. *See id.*; ER340-41. But the effects of centuries of racial discrimination did not evaporate in 2013. To the contrary, they remain an unavoidable present reality for Arizona's minority communities, which suffer marked disparities as compared to the white population in areas such as employment, wealth, transportation, health, and education. *See infra* at 21-22.

B. History of Ballot Collection and Delivery in Arizona

In recent years, Arizona has strongly encouraged voting by early mail-in ballot, including by establishing a Permanent Early Voting List ("PEVL"), which voters 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. As a result, 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 become the predominant means by which Arizonans vote, so, too, have thousands come to rely upon neighbors, friends, organizers,

activists, and campaigns to collect and hand deliver their voted 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, 288-89, 507-08, 546-48, 552-53, 567-572, 589-90, 594, 596-98, 618-20, 627, 928-29; A.R.S. § 16-548. Ballot collection and delivery has been *particularly* critical for minority voters, many of whom live in urban areas where they receive mail but lack secure outgoing mailboxes, or in rural areas—in particular, reservations or border towns with Hispanic populations of over 95%—with no mail service. ER209-10, 225-26, 246-47, 264, 268, 271-72, 299-300, 339-40, 508, 547-48, 571-72, 994-98, 2223-24. These same voters are disproportionately likely to lack reliable transportation to vote in person or deliver the ballots themselves, or to have economic or personal circumstances that make ballot collection and delivery crucial to their exercise of the franchise. ER194, 198-200, 209-211, 214-16, 219-20, 225-26, 231-33, 239-40, 245-46, 257-58, 264, 267-68, 270-72, 279, 281-82, 286, 339-40, 507-08, 546-48, 571-72, 589-90, 594, 596-98, 618-20, 627, 928-30, 999, 1002.

C. Senate Bill 1412 (2011)

It is no secret that ballot collection and delivery has been particularly beneficial for Arizona's minority voters, and legislators who have not traditionally enjoyed broad support in those communities have repeatedly tried to restrict it.

ER194-99, 246, 258, 267-68, 278.[2] They were nearly successful in 2011, with SB1412. ER194-97. At the time, § 5 was in force and State Elections Director Amy Bjelland (who worked with Secretary of State ("SOS") staff and the bill sponsor, Sen. Don Shooter, to draft SB1412) admitted to DOJ that SB1412's ballot collection restrictions were "targeted at voting … in predominantly Hispanic areas" near the 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. *See also* ER2261 ("The number of registered Latino voters [on the] PEVL has more than tripled since 2010 … to more than 300,000 registered voters"). "This sudden increase in the Hispanic community's use" of vote by mail "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."

[2] Arizona's minority voters have been participating in elections in recent years in substantially greater numbers and are statistically far less likely than white voters to support Republican candidates. *See* ER2262-66, 2285.

ER2341. Rep. Gallego described "the atmosphere in Arizona [as] scary" 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 …, 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 advised SB1412 could hurt Native Americans voters. ER2342.

In the end, DOJ had concerns about the impact of the law and requested more information. ER2339-40. Rather than satisfy those inquiries, the Legislature repealed the law. ER198, 2347, 2350.

D. House Bill 2305 (2013)

In 2013, the Legislature enacted HB2305, banning partisan ballot collection and requiring other ballot collectors to complete an affidavit stating they returned the ballot. HB2305 (2013). Violation was a misdemeanor. *Id*. Shortly after enactment, citizen groups organized a referendum effort and collected more than 140,000 signatures to place HB2305 on the ballot for a straight up-or-down vote. ER971. The Legislature then repealed it on party lines. ER198-99, 267, 278. Now-SOS Reagan admitted this was to avoid referendum, and she hoped parts would be reintroduced a la carte. ER630-31. *See also* ARIZ. CONST. art. 4, pt. 1, § 1(6)(C), (14) (restricting enactment of legislation after referendum).

E. House Bill 2023 (2016)

After one more failed attempt in 2015, *see infra* at 22 n.10, Rep. Ugenti-Rita introduced HB2023 in February 2016. *See* ER699. HB2023 imposes harsher penalties than its predecessors, making 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. *Id.*

Representatives of minority communities argued forcefully against the bill, making the case that it would disproportionately burden minority 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 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. ER247-48; *see also* ER225-26, 231-33, 244-46, 264, 268, 271-72, 289, 299-300, 504, 506, 589-90, 511-13, 2223-24, 2227-29. Rep. 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 characterized these voters as 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.

Although some claimed HB2023 was needed to combat fraud, no one identified 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.[3] Instead, proponents resorted to rumors and speculation. ER279-80.[4] Ultimately, Rep. Ugenti-Rita admitted HB2023 "doesn't … tackle" "fraud": it "is about an activity that *could potentially lead to* [fraud]." ER600 (emphasis added); *see also* ER269-70, 279. Yet, several amendments that could have addressed concerns of fraud by less burdensome means were rejected—including an amendment that would have permitted collection if the voter and collector signed an affidavit that the ballot was collected with permission, voted and sealed when collected, and the collector would deliver the ballot by Election Day. *See* ER205, 268-70, 279, 701-02. *See also* ER205, 270-71, 268-69, 557-77, 701-02 (rejecting amendments to permit collection with tracking receipt, to permit counting ballots postmarked by Election Day, and to reduce penalty to misdemeanor).

