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

STATE DEFENDANTS/APPELLEES' BRIEF

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, as well as 42 U.S.C. §§ 1983 and 1988. The district court entered the Order on appeal on September 23, 2016, and Plaintiffs timely appealed that same day. (ER0001-27); Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this interlocutory order denying Plaintiffs' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES[1]

1. Did the district court abuse its discretion in finding that Plaintiffs do not have a strong likelihood of success on the merits of their claim that H.B. 2023 violates § 2 of the Voting Rights Act?

2. Did the district court abuse its discretion in finding that Plaintiffs do not have a strong likelihood of success on the merits of their claim that H.B. 2023 violates the Fourteenth Amendment by burdening the right to vote?

3. Did the district court abuse its discretion in finding that Plaintiffs do not have a strong likelihood of success on the merits of their claim that H.B. 2023 violates the First and Fourteenth Amendments by burdening the associational rights of the organization Plaintiffs?

[1] Because the Court ordered simultaneous briefing, the State Defendants do not know how Plaintiffs will frame the issues to be decided in this appeal and thus assume that Plaintiffs will raise the issues raised below. Plaintiffs waive any issues not raised in their Brief.

4. Did the district court abuse its discretion in finding that Plaintiffs do not have a strong likelihood of success on the merits of their First and Fourteenth Amendment claim based on partisan fencing?

5. Did the district court abuse its discretion in finding that the balance of hardships and public interest weigh against preliminary injunctive relief?

STATEMENT OF THE CASE

On April 15, 2016, the Democratic National Committee, the Democratic Senatorial Campaign Committee, the Arizona Democratic Party ("ADP"), Kirkpatrick for U.S. Senate, and several Arizona voters (collectively, "Plaintiffs") filed a lawsuit challenging various Arizona election laws and practices.[2] This appeal arises from Plaintiffs' challenge of a new law, enacted as H.B. 2023 in the 2016 legislative session. (ER2946). H.B. 2023 is designed to prevent fraud or abuse in the early voting process and to ensure that a voter's ballot is received by elections officials in the same condition it left the voter's hands, by limiting who may deliver it. (*Id.*) At the same time, H.B. 2023 recognizes that a voter should be able to rely on family members, household members, or caregivers to deliver the voter's ballot, and thus permits those people to possess a voter's early ballot and return it to elections officials. (*Id*.)

[2] The Plaintiffs were joined shortly thereafter by Hillary for America and Intervenor-Plaintiff Bernie 2016, Inc. The Defendants are the Arizona Secretary of State's Office, Secretary of State Michele Reagan, and Attorney General Mark Brnovich (collectively, the "State Defendants"). The Arizona Republican Party and several Republican office holders or candidates intervened as defendants. Plaintiffs also sued various Maricopa County officials, who have not taken a position on the claims related to H.B. 2023.

For many years, Arizona has been a leader among the states in increasing both the opportunity to vote and the convenience of voting for all registered voters. (ER2883-85, ¶¶ 4-19; ER2888-91). In addition to voting at polling places on Election Day, the State permits early voting during the 27 days before an election. A.R.S. § 16-542(C); (ER2883, ¶ 8; ER2894-95, ¶¶ 7-8, 10-11). Early voting may be done in person or by mail. (ER2883, ¶ 5; ER2885, ¶ 15). The State also has a Permanent Early Voting List ("PEVL"). A.R.S. § 16-544. The PEVL voters automatically receive a mail-in ballot for every election in which they are entitled to vote, without requesting an early ballot for each election. The county recorders accept early ballots delivered by mail up until 7:00 pm on Election Day. A.R.S. § 16-548(A); (ER2895, ¶ 11). Early voting for the November 2016 General Election began on October 12, 2016.

For voters who prefer to vote in person, many counties operate multiple in-person early voting sites, some of which are open on Saturdays. (ER2885, ¶ 15; ER2895, ¶ 10; ER2902-14). If a voter received an early ballot by mail, but did not mail the ballot back to the county recorder in time to be received by 7:00 pm on Election Day, the voter may drop the sealed ballot at any polling place or the county recorder's office while the polls are open. A.R.S. § 16-548(A); (ER2885, ¶ 16; ER2895, ¶ 11).

In 2016, Arizona enacted H.B. 2023 to regulate the collection of early ballots. Numerous times throughout the debates on H.B. 2023, legislators stated that the bill was directed to the integrity of the elections process. (ER2921-22, ER2925-26, ER2928-32, ER2939-43). The law went into effect on August 6,

2016, just three days into the early voting period for the August 30, 2016 Primary Election.

H.B. 2023 does not limit any of the many means of voting that Arizona law provides. It only limits who may return a ballot. H.B. 2023 allows any member of a voter's family or household to return an early ballot for the voter. (ER2946). In addition, voters may give their ballots to their caregiver or to an election worker performing official duties. *Id.* If the voter cannot go to the polls because of an illness or disability, the voter can request a special election board to facilitate voting. A.R.S. § 16-549; (ER2885, ¶ 18; ER2895, ¶ 12).

