MARK BRNOVICH
Attorney General
Firm Bar No. 14000
Kara Karlson (029407)
Karen J. Hartman-Tellez (021121)
Assistant Attorneys General
1275 W. Washington Street
Phoenix, AZ 85007
Telephone (602) 542-4951
Facsimile (602) 542-4385
kara.karlson@azag.gov
karen.hartman@azag.gov
Attorneys for State Defendants

UNITED STATES DISCTRICT COURT
DISTRICT OF ARIZONA

Leslie Feldman, et al., Plaintiffs, v. Arizona Secretary of State's Office, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **STATE AND INTERVENOR DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' JOINT EMERGENCY MOTION FOR STAY AND INJUNCTION PENDING APPEAL**

No good cause exists to grant the relief sought by Plaintiffs' Emergency Motion for Stay and Injunction Pending Appeal (the "Motion) (Doc. 210). Plaintiffs cannot make the required showing for this extraordinary relief (and tellingly ask the Court for a prompt denial if the Court denies the Motion). (*Id.* at 1). H.B. 2023 has now been in effect for nearly two months, including through a Primary Election, and Plaintiffs present no new evidence—in fact, no evidence at all—requiring implementation and enforcement of H.B. 2023 to cease. The State and Intervenor Defendants (collectively, "Defendants") thus jointly respond in opposition to the Motion, and request that it be denied.[1]

I. BACKGROUND

On September 23, 2016, this Court entered its Order denying Plaintiffs' Motion for Preliminary Injunction of H.B. 2023. (Doc. 204). That same day, Plaintiffs filed a Notice of Appeal (Doc. 206), but did not move for reconsideration.[2] Plaintiffs did not file their "Emergency" Motion (Doc. 210) until five days later.

As an initial matter, the Defendants point out that the Court also denied their Joint Motion to Strike Portions of Plaintiffs' Reply Memorandum and Reply Exhibits (Doc. 167). (Doc. 204, at 5). In ruling on Plaintiffs' motion to preliminarily enjoin H.B. 2023, the Court reasoned in relevant part that it "must assess the likelihood that Plaintiffs will succeed on the merits of their claims," and that it "would disserve that end for the Court to blind itself to evidence" that would be presented in a summary judgment motion or at trial. (*Id*.) Plaintiffs have put forth *no additional evidence* in support of the relief sought by their Motion. Instead, Plaintiffs essentially rehash items presented by their P.I. Motion, which this Court properly denied after full consideration of all evidence—even

[1] The Maricopa County Defendants, who took no position on Plaintiffs' Motion for Preliminary Injunction of H.B. 2023 (the "P.I. Motion"), have informed Defendants that they will similarly take no position on the Motion.

[2] Grounds for a motion for reconsideration include "a showing of new facts or legal authority that could not have been brought to [the Court's] attention earlier with reasonable diligence." *See* LRCiv. 7.2(g)(1).

evidence disclosed for the first time with a reply brief. (*Id.*) This Court has thus given Plaintiffs the benefit of the doubt, but determined that it is unlikely that they will succeed on the merits. Plaintiffs' Motion provides no reason to alter that determination.

Perhaps even more telling, however, is what has occurred since the Court heard oral argument on Plaintiffs' P.I. Motion on August 3, 2016—three days before the effective date of H.B. 2023.[3] The Legislature adjourned May 7, 2016, so the effective date of H.B. 2023 was available to Plaintiffs (1) shortly after they filed their Complaint on April 15, 2016, (2) more than a month before they filed their P.I. Motion on June 10, 2016 (Doc. 84), and (3) certainly before any of the scheduling conferences in this matter that Plaintiffs reference in their Motion (Doc. 210, at 5). Despite that, Plaintiffs did not request that the Court expedite its ruling to enter an order before the August 6 effective date even though they sought—and received—an expedited hearing date. (*See generally* Doc. 175, Official Tr. of Mot. Hr'g held 8/3/16). Neither did Plaintiffs seek emergency relief from this Court once H.B. 2023 took effect, though they admit they knew by then that the law was effective. (*See* Doc. 210, at 5).

In fact, H.B. 2023 was in effect for all but the first three days of early voting for the Primary Election—meaning "the approximately 80% of voters" on the Permanent Early Voting List received their ballots and, if they so desired, voted and lawfully submitted them to be counted under the sensible limitations imposed by H.B. 2023.[4] At

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[3] *See* Ariz. State Senate, Final Revised Fact Sheet for H.B. 2023, as enacted, dated March 22, 2016, at 2, *available at* https://apps.azleg.gov/BillStatus/GetDocumentPdf/440478 (stating that H.B. 2023 would be effective on the general effective date). The general effective date is the ninety-first day after the Legislature adjourns *sine die*. Ariz. Const. art. 4, part 1, § 1, cl. 3; *see also* http://www.azleg.gov/general-effective-dates/ (listing August 6, 2016, as the general effective date for laws enacted via the Second Regular Session of the Fifty-second Legislature).