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[3] Arizona had already long since criminalized ballot collection fraud. *See* A.R.S. §§ 16-1005(a)-(f); *see also* A.R.S. § 16-545; ER526-28 ("[HB2023] doesn't directly address fraud…. [B]allot fraud, electoral fraud, is already addressed all over [the elections code]") (Ugenti-Rita). And several such violations are classified as *misdemeanors*, not felonies. *See, e.g.*, A.R.S. §§ 16-1018, 16-1017 (classifying as misdemeanor the intentional disabling or removal of a voting machine or voting record from a polling place, or hindering the voting of others).

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

On February 4, the House passed HB2023 by a 34-23 vote. 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.

F. HB2023's Enforcement

In response to records requests and in public statements, county recorders have advised they do not intend to take any action to enforce HB2023. *See*, *e.g.*, ER870-72, 2617-18. Indeed, the SOS has failed to provide elections officials with any guidance on the issue. ER493-501. The Arizona Republican Party, however, has confirmed it is training volunteers to demand identifying information from voters dropping off ballots, and is encouraging those volunteers to interrogate and follow them, record their faces and license plates, and even call 911. ER2617-18.

III. PROCEDURAL HISTORY

Appellants initiated this action less than six weeks after HB2023 was signed into law, filing a complaint in the District Court on April 15, which was amended on April 19. ER28. In an initial scheduling conference, Appellants stated their readiness to file a motion for preliminary injunction by May 13, but explained that the motion would benefit from limited discovery. ER103.[5] The District Court granted Appellants' request for expedited discovery, but denied their request for a highly expedited briefing and hearing schedule based on Appellees' objections and assurances that no decision was needed until "late in the game" because the injunction "would be essentially just saying not to enforce a new law." ER96-97.

[5] Appellants' discovery requests were narrow, asking largely that Defendants respond to public records requests made in early April. ER106.

Thus, the District Court ordered that the preliminary injunction motion be filed on June 10, with argument on August 12. ER2840. The District Court stated 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 the schedule be modified to ensure that an order could be issued before then. ER903. The District Court rescheduled argument for August 3, ER80, but did not render a decision until September 23, when it denied the motion for a preliminary injunction in the order that is the subject of this appeal, ER1. Appellants filed a notice of appeal within hours, ER2856, and a motion for injunction pending appeal in the District Court five days later. ER2857. Two hours after the District Court denied that motion on October 4, Appellants filed an emergency motion for an injunction pending appeal and for expedited review with this Court. *See* ER2818-19; Doc. 16. That motion was denied by the motions panel without explanation on October 11. Doc. 27. On October 14, the panel *sua sponte* amended its order to expedite the appeal. Doc. 28.

SUMMARY OF THE ARGUMENT

The criminalization of a means by which thousands of Arizona's voters have participated in past elections plainly abridges—and in some cases, will result in the complete denial of—the fundamental right to vote. Appellants (which include the Arizona Democratic Party ("ADP"), the Democratic National Committee ("DNC") and current presidential and senatorial campaigns), their individual members and constituents, as well as thousands of other Arizona voters, will thus experience irreparable, constitutional harm if HB2023 is not immediately enjoined. The

District Court's conclusion that Appellants were not entitled to a preliminary injunction rested on erroneous constructions of both the VRA and the *Anderson-Burdick* test, which the Supreme Court applies to 14th Amendment challenges to voting restrictions. It further repeatedly credited Appellees' factual arguments, even where there was no evidence in the record to support them, while discounting, minimizing and outright ignoring substantial—and often unrefuted—evidence submitted by Appellants in support of their claims. In doing so, the District Court improperly embraced the approach recently taken by a divided Sixth Circuit panel, which rested on the incorrect assumption that careful scrutiny of state laws burdening voting rights is "an improper intrusion of the federal courts." *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *15-17 (6th Cir. Aug. 23, 2016) (Stranch, J., dissenting). As the dissent to that decision recognized, that "see-no-evil" approach harkens back to an earlier time in our nation's history, and has thoroughly been rejected by Congress in enacting the VRA, as well as countless Supreme Court and other decisions that have followed, which hold that careful scrutiny of laws that impact our most precious right "of having a voice in the election of those who make the laws," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), is not only appropriate, but an important duty of the judiciary. Thus, "[o]ur recent jurisprudence does not shy away from the scrutiny that is essential to protection of the fundamental right to vote." *Ohio Democratic Party*, 2016 WL 4437605, at *15-17 (Stranch, J., dissenting). Indeed, this Court and the Supreme Court have recently reaffirmed that federal courts must be vigilant when constitutional rights are at stake. *See Whole Woman's Health v. Hellerstedt*, 136 S.

Ct. 2292, 2310 (2016), *as revised* (June 27, 2016); *Pub. Integrity All., Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366 (9th Cir. Sept. 2, 2016) (en banc). Evaluated under the appropriate standards, HB2023 cannot survive.