The district court recognized that H.B. 2023 is a reasonable, non-discriminatory election regulation. (*See generally* ER0001-27). On September 23, 2016, the district court denied Plaintiffs' request to enjoin enforcement of H.B. 2023 because they did not show that they have a likelihood of success on their claims that H.B. 2023 violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301, or the First and Fourteenth Amendments. (ER0014, 21, 23, 25).

Plaintiffs appealed the district court decision, and moved the district court for an injunction pending appeal. On October 4, 2016, the district court denied the injunction pending appeal. (ER2818-19). On October 11, 2016, this Court did the same. (Doc. 27). Early voting for the November 8 General Election began on October 12, 2016.

STANDARD OF REVIEW

This Court reviews the district court's decision not to enjoin enforcement of H.B. 2023 for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*,

344 F.3d 914, 918 (9th Cir. 2003) (en banc). That review should be "limited and deferential" and does not include "review [of] the underlying merits of the case." *Id.* The district court's interpretation of the law is reviewed de novo. *Id.*

Plaintiffs sought a preliminary injunction—"an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In order to justify such extraordinary relief, Plaintiffs must show that they (1) are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip[ ] in [their] favor, and (4) an injunction is in the public interest." *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). The less certain "the likelihood of success on the merits, the more plaintiffs must convince the [ ] court that the public interest and balance of hardships tip in their favor." *Sw. Voter Registration*, 344 F.3d at 918.

SUMMARY OF THE ARGUMENT

Plaintiffs' challenges to H.B. 2023 are fatally flawed for one overarching reason—Plaintiffs have not identified a single voter who will be hindered in the voting process by the law. (ER0008-9, 19). Absent such harm, the State's important regulatory interests in preventing fraud in the early voting process and ensuring public confidence in the integrity of its elections are more than sufficient to justify the limitation of a voting convenience. (ER0019-21). Consequently, the district court did not abuse its discretion in determining that Plaintiffs had not met their burden of showing that H.B. 2023 should be enjoined.

In the district court, Plaintiffs failed to demonstrate that they had a likelihood of success on the merits of their § 2 claim because they could not show that H.B. 2023 imposed a disparate impact on minority voters. (ER0008-9). In particular, they provided no statistical evidence that showed that H.B. 2023's reasonable limitation on ballot collection would impact minority voters more than white voters. (*Id.*) Nor did they provide other evidence that would be sufficient to demonstrate a disparate impact. (ER0010). Moreover, Plaintiffs did not establish a "causal connection between [H.B. 2023's limitation of ballot collection] and a prohibited discriminatory result." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc). Because Plaintiffs did not show that H.B. 2023 would disproportionately affect minority voters' opportunity to participate in the political process, they failed to meet their burden on their § 2 claim.

Plaintiffs similarly lacked evidence to show that the loss imposes a severe burden on the right to vote for any voter or group of voters, regardless of race. Arizona law provides numerous ways for voters to vote early or on Election Day. (ER0016-17). Moreover, H.B. 2023 contains a reasonable exception to its prohibition on collection of early ballots—a voter's family member, household member, or caregiver may possess or deliver an early ballot to the postal service or elections officials. (ER0016). Consequently, the district court correctly concluded that H.B. 2023 "does not eliminate or restrict any method of voting," and therefore it "imposes only minor burdens not significantly greater than those typically associated with voting." (ER0016, 19). In view of this slight burden, the State's important interests in minimizing the opportunity for ballot tampering or

destruction and eliminating the perception of fraud are weighty enough to justify the law. *See Crawford v. Marion Cty. Elec. Bd.*, 533 U.S. 181, 204 2008).

The State's important regulatory interests also outweigh the minimal burden on Plaintiffs' First Amendment associational and expressive rights. (ER0023). Although the organizational Plaintiffs may no longer collect ballots from voters, they may still talk to them about candidates, issues, and the voting process. H.B. 2023 does not prevent Plaintiffs from assisting voters with requesting or completing early ballots, or providing instructions on how to ensure the early ballot is timely delivered to elections officials. In short, H.B. 2023's limitation on the ministerial act of transmitting a ballot from a voter to elections officials does not violate the First Amendment. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013).

In view of Plaintiffs' failure to demonstrate a likelihood of success on the merits of their § 2 and constitutional claims, they cannot show that they are likely to suffer irreparable harm, or that the balance of hardships tip in their favor. (ER0025-26). Indeed, they have not shown harm or hardship at all. The State Defendants, on the other hand, can clearly demonstrate that an injunction would harm voters as a whole and that the public interest militates against enjoining enforcement of H.B. 2023. The State Defendants have an interest in enforcing a duly-enacted, reasonable regulation of the voting process. *Maryland v. King*, 133 S. Ct. 1, 3 (2012). Moreover, the public interest would not be served by changing the rules relating to early ballot collection in the middle of the early voting period. *Purcell v.Gonzalez*, 549 U.S. 1, 4-5 (2006); *Sw. Voter Registration*, 344 F.3d at

919. For these reasons, the district court did not abuse its discretion in denying Plaintiffs' request for an injunction of H.B. 2023, and this Court should affirm that decision.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Finding that Plaintiffs Did Not Show a Likelihood of Success on Their Voting Rights Act Section 2 Claim.[3]