ARGUMENT

I. STANDARD OF REVIEW

An order denying a preliminary injunction is reviewed for abuse of discretion, which occurs when a court "applies an incorrect legal rule or relies upon a factual finding that is illogical, implausible, or without support in inference that may be drawn from the record." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quotation marks and citation omitted). The District Court's legal conclusions are thus reviewed *de novo*, and its factual findings for clear error. *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014). To obtain a preliminary injunction, a plaintiff must establish (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Id*. (citing *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008)). An injunction may also issue if there are "[s]erious questions going to the merits," the hardships tip sharply in favor, there is a likelihood of irreparable injury, and the injunction is in the public interest. *Id*.

II. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

A. HB2023 Violates the VRA

Appellants are likely to succeed on their § 2 claim. To arrive at the contrary conclusion, the District Court created a new threshold test, severely limiting the

means by which voting rights plaintiffs may prove a violation of § 2. This test is unsustainable under Supreme Court precedent, which makes clear courts must reject cramped readings of the VRA so as to "provid[e] the broadest possible scope," to effectuate "the broad remedial purpose of rid[ding] the country of racial discrimination in voting" for which it was enacted. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and quotation marks omitted). When the correct legal standards are applied, it is plain Appellants more than met their burden.

1. Legal Standard

Section 2 provides in relevant part: "No voting … standard, practice, or procedure shall be imposed or applied … in a matter which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A violation "is established if, based on the totality of the circumstances, it is shown that the political processes … are not equally open to participation by members of a [protected] class … in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. § 10301(b).

Courts have come to recognize two different types of § 2 challenges: "vote dilution" and "vote denial" claims. Vote dilution claims arise where "methods of electing representatives" have "the effect of diminishing minorities' voting strength," while vote denial claims challenge any other type of voting "'standard, practice, or procedure'" that "'results in a denial or abridgement of the right … to vote on account of race or color.'" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) ("*LOWV*") (quoting 52 U.S.C. §

10301(a)), *cert. denied*, 135 S. Ct. 1735 (2015). Justice Scalia described a classic § 2 vote denial case as: "if, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity to *participate* in the political process than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able to *elect* their own candidate." *Chisom*, 501 U.S. at 407-08 (Scalia, J., dissenting) (quotation marks and citation omitted); *see also id.* at 397.[6] Despite their different targets, vote dilution and vote denial cases are creatures of the same statutory language, and are subject to significantly overlapping standards. *See, e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-CV-11844, 2016 WL 3922355, at *7 (E.D. Mich. July 21, 2016), *as amended* (July 22, 2016); *Veasey v. Abbott*, 830 F.3d 216, 273-74 (5th Cir. 2016) (Higginson, J., joined by Costa, J., concurring); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003); *see also Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).

As the District Court correctly recognized, this is a vote denial case, which is subject to a two-part test, pursuant to which plaintiffs must show: (1) the challenged provision imposes a discriminatory burden on members of a protected class, and (2) that burden is "in part … caused by or linked to 'social and historical

[6] This is drawn straight from the text of § 2, which prohibits "abridgement" as well as denial of voting rights, 52 U.S.C. § 10301(a); thus, Appellants need not show that HB2023 makes voting *impossible* for minorities, only disproportionately more *burdensome*. *Gingles*, 478 U.S. at 35-36, 44, 47. 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)).

conditions' that have or currently produce discrimination against members of the protected class.'" *LOWV*, 769 F.3d at 240 (quoting *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 553-54 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014)); *see also Gingles*, 478 U.S. at 35-36, 47. Courts have repeatedly found that the text of § 2 requires that, "'[i]n assessing *both* elements, courts should consider 'the totality of the circumstances.'" *Id*. (quoting 52 U.S.C. § 10301(b)) (emphasis added); *see also Veasey*, 830 F.3d at 248; *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998). To do so, courts typically look to the factors found in the Senate Report accompanying the 1982 amendments to the VRA (the "Senate factors"). *See Farrakhan*, 338 F.3d at 1015. These factors are not intended to be comprehensive or exclusive, nor must every one—or even a majority—weigh in favor of finding a § 2 violation. *See id*. at 1015-16; *United States v. Blaine Cty., Mont.*, 363 F.3d 897, 914 n.26 (9th Cir. 2004).

2. Appellants Satisfied The First Part of the § 2 Test

Appellants presented substantial evidence that HB2023 disparately burdens minority voters. Rather than carefully evaluate that evidence as the law requires, the District Court declared that § 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," and then concluded Appellants had not met that standard. ER8-10. This was legal error.

First, as the District Court acknowledged, no court has ever before found that a plaintiff may only demonstrate a disparate impact under § 2 by "quantitative

or statistical evidence" of any sort, much less in the narrow vein described, *see* ER9, and for good reason. It flies in the face of the Supreme Court's admonition that courts must interpret the VRA to "provide[] the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403 (citations and quotation marks omitted). Thus, courts have routinely rejected arguments that there is only one way for § 2 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*, 7 F. Supp. 2d at 1169 ("[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"). And the *en banc* Fifth Circuit recently rejected a comparable argument in *Veasey v. Abbott*, where defendants contended § 2 required plaintiffs to show reduced turnout. 830 F.3d at 259. The court disagreed, recognizing it would "present[] problems for pre-election challenges … when no such data is yet available." *Id*. at 260. "More fundamentally" it would run contrary to § 2's text and ultimately "cripple" the VRA. *Id*. at 261.[7]