A. Plaintiffs Misconstrue the Applicable Standard for Section 2.

Section 2 of the Voting Rights Act ("VRA") prohibits voting practices and procedures "which result[ ] 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 of § 2 therefore requires a showing that members of a group protected by § 2 "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Where, as here, Plaintiffs alleged vote denial under § 2, "proof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." *Gonzalez*, 677 F.3d at 405 (internal quotation marks omitted). Put another way, "[t]o prove a § 2 violation, [Plaintiffs have] to establish that this requirement, as applied to Latinos, caused a prohibited

[3] Plaintiffs incorrectly named the Secretary of State as a Defendant for their § 2 claim. "It is well-established that . . . the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). Plaintiffs challenge H.B. 2023, but the only method for enforcing it is through a criminal proceeding. *See* Ex. 7. The Secretary does not enforce criminal laws. *See generally* A.R.S. § 41-121; Title 16.

discriminatory result." *Id.* at 407. There are thus two requirements: a discriminatory impact and a causal connection. *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

Instead of presenting evidence showing the number or proportion of minority voters who are more heavily impacted by H.B. 2023 than white voters, Plaintiffs asked the district court and now this Court to rely on factors from the Senate Report to the 1982 VRA amendments (the "Senate Factors") to prove a discriminatory impact. (*See* ER2654-56; Doc. 16, at 11). But the Senate Factors by themselves do not show a § 2 violation. Plaintiffs must make a threshold showing of discriminatory impact before moving on to the Senate Factors.[4] *See, e.g.*, *Old Person v. Brown*, 312 F.3d 1036, 1040-41 (9th Cir. 2002).

And, as § 2(b) makes clear, the Court must assess the opportunity provided to vote—not whether individuals choose to use the opportunity provided. *See Frank*, 768 F.3d at 753. "The question is not whether the voting law could be made more convenient—they virtually always can be. Rather, the question is whether the electoral system as applied treats protected classes the same as everyone else, determined by the totality of the circumstances." *McCrory*, 2016

[4] The Plaintiffs also ignored key differences between the claims contemplated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and their claim. District line-drawing was the primary concern in *Gingles*. *See League of Women Voters*, 769 F.3d at 239. While § 2 sweeps more broadly than district drawing, courts must be cautious in applying the Senate Factors to other contexts. *See, e.g., N.C. State Conference of the NAACP v. McCrory*, 1:13CV658, 2016 WL 1650774, at *75 (M.D.N.C. Apr. 25, 2016); *see also Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

WL 1650774, at *117. Plaintiffs presented no evidence—quantitative or otherwise—that H.B. 2023 burdens minority voters' opportunity to vote more heavily than that of white voters.

B. Plaintiffs' Admitted Failure to Provide Any Quantitative Evidence Precluded a Finding of a Likely Disparate Impact.

Plaintiffs do not challenge the district court's finding that they "provide[d] no quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." (ER0008). The district court thus correctly determined that "Plaintiffs are not likely to succeed on their § 2 claim because there is insufficient evidence of a statistically relevant disparity between minority as compared to white voters" caused by H.B. 2023. *Id*.

This Court applied § 2 in a similar manner in *Gonzalez*. There, this Court explained that § 2 requires evidence of a "causal connection" between the challenged law and "some relevant statistical disparity between minorities and whites." *Gonzalez*, 677 F.3d at 405 (internal quotations and citation omitted). Accordingly, the presence of some Senate Factors could not save a § 2 claim when plaintiffs failed to prove that the voter ID law at issue caused Hispanic voters to have less opportunity to vote than white voters. *See id.* at 407.

Here, Plaintiffs contend that the district court "invented a new test" by requiring quantitative evidence of disparate impact. To the contrary, several courts have emphasized the importance of quantitative evidence in § 2 vote-denial claims. *See One Wisc. Inst., Inc. v. Thomsen*, 15-cv-324-jdp, 2016 WL 4059222, at *49 (W.D. Wis. July 29, 2016) ("[P]laintiffs' evidence of a disparate burden

substantially consists of anecdotes and lay observations . . . . This testimony does not establish a verifiable disparate effect."); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) ("[C]ourts regularly utilize statistical analysis to discern whether a law has a discriminatory impact.").[5] Additionally, the district court correctly observed that quantitative evidence is required to prove disparate impact in other contexts, such as claims arising under the Fair Housing Act, Age Discrimination in Employment Act, Equal Pay Act, Title VII, or 42 U.S.C. § 1983. (ER0009).

Plaintiffs have not cited *any* case in which a disparate impact was proven, in the § 2 context or otherwise, without any quantitative evidence. Instead, they point to a few § 2 vote-dilution cases, in which some courts have not required quantitative evidence to prove the existence of some of the Senate Factors. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993) (discussing evidence to show that a minority candidate is minority-preferred); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320-21 (10th Cir. 1996) (same); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) (addressing proof of political cohesiveness and racial bloc voting).[6] This ignores the threshold question of a disparate impact, which

[5] Although the plaintiffs in *Veasey* did not provide voter turnout data, they provided other quantitative evidence. *See Veasey*, 830 F.3d at 250.

[6] Plaintiffs contend that when § 5 preclearance requirements were used, the Department of Justice did not require covered jurisdictions to provide quantitative evidence. (ER2654). But the Supreme Court has made clear that "[t]he inquiries under §§ 2 and 5 are different." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009); *see also Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2624 (2013) (explaining that "there are important differences between [§ 2] proceedings and preclearance proceedings" because "the preclearance proceeding not only switches the burden of proof to the

must be shown before the Senate Factors come into play to show causation. *See League of Women Voters of N.C.*, 769 F.3d at 240.

Plaintiffs further argue they should be excused from producing quantitative evidence because the State does not track the data. (*See* ER0010, n.3). But Plaintiffs, not Defendants, have the burden of showing a violation of § 2 and no authority supports Plaintiffs' claim to the contrary. (*Id*.). Moreover, Plaintiffs had several options to procure quantitative evidence on H.B. 2023's impact in the absence of State-provided data.[7] The ADP has asserted that it has long been involved in collecting early ballots, yet provides no reason why it did not track data on those collection efforts, even though limitations on ballot collection have been considered by the Arizona Legislature since at least 2011. (*See* ER0299-300).

C. Even if Quantitative Evidence Was Not Required, Plaintiffs Failed to Show a Likelihood of Disparate Impact.

In concluding that Plaintiffs failed to show a likelihood of a disparate impact from H.B. 2023, the district court did not rely solely on Plaintiffs' admitted failure to provide any quantitative evidence supporting their claims. The district court also determined that "[a]ssuming, *arguendo*, that a § 2 violation could be proved using non-quantitative evidence, Plaintiffs' evidence is not compelling." (ER0010). The court did not abuse its discretion.

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supplicant jurisdiction, but applies substantive standards quite different from those governing the rest of the nation") (internal quotation marks omitted).

[7] Indeed, the organizational Plaintiffs, who collected ballots before H.B. 2023, were best situated to gather information about their own ballot collection activities. Elections officials, who receive collected ballots through the mail, at early voting locations, and at polling places are not able to gather information about which voters' ballots were collected.

The district court concluded that Plaintiffs' declarations were "predominantly from Democratic partisans and members of organizations that admittedly target their [get out the vote] efforts at minority communities," and thus only provided an incomplete picture of ballot collection, which is used by "groups from all ideological backgrounds." (ER0010 & n.4 (internal quotations and citation omitted)). In response to Plaintiffs' argument that H.B. 2023 will harm voters in Arizona's rural communities, the district court explained that Plaintiffs failed to rebut the evidence showing that many rural communities are predominantly white. (ER0011). The district court further concluded that Plaintiffs' selective use of H.B. 2023's legislative history and a DOJ preclearance file for a previous bill was "largely duplicative" of their insufficient declarations, did not provide any statewide information on ballot collection, and had been taken out of context. (ER0011-14).[8] Indeed, those bills were enacted by legislatures with

[8] Plaintiffs repeatedly suggest that racial animus motivated H.B. 2023. However, the evidence on which Plaintiffs rely arises from different bills from prior legislative sessions. For example, Plaintiffs refer to the similar provisions enacted in 2013 as H.B. 2305. Plaintiffs have mischaracterized H.B. 2305, as if it were solely about banning ballot collection. (Doc. 16, at 4). In reality, H.B. 2305 was an omnibus elections bill that did many things—most of which had nothing to do with ballot collection. H.B. 2305 changed requirements for initiative petitions and petition circulators and created a system to remove voters from PEVL if they repeatedly voted in person. H.B. 2305, 51st Leg., Reg. Sess. (Ariz. 2013), *available at* https://apps.azleg.gov/BillStatus/GetDocumentPdf/223742.

Plaintiffs then jump to the improper conclusion that the legislature must have repealed H.B. 2305 to avoid having its ballot collection provision subjected to popular referendum (Doc. 16, at 13). Rather, now-Secretary Reagan explained that the repeal of the omnibus legislation and *a la carte* re-introduction was needed because "[t]o have something that big with that many statutes be voter protected [after referendum], we wouldn't be able to conform our elections to get even the

substantially different membership from the body that enacted H.B. 2023, so they are of little value when determining legislative intent.

Plaintiffs also suggest that the district court should have considered socioeconomic inequalities between minority and white voters in its disparate impact analysis. But the Senate Factors, including socioeconomic inequalities (Factor 5), only "come[] into play" *after* a plaintiff has shown the requisite disparate impact. *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *13 (6th Cir. Aug. 23, 2016).

D. Plaintiffs Have Also Failed to Establish a Likelihood of Success on the Second Element of a § 2 Claim.

Even if Plaintiffs had shown a discriminatory impact, they must still show that H.B. 2023 "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47; *see also Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 316 (3d Cir. 1994) (rejecting reliance on societal factors where "the record reveals no link between the societal conditions and factors . . . and the electoral practice"); *McCrory*, 2016 WL 1650774, at *83 (holding that the history of discrimination factor, for example,

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easy stuff that we do, the non-controversial things, all of that would have to go to the ballot." (ER0630-31). The concerns about a referendum to repeal H.B. 2305 was that Arizona's Voter Protection Act would make it next to impossible to modify even the more mundane aspects of election law, such as signature and circulator requirements. *See* Ariz. Const. art. IV, pt. 1, § 1(6)(C), (14). Tellingly, there has been no referendum of H.B. 2023.

must be connected to the challenged practice).