The District Court would have done well to follow the Fifth Circuit's lead. Instead, it read a strict evidentiary requirement into the VRA that is not there,

[7] Indeed, 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 it is often unavailable. *See* 28 CFR Ch. 1, §§ 51.26-.28. *See also* ER2314-33 (Arizona's submission to DOJ seeking preclearance of precursor ballot collection law contained no statistical or quantitative evidence).

creating a means for a state to engage in precisely the type of subtle voting discrimination Congress meant to prohibit. *See Chisom*, 501 U.S. at 406 (Scalia, J., dissenting). Under the District Court's construction, a state could even give literacy tests to predominately minority voters, but insulate itself from challenge by not tracking the voters tested. *See Veasey*, 830 F.3d at 260. The result is particularly troubling here, where Arizona has historically failed to track how early ballots are returned and affirmatively rejected amendments to HB2023 that would have enabled the type of analysis that the District Court now says is required. *See* ER205, 268-70, 281, 701-02.[8]

Moreover, Appellants produced ***unrefuted*** quantitative evidence that HB2023 will disparately impact minority voters, who are statistically far less likely to have access to a vehicle (making it much more difficult to travel to polling places to drop off their own ballots, or to the post office in communities without secure—or sometimes *any*—outgoing mail service). ER1002, 2293, 2303, 2311; *see also* ER245-49, 254, 257-58, 270-72, 281, 286, 299-301. They are similarly

[8] The District Court characterized this as shifting the evidentiary burden to the State. *See* ER10 n.3. This was legal error. The proper test does not shift the burden; it simply effectuates the VRA's plain language and purpose by recognizing that the "totality of the circumstances" may sometimes mean plaintiffs demonstrate disparate impact in different ways. And 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) (en banc), necessarily includes that statistics on ballot collection are not available *because Arizona elects not to keep them*. Relatedly, Appellees have previously argued *Veasey* is distinguishable because the plaintiffs were able to prove (after completing discovery and trial on the merits) disparate impact using statistical data. But the *Veasey* plaintiffs proved disparate impact based on data *maintained by Texas*. 830 F.3d at 250-51.

statistically far more likely to have lower levels of education and English proficiency, making navigation of the voting process more difficult generally and the assistance provided by ballot collectors particularly critical (including, for example, to ensure that voters know ballots must be *received*, not postmarked, by Election Day). ER999, 1001, 2293, 2302; *see also* ER231-32, 238-40, 928-31. Voters in these communities are also more likely to change addresses more frequently, making it more difficult to locate the correct polling place. ER999, 1002, 2293; *see also* ER928-31. Indeed, statistical evidence demonstrates that Arizona's minority voters are more likely to have their in-person ballots rejected for being cast in the wrong precinct. ER1012, 2311, 2724-32. Further, when minority voters do go to vote in person in Arizona, they are more likely to have to wait in long lines. ER994-95, 999, 2292. And they are more likely to suffer from health problems, or have difficult financial situations, that make waiting in such lines more burdensome for them than voters without such circumstances (who are, in Arizona, disproportionately white). ER999-1000, 1003, 2293, 2301; *see also* ER232-33, 257-58, 299-301. Such evidence is more than sufficient to "indirectly prove the nature and severity of the burden[]" to meet the first part of the § 2 test. *One Wis. Inst., Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222, at *36, 48 (W.D. Wis. July 29, 2016); *see also Gonzalez*, 677 F.3d at 406; *Veasey*, 830 F.3d at 248; *LOWV*, 769 F.3d at 245; *Husted*, 768 F.3d at 554; *Cuthair*, 7 F. Supp. 2d at 1169. *Cf. NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) ("These

socioeconomic disparities establish that no mere 'preference' led African Americans … to disproportionately lack acceptable photo ID.").[9]

The District Court's analysis in the alternative, in which it "[a]ssum[es], *arguendo*, that a § 2 violation could be proved using non-quantitative evidence," ER10, is also fatally flawed, because it is based on several assumptions and conclusions that are clearly erroneous. 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. *See supra* at 5-9. And, reflecting a deeply troubling evidentiary double standard, the District Court presumes white voters are equally burdened, because "both … live in rural areas." ER11. But even if there were evidence that white voters were just as likely to live in areas *lacking mail delivery* (and as the District Court's opinion recognized, there was none, *see id.*), the demonstrated racial socioeconomic disparities prove that HB2023's burdens will fall disparately on minority voters.

[9] For similar reasons, this Court's opinion in *Gonzalez v. Arizona* does not support the decision below. There, an en banc panel upheld Arizona's voter photo ID law against a § 2 challenge. In doing so, it found that the plaintiff had "adduced *no evidence* that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." 677 F.3d at 407 (emphasis added). Here, by contrast, Appellants produced ample evidence that HB2023 disproportionally impacts minority voters.

The District Court also failed to separately consider the burdens on Native Americans, including in the Tohono O'odham Nation, where 1,900 members lack home mail delivery, and must travel up to 40 miles to the nearest post office. ER247-49, 511-13, 980-81. As a result, many rely on neighbors to communally collect and deliver mail. ER247-49, 511-13, 980-81, 2228, 2342. HB2023 makes this a *felony*. If a law makes voting disproportionately more burdensome on *any* minority community—indeed, a single minority *voter*—that is sufficient to establish a § 2 violation. *See, e.g.*, *LOWV*, 769 F.3d at 244 (quoting 52 U.S.C. § 10301(a)); *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016).