Here, Plaintiffs did not connect their analysis of the Senate Factors to H.B. 2023. Indeed, Plaintiffs' attempt to show a link to H.B. 2023 is so tenuous that the same logic could be applied to any electoral practice. (*See* Doc. 16, at 11-12) (arguing that "Arizona's history of discrimination and its continued impacts" make voting other than by ballot collection less accessible to minorities). These generalizations do not establish that H.B. 2023 interacts with evidence of any of the Senate factors. *See Frank*, 768 F.3d at 754 (rejecting interpretation of § 2 that would "sweep[ ] away almost all registration and voting rules"). This claim is akin to the claim rejected in *Gonzalez*. There, this Court found no § 2 violation, despite the presence of some Senate factors, because Plaintiffs "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." *Gonzalez*, 677 F.3d at 407. Here, Plaintiffs failed to show how a reduction in the availability of ballot collection will leave minority voters with less opportunity to participate and elect representatives of their choice.

Indeed, Plaintiffs' own argument to this Court demonstrates that the Senate Factors must bear some causal link to the election law at issue. Plaintiffs have argued that the court in *One Wisconsin* found a disparate burden on minorities because plaintiffs produced evidence that Wisconsin's minority voters were more transient than white voters. (Doc. 25, at 4). "Based on these disparities the court

found 'that the durational residency requirements will impose considerable burdens'" on the minority populations. (*Id.* (quoting *One Wis. Inst.*, 2016 WL 4059222, at *36)). In other words, the *One Wisconsin* plaintiffs pointed to a specific hardship, residential transience, that was linked specifically to a law requiring voters to maintain a residence for a period of time before they were allowed to register to vote. This is exactly the kind of logical connection that Plaintiffs have not shown here. Instead, they rely on general socio-economic disparities between minority and white voters, which are unrelated to the voting regulation at issue. This Court has found such arguments unavailing. *See Gonzalez*, 677 F.3d at 407.

II. The District Court Did Not Abuse Its Discretion in Finding that H.B. 2023 Does Not Violate the Constitution.

Although handing an early ballot to a person who comes to a voter's home and offers to deliver the ballot to elections officials may be marginally more convenient than putting that ballot in a mailbox or dropping it off at a polling place on Election Day, H.B. 2023 does not violate the Fourteenth Amendment because it does not burden the right to vote. *See Ohio Democratic Party*, 2016 WL 4437605, at *6 (stating that elimination of a week during which one could both register and vote early at the same time "can hardly be deemed to impose a true 'burden' on any person's right to vote," and that "[a]t worst, it represents a withdrawal or contraction of just one of many conveniences that have generously facilitated voting participation"). Nor does elimination of this convenience prevent Plaintiffs from engaging in all of the expressive and associational activities that they

conducted before the legislature enacted H.B. 2023. The evidence that Plaintiffs presented in the district court simply does not support a finding that H.B. 2023 meaningfully burdens the right to vote. The district court did not abuse its discretion in finding that Plaintiffs were unlikely to succeed on the merits of their First and Fourteenth Amendment claims. (ER0021, 23).

A. Plaintiffs Offer No Evidence that H.B. 2023 Burdens Voters; the State's Important Regulatory Interests Support Its Constitutionality.

As the district court recognized, the *Anderson-Burdick* test applies to Plaintiffs' claim that H.B. 2023 burdens the Fourteenth Amendment right to equal protection —*i.e.*, the court must "weigh the nature and magnitude of the burden imposed by the law against the state's interests in and justifications for it." (ER0015 (citing *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008))). The extent of the burden on the asserted rights determines the level of scrutiny. Where the burden is not severe, courts "apply less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (internal quotation marks omitted).

Plaintiffs have not shown that H.B. 2023 severely burdens the right to vote. *See Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1199 (Ill. Ct. App. 2005) (holding that the burden from a law limiting the return of absentee ballots more strictly than H.B.2023 "is slight and is nondiscriminatory"). Indeed, even after the Primary Election, Plaintiffs have not identified a single voter whose ability to vote was burdened by H.B. 2023. (*See* ER2811-12, at 40:25-41:3 ("I have no way of

knowing if and how many voters could be impacted by [the ADP's] inability to mail their ballot for them."); ER3097, at 92:5 ("All voters can mail in their ballot.")).[9]

Here, even voters without outgoing mail service at their homes have the 27-day early voting period in which to find a mail box or post office to mail their voted early ballots. (*See* ER2883, ¶¶ 4-8). If they neglect to do so, they can drop them off at any polling place in their county on Election Day. (*See* ER2885, ¶ 16). If they are truly housebound, a family member, household member, or caregiver can deliver the early ballot to the postal service or elections officials for them.[10] *See* A.R.S. § 16-1005(H), (I). Moreover, Plaintiffs have not shown that H.B. 2023 burdens voters' ability to vote in person on Election Day, at an in-person early voting site, or to vote by a special election board.

Plaintiffs argue that these alternatives to ballot collection are more burdensome, and that learning about these alternatives shortly before an election is itself a burden. (Doc. 16, at 14). Surely, voters do not need to learn that they can vote at a polling place near their home on Election Day, and Plaintiffs are well-positioned to inform voters of the other methods of voting. Indeed, Plaintiffs' claims about these harms are purely speculative, as they have not identified a

[9] Plaintiffs argue that this Court should disregard the Primary Election due to the low turnout. (Doc. 25, at 9). But even with low turnout, nearly a million Arizonans voted in the Primary Election, and Plaintiffs have not located anyone who did not vote because the voter could not timely deliver his or her ballot to elections officials.

[10] Of course, these exceptions apply to all voters, regardless of disability or illness.

single voter who will incur a substantial obstacle to voting in November due to H.B. 2023. *See Caribbean Marine Services Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."). In addition, while Plaintiffs claim that H.B. 2023 chills voters from participating, they do not acknowledge that voters do not risk criminal liability, because H.B. 2023 imposes criminal liability solely on ballot collectors. (*See id.*); A.R.S. § 16-1005(H). Furthermore, counties may still count a ballot even if it is returned in violation of H.B. 2023. *See generally* A.R.S. § 16-1005 (containing no prohibition on counting ballots returned by an unauthorized person).

In sum, H.B. 2023 removes one convenience from voters who had previously been targeted by ballot collectors.[11] *See Ohio Democratic Party*, 2016 WL 4437605, at *6 (concluding that the Constitution does not require states to "maximize voting convenience"). In contrast, courts have considered far more extensive restrictions to be only minimal burdens. For example, this Court concluded that Arizona's requirement of documentary evidence of citizenship in order to register to vote is not a severe burden, even though a person without such evidence cannot vote in state elections. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007). The Supreme Court has held that voter ID requirements impose only a minimal burden, even when they require gathering records and

[11] Notably, the "burden" imposed by H.B. 2023 is only new for the relatively few voters who used ballot collectors in the past. Most Arizonans who vote by early ballot have delivered their ballots to elections officials without ballot collection for many years.

traveling to government offices to obtain identification. *Crawford*, 553 U.S. at 198 (stating that the steps necessary to obtain a photo identification card, including travel to a government office, "surely do[ ] not qualify as a substantial burden on the right to vote"). Given the myriad ways in which Arizonans can vote, the district court did not err when it found "that H.B. 2023 imposes only minor burdens not significantly greater than those typically associated with voting." (ER0019).

Plaintiffs complain that the district court applied the wrong standard to their Fourteenth Amendment claim—that it used rational basis review to deny a preliminary injunction. (Doc. 16, at 17). By seizing on one word in the district court's 27-page Order, Plaintiffs ignore the full picture of the analysis, in which the district court determined that "[b]ecause H.B. 2023 imposes only minimal burdens, Arizona must show only that it serves important regulatory interests." (ER0019 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008))). This is the correct standard under this Court's en banc opinion in *Public Integrity Alliance, Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at *4 (Sept. 2, 2016) (stating that laws regulating the right to vote are to be analyzed using the *Anderson-Burdick* framework). Plaintiffs further argue that the district court "fail[ed] to conduct the 'means-end fit analysis' the law requires." (Doc. 25, at 8). But that is merely another way to describe the *Anderson-Burdick* flexible standard—where the interests necessary to justify a voting regulation must increase in importance as the burden on voters increases.

Here, the burden on voters is, at most, slight. *See Qualkinbush*, 826 N.E.2d at 1199. Consequently, the district court properly relied on the State's interests in preventing absentee voter fraud and preserving public confidence in the integrity of elections. (ER0019-21). Indeed, the Supreme Court has repeatedly recognized these interests as important regulatory interests that justify the minimal burden that H.B. 2023 may impose on voters. (*Id.*); *see Crawford,* 553 U.S. at 195 (combatting election fraud); *Purcell*, 549 U.S. at 4 (preserving public confidence in the electoral process).

B. Ballot Collection Alone Is Not Expressive Activity Protected by the First Amendment.

Plaintiffs also argued that H.B. 2023 burdened their associational rights. (Doc. 16, at 15). The *Anderson-Burdick* test applies to this claim as well. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Plaintiffs assert that the district court "undervalu[ed] the expressive significance of participation in, and the assistance of others in participating in, the political process." (Doc. 16, at 15). In fact, the district court properly disentangled Plaintiffs' expressive and associational conduct from the ministerial act of delivering ballots. (ER0022 (citing *Voting for Am.*, 732 F.3d at 389, 392)). As Plaintiffs' witnesses acknowledged, H.B. 2023 does not limit their expressive activity. (ER2813-17, at 99:19-103:13 (describing the ADP's voter education and get out the vote efforts); ER3098-102, at 123:14-127:12). It will not prevent them from engaging with voters to discuss candidates and issues, to inform them about the process of voting early or on Election Day, and to encourage them to vote.