3. Appellants Satisfied The Second Part of the § 2 Test

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*). *See* 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*, 830 F.3d at 263. 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, 257-58, 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 "bab[ied]," ER542-43, or abdicating "responsibility to cast their vote." ER542, 532-33, 576-77.

- Arizona has a history of racially polarized voting, and politicians have and continue to rely on explicit and subtle appeals to racial prejudice (*Factors 2 and 6*). ER336-39, 990-93, 1004-05, 2657 n.4. Subtle racial appeals were even a part of the consideration of HB2023 and predecessor legislation.[10] The effect "is to lessen to some degree the 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.

As discussed, many of these factors are *directly* linked to the disparate burden HB2023 imposes. For instance, the disparities in vehicular access, hourly-wage employment, voting histories, and education that have resulted from discrimination all cause ballot collection to be more important for Arizona's minority voters than for white voters. *See supra* at 18-19.

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

[10] 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.

identify even one concrete example of fraud in Arizona that HB2023 could have prevented. *See supra* at 9; *see also Veasey*, 830 F.3d at 263. Instead, they resorted to speculation, or argued it was sufficient that people believed fraud was occurring or could occur. *See supra* at 9. 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.

The District Court committed clear error in crediting the State's contention that HB2023 "is a prophylactic measure intended to prevent absentee voter fraud" and "eliminates the perception of fraud," ER19, where there was *no* evidence that HB2023 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 Court further erred in crediting the argument that HB2023 was justified because "absentee voting presents a greater opportunity for fraud," ER20; HB2023 did *not* outlaw absentee voting—it simply made it harder for voters without reliable or secure mail service, or reliable transportation, to use it. Tampering with voted absentee ballots, as well as every other type of conceivable fraud related to ballot collection, was *already* a crime. *See* A.R.S. §§ 16-1005(A)-(F); *see also* A.R.S. § 16-545. And the

Legislature rejected amendments to address these concerns without making it more difficult to vote. *See supra* at 9.

Courts have found § 2 cases likely to succeed on far less evidence than present here. *See, e.g.*, *LOWV*, 769 F.3d at 245-47; *Johnson*, 2016 WL 3922355, at *11-13. Moreover, "courts must be careful not to become preoccupied with the trees and thereby lose sight of the forest," it is the "landscape as a whole" that is important. *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 303-04 (D. Mass. 2004); *see also McCrory*, 831 F.3d at 214. But in the District Court, that was Appellees' approach. They nitpicked at evidence regarding a few Senate factors, while ignoring Arizona's lengthy and continuing history of discrimination, including specifically in voting; the stark socioeconomic disparities minorities still suffer; the Legislature's lack of concern for minority voters as evidenced by their dismissal of testimony of HB2023's burdens on those voters; a history of racially polarized voting previously recognized by this Court, *Gonzalez*, 677 F.3d at 406-07; and the demeaning, disturbing racial appeals that continue in Arizona's elections and recently seem to have reached a fever pitch. ER2657 n.4. For all of the foregoing reasons, the District Court should have found that Appellants demonstrated a strong likelihood of success on their VRA claim.

B. HB2023 Violates the First and Fourteenth Amendments

The District Court also made a number of errors in its analysis of Appellants' constitutional claims, causing it to significantly understate HB2023's burdens on 1st and 14th Amendment rights, give too much deference to the state's

proffered interests, and conclude incorrectly that HB2023 is likely to be found constitutional.

The Supreme Court has developed a balancing test to determine whether facially nondiscriminatory elections laws impose an "undue" burden on voters in violation of the 14th Amendment. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). In applying the *Anderson-Burdick* test, courts "weigh 'the character and magnitude of the asserted injury to the rights … that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This approach applies a "flexible" sliding scale, in which "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which [the challenged law] burdens [voting rights]." *Id.* Courts calibrate this standard in each case to "[t]he precise character of the state's action and the nature of the burden on voters." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592-93 (6th Cir. 2012) (quotation marks omitted). It does not, however, permit rational basis review or burden shifting. *Pub. Integrity All.*, 2016 WL 4578366, at *4 (en banc).

As an initial matter, 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

substantial 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, 929-30, 2236-37. It follows that the elimination of ballot collection will prevent voters from casting ballots in the upcoming election. *See also Veasey*, 830 F.3d at 263 ("[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 made several errors in applying *Anderson-Burdick*, each of which contributed to its ultimate erroneous conclusion that Appellants were not likely to succeed on the merits. *First*, it failed to consider the burdens imposed on the specific groups of voters for whom HB2023 is likely to pose the most serious challenges. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186, 191, 198, 201 (2008) (controlling op.); *Pub. Integrity All.*, 2016 WL 4578355, at *3 n.2; *One Wis.*, 2016 WL 4059222, at *35; ER2620-22, 2631-33. The burdens on impacted voters here are severe. They cannot cast an early ballot (a right conferred by A.R.S. § 16-541) unless they incur the burdens (which their socioeconomic circumstances make more difficult to bear or even achieve) of traveling many miles to mail their ballot, drop it off, or vote in person. "These options reduce the burden that the law imposes, but they do not negate it entirely." *One Wis.*, 2016 WL 4059222, at *35. This is particularly so in Arizona, where voting in person has repeatedly proved difficult because of serious errors by election administrators, particularly with Spanish-language materials. ER257-59, 273, 290, 340, 818-20, 824-25, 2699-2703. Voters in the 2016 presidential primary waited for as long as six hours to cast their ballots in Maricopa County. *See*