(*Id*.) Nor does H.B. 2023 prevent Plaintiffs from assisting a voter with obtaining and completing an early ballot. The only thing that H.B. 2023 will prevent Plaintiffs from doing is collecting voters' voted ballots. Like the voter registration laws at issue in *Voting for America,* H.B. 2023 "do[es] not in any way restrict or regulate who can advocate pro-vot[ing] messages, the manner in which they may do so, or any communicative conduct. [It] merely regulate[s] the receipt and delivery of completed [ballots], two non-expressive activities." 732 F.3d at 391 (footnotes omitted).[12]

Even if the Court were to conclude that ballot collection is inextricably intertwined with Plaintiffs' associational and speech-related activities, H.B. 2023 does not severely burden those activities. *See Timmons*, 520 U.S. at 358 (applying the *Anderson-Burdick* test to a claim that state election law violated First Amendment associational rights). Plaintiffs are not seriously limited in their ability to engage with voters and encourage them to vote for the candidates that Plaintiffs support. As the burden on Plaintiffs' First Amendment rights is not severe, if it exists at all, the State's interests in deterring fraud related to early ballots are more than enough to justify H.B. 2023 and the district court did not

[12] Plaintiffs argued to the district court that cases analyzing restrictions on voter registration provide appropriate guidance for analyzing their First Amendment claims. (ER0186 (citing *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006)). But they now try to distinguish *Voting for America,* the voter registration case on which the district court relied, because it involved a law that regulated more things than H.B. 2023 does. (*See* Doc. 16, at 15-16 n. 10). The careful analysis of the First Amendment issues in *Voting for America* provides useful guidance, and it should not be ignored because it warrants a result that Plaintiffs dislike.

abuse its discretion in finding that Plaintiffs are not likely to succeed on their First Amendment claim. (*See* ER0023).

C. Plaintiffs Failed to Establish a Likelihood of Success on the Merits of Their Partisan Fencing Claim.[13]

The district court properly concluded that Plaintiffs had not established a likelihood of success on the merits of their "partisan fencing" claim. (ER0023-25). As the district court recognized, *Carrington v. Rash*, 380 U.S. 89, 91-92 (1965), from which the term partisan fencing derives, does not "create a separate equal protection cause of action to challenge a facially neutral law that was allegedly passed with the purpose of fencing out voters of a particular political affiliation." (ER0024 quoting *Ohio Org. Collaborative v. Husted*, 2:15-CV-1802, 2016 WL 3248030, at *48 (S.D. Ohio May 24, 2016), *rev'd on other grounds by Ohio Democratic Party*, 2016 WL 4437605); *see also Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 584 (E.D. Va. 2015). The district court appropriately rejected Plaintiffs' argument that it should adopt a framework for alleged partisan discrimination that has been reserved for discrimination on the basis of race or other suspect classes. (ER0024-25 quoting *One Wis. Inst., Inc. v. Nichol*, 15-CV-324-JDP, 2016 WL 2757454, at *12 (W.D. Wis. May 12, 2016)). Instead, the *Anderson-Burdick* test provides "the proper standard under which to evaluate an equal protection challenge to laws that allegedly burden the right to vote of certain

[13] Plaintiffs did not raise their partisan fencing claim in their motions for emergency relief in the district court (ER2640-65) or in this Court (Doc. 16). Due to the simultaneous briefing ordered here, it is unclear whether Plaintiffs have abandoned this claim.

groups of voters." *Ohio Org. Collaborative*, 2016 WL 3248030, at *48. Because H.B. 2023 imposes "only minor burdens on voting and associational rights," Arizona's interest in preserving the integrity of elections again outweighs Plaintiffs' speculative burden on Democrats under H.B. 2023. (ER0025).

III. No Harm, Let Alone Irreparable Harm, Will Arise Absent an Injunction.

Plaintiffs assert that H.B. 2023 will cause them and "thousands of other Arizona voters" to be irreparably harmed by restricting their "fundamental right to vote." (Doc. 16, at 1). Plaintiffs, however, have not identified a single Arizona voter facing a serious restriction on his or her right to vote due to H.B. 2023. Instead, Plaintiffs point to the thousands of ballots that they and other voter engagement groups have collected in previous elections, arguing that voters "rely" on those ballot collection efforts, and H.B. 2023 "bans them from voting by their preferred method." (*Id.* at 2-3). Past use of a convenient method of delivering an early ballot to the county recorder, however, does not constitute reliance, nor can it prove that voters who have used ballot collectors in the past will face any serious hurdle to voting in the future. *See Ohio Democratic Party*, 2016 WL 4437605, at *6. As the district court correctly recognized, H.B. 2023 "does not eliminate or restrict any method of voting." (ER0016).