ER264-66, 287, 296-97. And Arizona rejects the highest number of provisional ballots nationwide, ER2695, at least partly due to Maricopa County's practice of disenfranchising voters through an official policy of misleading voters "to believe that their vote would count" even where it would not. Under Advisement Ruling at 5, *Jones v. Reagan*, CV 2016-014708 (Ariz. Super. Ct. Sept. 9, 2016). These serious issues make in-person voting particularly burdensome for precisely those communities most likely to be impacted by HB2023's criminalization of ballot collection.

In concluding that Arizona's election regime "alleviates" many of HB2023's burdens through other voting options, ER16-17, the District Court illogically assumed that those alternatives—which are plainly more burdensome for the voters who were reliant upon ballot collection through the simple act of handing a ballot to a ballot collector, and require voters to learn about (sometimes obscure) alternative methods of voting shortly before an election—will offset the burdens imposed by HB2023, despite explicit evidence in the record to the contrary. As the District Court itself noted, 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 made several additional legal 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*, 553 U.S. at 198). "However slight th[e] burden [on voting] may appear, … it must be justified by relevant and []legitimate state interests sufficiently

weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (controlling op.) (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.

The District Court also failed to conduct the "means-end fit analysis" the law requires. *See id.*; *accord Burdick*, 504 U.S. at 434; *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015). A state's interest in preventing voter fraud and promoting election integrity, "does not mean … that [it] can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters." *Husted*, 768 F.3d at 547. It "must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, *meaning it actually addresses*, the interest put forth." *Id.* at 545 (emphasis added); *see also One Wis.*, 2016 WL 4059222, at *26. The State did not, and could not possibly, do so here. Applying the proper standard, it is plain that the means-end fit between HB2023 and its purported interests is weak, at best, and those goals could have been achieved through less burdensome means. *See, e.g.*, *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) ("*OFA*") (restriction likely unconstitutional where "no evidence" to support "vague" state justifications); *Common Cause*, 800 F.3d at 928 ("[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).

Finally, the District Court incorrectly concluded that HB2023 does not burden associational rights, undervaluing the expressive significance of participating—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*. *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 Org'd for Welfare & Emp't Rights 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.[11]

III. APPELLANTS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

As this Court has repeatedly recognized, "'[t]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Humble*, 753 F.3d at 911 (quoting *Melandres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). Thus, "[c]ourts 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 v. Burns*, 427 U.S. 347, 373 (1976); *OFA*, 697 F.3d at 436; *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986).[12]

[11] In finding otherwise, the District Court relied solely on the 2-1 decision in *Voting for America, Inc. v. Steen*, 732 F.3d 382, 388 (5th Cir. 2013), which found 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 scrutiny." But HB2023 does only one thing: prohibits a means of voting and getting out the vote. It is not equivalent to "camping" as expressive activity (the *Steen* court's analogy, *id*. at 389). Further, the regulations at issue in *Steen* did not *criminalize* third-party voter registration, only regulated it. *Id*. at 393. And the court's conclusion that "Texas need not show specific local evidence of fraud … to justify preventive measures," *id*. at 394, a conclusion that the District Court relied upon, *see* ER20, cannot be sustained following the Fifth Circuit's *en banc* decision in *Veasey*. *See* 830 F.3d at 262.

[12] A case raising 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).

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. The District Court's conclusion that Appellants had not satisfied this requirement rested on both legal and clear factual error. For instance, the District Court erroneously held Appellants could only show irreparable injury if they identified which or how many voters HB2023 will burden. *See* ER8, 2818. This was an error of law. *See LOWV*, 769 F.3d at 244; *Frank*, 819 F.3d at 386; *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1079, 1082 (N.D. Fla. 2004). Moreover, the record is brimming with the stories of voters who previously would have been severely burdened, and in many cases disenfranchised, but for ballot collection. *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. In each election, voter's circumstances will be different, but these examples demonstrate that HB2023 will irreparably harm voters within Appellants' constituency and membership. *See*, *e.g.*, *OFA*, 697 F.3d at 436 (finding presidential campaign, the DNC and Ohio Democratic Party satisfied irreparable harm supporting injunction extending early voting where "Plaintiffs, their members and constituents, and all … Ohio voters will be irreparably harmed absent an injunction"); Order Granting Prelim. Inj. at 10, 23, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-00607-MW-CAS (N.D. Fla. Oct. 16, 2016) (same). Relatedly, the single-minded focus on individual voters ignores the unrefuted evidence that HB2023 causes the organizational Appellants irreparable harm, because they must divert resources—which then cannot be spent

on the upcoming election—to ensure HB2023 does not prevent their supporters from voting. ER2222-24; *cf.* ER8 (ADP alleged concrete and particularized injury).