Plaintiffs criticize the district court for relying on the deposition testimony of ADP Executive Director Sheila Healy in determining that there was no likelihood of irreparable harm from enforcement of H.B. 2023. (Doc. 16, at 18). In addition to Healy's testimony, the district court also relied on the conclusion that "[b]ecause

Plaintiffs are not likely to succeed on the merits of their claims, they have not shown that H.B. 2023 will likely cause them irreparable harm." (ER0025 (citing *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986))). Moreover, Plaintiffs' attempt to distance themselves from Healy's testimony by asserting that she was testifying in her personal capacity cannot remedy their complete failure to present evidence of who and how many people will be harmed irreparably by enforcement of H.B. 2023.[14]

Early voting for the August 30, 2016 Primary Election began on August 3, 2016, and H.B. 2023 became effective on August 6, 2016. Nearly a million Arizonans cast ballots in the Primary Election, yet Plaintiffs have not located a single person who was unable to vote or was severely burdened in his or her ability to vote because H.B. 2023 limited who could deliver early ballots to the postal service or election officials. If no one was irreparably harmed in the Primary Election, it follows that continued enforcement of this reasonable voting regulation will not cause irreparable harm in the General Election. Indeed, early voting for the General Election began on October 12, 2016, and Plaintiffs still have not

[14] Despite Plaintiffs' counsel's statement during Healy's deposition that she was testifying in her personal capacity, Healy submitted a declaration in her official capacity as ADP Executive Director that described at length the ADP's activities and knowledge. (*See* ER0293-304, at ¶¶ 2, 20; ER2808, at 37:19-22). Healy's testimony that she "ha[d] no way of knowing if and how many voters could by impacted by [ADP's] inability to offer to mail their ballot for them" was a response to questions about the ADP's ballot collection activities described in her declaration. (ER2811-12, at 40:23-41:2; *see also* ER2808-11, at 37:19-40:22).

identified a single voter who will be unable to vote or be severely burdened in voting by H.B. 2023.

IV. The District Court Did Not Abuse Its Discretion in Finding that Neither the Balance of Hardships nor the Public Interest Favors Plaintiffs.

Plaintiffs assert that the district court erred when it did not consider whether they had raised "serious questions on the merits and [whether] the balance of hardships tips in their favor." (Doc. 16, at 18). As explained above, Plaintiffs have presented no evidence of any voter who will be harmed by H.B. 2023. Plaintiffs have established neither a serious question about the merits nor that the balance of hardships tips sharply in their favor. Moreover, "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support issuance of a preliminary injunction, *so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest*." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (emphasis added) (describing the continued validity of the "serious questions" test after *Winter*, 555 U.S. 7). Because Plaintiffs failed to make a showing on any of the prongs of the *Winter* test, the district court properly denied injunctive relief.

Plaintiffs seek an injunction against enforcement of an election law, and the "State indisputably has a compelling interest in preserving the integrity of its election process." *See Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 203. This Court has held that the "law recognizes that election cases are different form ordinary injunction cases," because "hardship falls not only upon the putative

defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration*, 344 F.3d at 919. "Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the public interest." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012).

Here, the public interest and balance of equities tip strongly in the State's favor. *King*, 133 S. Ct. at 3 ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Plaintiffs wrongly assert that the district court's finding that an injunction against a State law irreparably harms the State "has been rejected by circuit courts throughout the country, including this Court." (Doc. 16 at 19). The case Plaintiffs rely on to undermine the district court's finding actually *concedes* that an injunction against State law may harm the State, then weighs that harm against the harm to the plaintiffs.[15] *See Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) ("On the one hand, there is some authority suggesting that 'a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.'"); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparably injury whenever an enactment of

[15] The state statute at issue in *Latta* prohibited same-sex marriage. This Court dissolved the stay against same-sex marriage in Idaho after the United States Supreme Court denied certiorari in *Herbert v. Kitchen*, 134 S.Ct. 893 (2014). The denial of certiorari in *Herbert* vacated stays in seven same-sex marriage cases then pending before the Supreme Court.

its people or their representatives is enjoined."). Additionally, basic separation of powers principles support that an injunction against a validly-enacted criminal law harms the State. *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (discussing the balance required to respect judicial comity and federalism principles when federal courts are called upon to enjoin state criminal laws).

Plaintiffs rely on public statements by county officials and the Secretary of State's failure to provide guidance to county election officials to argue that the State has no interest in enforcing H.B. 2023. (Doc. 16, at 19). Because H.B. 2023 is a criminal law, neither county nor state elections officials are responsible for its enforcement. Instead, that task falls to the Attorney General, who intends to act on any information he receives regarding violations of H.B. 2023. *See* A.R.S. § 16-1021.

At this point the burden to the State, elections officials, and voters is even more acute because Early Voting for the 2016 General Election has already begun in Arizona. Federal court interference with the election at this late date will only increase voter confusion and undermine voter confidence in the integrity of the election. *Purcell*, 549 U.S. at 4-5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to stay away from the polls. As an election draws closer, that risk will increase.").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Plaintiffs' Motion for Preliminary Injunction of H.B. 2023.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the State Defendants state that they are aware of Case No. 16-16865 pending before this Court, in which Plaintiffs appeal the district court's October 11, 2016, order denying them preliminary injunctive relief on their provisional ballot claims.

RESPECTFULLY SUBMITTED this 17th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by Ninth Circuit Rule 32(a)(7). The Brief contains 7,937 words, 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/ Karen J. Hartman-Tellez

CERTIFICATE OF SERVICE

I certify that on October 17, 2016, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

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