In the emergency briefing that preceded this motion, Appellees argued that the absence of evidence of voters who were burdened or disenfranchised as a result of HB2023 in the August 2016 primary, which took place after this matter was submitted and heard below, showed HB2023 will not cause irreparable harm. This argument is fundamentally flawed. Only 29% of Arizona voters voted in that primary in which the Democratic races were mostly uncontested. *See* ER968; https://results.arizona.vote/elections/-103/0/2016-primary-election/featured-races. And there is no evidence that the Republican Party had implemented the voter intimidation tactics that it intends to use in the general election.

IV. THE EQUITIES AND PUBLIC INTEREST BOTH FAVOR AN INJUNCTION

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 Rockies v. Cottrell*, 632 F.3d 1127, 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." *Brewer*, 757 F.3d at 1069 (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 a state is irreparably injured when it is enjoined from effectuating its statutes, ER26, relies on a controversial view this Court has explicitly declined to endorse, noting that, 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). *Second*, it is unclear whether Arizona *will* enforce HB2023 even if it *can*. County recorders have confirmed they do not intend to do so, and the SOS has not issued any guidance on the issue. *See, e.g.*, ER493-501, 870-72, 2617-18.[13] At the same time, the Republican Party is training volunteers to use HB2023 as an excuse to interrogate people dropping off multiple ballots, encouraging them to follow these voters out to the parking lot, photograph and videotape them, and even call 911 to report a crime in progress. 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

[13] In practice, the SOS—despite having vocally advocated for HB2023's passage, and even campaigning on the evils of ballot collection, ER695—has proven to be so unconcerned by its effects that she personally offered to collect ballots for her staffers just days after it was signed into law. ER975.

democratic system affords. These harms to voters are imminent and profound, and plainly outweigh any purported harm suffered by the state.

V. THIS COURT HAS AUTHORITY TO GRANT THE REQUESTED RELIEF PRIOR TO THE ELECTION

In the years since the Supreme Court issued its decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), defendants in voting rights cases have increasingly read that case as an invitation to attempt to delay litigation long enough to then argue that dicta in *Purcell* stating that "[c]ourt orders affecting elections, especially conflicting orders, can … result in voter confusion and consequent incentive to remain away from the polls," *id*. at 4-5, is reason to deny relief. Indeed, a district court judge recently excoriated the Florida Secretary of State for attempting to do just that, rejecting his attempts to "request[] as much time as he felt he could possibly justify so that he could use every second available to run out the clock … thus disenfranchising thousands." Notice of Cancellation of Hr'g at 5, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-00607-MW-CAS (N.D. Fla. Oct. 15, 2016) (Dkt. 34). This Court should similarly reject arguments by Appellees that time has run out and Arizonans must be deprived "of their most precious right" as a result of Appellees' own repeated objections to expedition. *Id*.

In fact, *Purcell* did not hold that a court cannot act to protect voters as an election nears. The Supreme Court recently illustrated this when it denied a stay in *North Carolina v. N.C. State Conference of the N.A.A.C.P.*, No. 16A168 (U.S. Aug. 31, 2016). As a result of that decision, early vote plans had to be revised, and a voter ID law for which there had been training and public education—and that

had just been applied in the primary—was enjoined. N.C. Em. App. to Recall & Stay Mandate at 2, 29-30, No. 16A168 (Sup. Ct. Aug. 15, 2016). Moreover, and in marked contrast to both *Purcell* and *North Carolina*, elections officials have made *no* preparations related to HB2023's implementation or enforcement. ER870, 2618. Nor did *Purcell* involve a law *criminalizing* a means by which thousands cast their ballots.

Appellees repeatedly assured the District Court that the extended schedule *they requested* would not put the case "into the [*Purcell*] danger zone," and that no decision need be rendered until "late in the game," because the injunction "would be essentially just saying not to enforce a new law." ER94-97, 100, 119-20, 122-23. They were correct. Far from creating "voter confusion and consequent incentive" not to participate in the election, an injunction here will avoid irreparable injury to fundamental rights, prevent intimidation and harassment as a result of vigilante attempts to enforce HB2023, and save Arizonans from the risk of being subject to criminal penalties for doing nothing more nefarious than helping their neighbors vote. *See* ER258, 268, 270-71, 279-81, 514-15, 607-08.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court reverse the District Court's denial of the motion for a preliminary injunction and remand with instructions to immediately issue the requested injunction.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

s/ *Elisabeth C. Frost*

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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 17, 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), and is jointly filed by separately represented parties. The brief contains 9,825 words and 35 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*

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,

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

ADDENDUM TO APPELLANTS' OPENING BRIEF

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Key Provisions of the U.S. Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S. Code §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Key Provisions of the Voting Rights Act of 1965, 52 U.S.C. § 10301

Section 2.

No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Arizona House Bill 2023(2016)

An Act

Amending Section 16-1005, Arizona Revised Statutes; Relating To Ballot Abuse.

Chaptered Version

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 16-1005, Arizona Revised Statutes, is amended to read:

16-1005. Ballot abuse; violation; classification

A. Any person who knowingly marks a voted or unvoted ballot or ballot envelope with the intent to fix an election for ~~his~~ THAT PERSON'S own benefit or for that of another person is guilty of a class 5 felony.

B. It is unlawful to offer or provide any consideration to acquire a voted or unvoted early ballot. A person who violates this subsection is guilty of a class 5 felony.

C. It is unlawful to receive or agree to receive any consideration in exchange for a voted or unvoted ballot. A person who violates this subsection is guilty of a class 5 felony.

D. It is unlawful to possess a voted or unvoted ballot with the intent to sell the voted or unvoted ballot of another person. A person who violates this subsection is guilty of a class 5 felony.

E. A person or entity that knowingly solicits the collection of voted or unvoted ballots by misrepresenting itself as an election official or as an official ballot repository or is found to be serving as a ballot drop off site, other than those established and staffed by election officials, is guilty of a class 5 felony.

F. A person who knowingly collects voted or unvoted ballots and WHO does not turn those ballots in to an election official, the United States postal service or any other entity permitted by law to transmit post is guilty of a class 5 felony.

G. A person who engages or participates in a pattern of ballot fraud is guilty of a class 4 felony. For the purposes of this subsection, "pattern of ballot fraud" means the person has offered or provided any consideration to three or more persons to acquire the voted or unvoted ballot of a person.

H. A PERSON WHO KNOWINGLY COLLECTS VOTED OR UNVOTED EARLY BALLOTS FROM ANOTHER PERSON IS GUILTY OF A CLASS 6 FELONY. AN ELECTION OFFICIAL, A UNITED STATES POSTAL SERVICE WORKER OR ANY OTHER PERSON WHO IS ALLOWED BY LAW TO TRANSMIT UNITED STATES MAIL IS DEEMED NOT TO HAVE COLLECTED AN EARLY BALLOT IF THE OFFICIAL, WORKER OR OTHER PERSON IS ENGAGED IN OFFICIAL DUTIES.

I. SUBSECTION H OF THIS SECTION DOES NOT APPLY TO:

1. AN ELECTION HELD BY A SPECIAL TAXING DISTRICT FORMED PURSUANT TO 37 TITLE 48 FOR THE PURPOSE OF PROTECTING OR PROVIDING SERVICES TO AGRICULTURAL LANDS OR CROPS AND THAT IS AUTHORIZED TO CONDUCT ELECTIONS PURSUANT TO 39 TITLE 48.

2. A FAMILY MEMBER, HOUSEHOLD MEMBER OR CAREGIVER OF THE VOTER. FOR THE PURPOSES OF THIS PARAGRAPH:

(a) “CAREGIVER” MEANS A PERSON WHO PROVIDES MEDICAL OR HEALTH CARE ASSISTANCE TO THE VOTER IN A RESIDENCE, NURSING CARE INSTITUTION, HOSPICE FACILITY, ASSISTED LIVING CENTER, ASSISTED LIVING FACILITY, ASSISTED LIVING HOME, RESIDENTIAL CARE INSTITUTION, ADULT DAY HEALTH CARE FACILITY OR ADULT FOSTER CARE HOME.

(b) “COLLECTS” MEANS TO GAIN POSSESSION OR CONTROL OF AN EARLY BALLOT.

(c) “FAMILY MEMBER" MEANS A PERSON WHO IS RELATED TO THE VOTER BY BLOOD, MARRIAGE, ADOPTION OR LEGAL GUARDIANSHIP.

(d) “HOUSEHOLD MEMBER” MEANS A PERSON WHO RESIDES AT THE SAME RESIDENCE AS THE VOTER.

Passed by the House February 4, 2016

Passed by the Senate March 9, 2016.

Approved by the Governor March 9, 2016.

Filed in the Office of the Secretary of State March 9, 2016.

Key Provisions of the Arizona Revised Statutes - Title 16

16-1005. Ballot abuse; violation; classification

A. Any person who knowingly marks a voted or unvoted ballot or ballot envelope with the intent to fix an election for that person's own benefit or for that of another person is guilty of a class 5 felony.

B. It is unlawful to offer or provide any consideration to acquire a voted or unvoted early ballot. A person who violates this subsection is guilty of a class 5 felony.

C. It is unlawful to receive or agree to receive any consideration in exchange for a voted or unvoted ballot. A person who violates this subsection is guilty of a class 5 felony.

D. It is unlawful to possess a voted or unvoted ballot with the intent to sell the voted or unvoted ballot of another person. A person who violates this subsection is guilty of a class 5 felony.

E. A person or entity that knowingly solicits the collection of voted or unvoted ballots by misrepresenting itself as an election official or as an official ballot repository or is found to be serving as a ballot drop off site, other than those established and staffed by election officials, is guilty of a class 5 felony.

F. A person who knowingly collects voted or unvoted ballots and who does not turn those ballots in to an election official, the United States postal service or any other entity permitted by law to transmit post is guilty of a class 5 felony.

G. A person who engages or participates in a pattern of ballot fraud is guilty of a class 4 felony. For the purposes of this subsection, "pattern of ballot fraud" means the person has offered or provided any consideration to three or more persons to acquire the voted or unvoted ballot of a person.

H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.

I. Subsection H of this section does not apply to:

1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.

2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:

(a) “Caregiver” means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.

(b) “Collects” means to gain possession or control of an early ballot.

(c) “Family member” means a person who is related to the voter by blood, marriage, adoption or legal guardianship.

(d) “Household member” means a person who resides at the same residence as the voter.

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s/ *Sarah R. Gonski*