[4] As the Court noted, under H.B. 2023—now A.R.S. § 16-1005(H), (I)—"voters may return their own ballots, either in person or by mail, or they may entrust their ballots to family members, household members, or caregivers." (Doc. 204, at 16).

no time did Plaintiffs request emergency relief or an expedited ruling from the Court based on irreparable harm occurring during the early voting period. Instead, Plaintiffs focus yet again in their Motion on predecessor enactments to H.B. 2023 to attempt to show discriminatory intent or effect. Plaintiffs' belated attempt continues to fail.

Plaintiffs spend just one paragraph on facts actually relevant to the sections of A.R.S. § 16-1005 added by H.B. 2023. (*See* Doc. 210, at 4-5). There was no "intense public backlash" or any threatened referendum of H.B. 2023 itself.[5] And, as to the testimony of the Executive Director of the Arizona Democratic Party (the "ADP"), the one Plaintiff that the Court found had standing to challenge the validity of H.B. 2023, Plaintiffs try to discount her sworn testimony and admissions as something on which the Court "misplaced" its reliance. (Doc. 210, at 6).

If there were actually "substantial evidence that thousands of voters—including specifically Plaintiffs' core constituencies and registered Democrats—rely" on practices limited by H.B. 2023, then Plaintiffs would have presented such evidence at some point in the record of their P.I. Motion, the ADP Executive Director would have testified to it, or Plaintiffs would have gathered such evidence before and during the Primary Election that took place on August 30, 2016,[6] and immediately brought it before the Court. Those things have not occurred because such evidence does not exist. Plaintiffs have made and can make no showing of immediate, irreparable harm warranting this Court's stay of its own Order and belated entry of an injunction barring enforcement of H.B. 2023, which is now law.

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[5] Unlike repealed H.B. 2305, which amended several election laws, including those relating to the process of getting initiatives on the ballot, H.B. 2023 added only the provisions at issue in this lawsuit.

[6] As the Court recognized in its Order (Doc. 204 at 10, n.3), it is not the State's burden to collect this evidence for Plaintiffs, who profess to know "thousands of voters" who rely on practices now limited by H.B. 2023 to vote.

II. PLAINTIFFS MAKE NO SHOWING OF HARM, LET ALONE IMMEDIATE IRREPARABLE HARM, ABSENT A STAY AND INJUNCTION.

Plaintiffs assert that H.B. 2023 will cause them and "thousands of other Arizona voters" to be irreparably harmed by restrictions on "fundamental voting rights." (Doc. 210, at 6). 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 6-7). 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. As the Court correctly recognized, H.B. 2023 "does not eliminate or restrict any method of voting." (Doc. 204, at 16).

Plaintiffs criticize the Court for relying "solely" 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. 210, at 6). But the 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." (Doc. 204, at 25 (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.[7]

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[7] 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*

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 by H.B. 2023's limitation of the persons who could hand deliver early ballots to 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.

III. AS THE COURT PROPERLY FOUND, PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. For their § 2 Claim, Plaintiffs' Admitted Failure to Provide Any Quantitative Evidence Precluded a Finding that H.B. 2023 Was Likely to Have a Disparate Impact on Minorities.

Plaintiffs do not challenge this Court's finding that they have "provide[d] no quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." (Doc. 204, at 8). Given the complete lack of such evidence, this Court correctly held 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." (*Id.*)[8]

Plaintiffs contend this holding "created a new threshold test, never applied before by any court." (Doc. 210, at 7). Nothing could be further from the truth.

Doc. 100, at ¶¶ 2, 20; Ex. 1, Third Declaration of Karen J. Hartman-Tellez, Ex. A, Healy Dep. 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. (Healy Dep. at 40:23-41:2; *see also id.* at 37:19-40:22).

[8] The Court did not require Plaintiffs to "definitively" prove a § 2 violation, as Plaintiffs contend. (Doc. 210, at 8 n.2). Plaintiffs simply ignore the Court's references to and application of the likelihood of success standard. (*See* Doc. 204, at 8, 14, 21-22).

This Court is far from the first to emphasize the importance of quantitative evidence in showing the requisite disparate impact in § 2 vote-denial claims. *See One Wisc. Inst., Inc. v. Thomsen*, 15-cv-324-jdp, 2016 WL 4059222, at *47 (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," as required by § 2); *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016). ("[C]ourts regularly utilize statistical analysis to discern whether a law has a discriminatory impact."). In *Gonzalez*, for instance, the Ninth Circuit quoted the trial court's conclusion that a challenged law did not violate § 2 when it did "not have a *statistically significant* disparate impact on Latino voters." *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc) (emphasis added; internal quotations and citation omitted).

This Court also correctly recognized the necessity of quantitative evidence in proving 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. (Doc. 204, at 9 (citing numerous cases)). Plaintiffs do not address *any* of these authorities, much less explain why their rationale should not apply to cases arising under the VRA. Nor do Plaintiffs cite *any* case in which a disparate impact was proven, in the § 2 context or otherwise, without quantitative evidence. Plaintiffs instead offer brand new unsubstantiated arguments in a belated attempt to justify their admitted failure to provide any quantitative evidence to support their § 2 claim. They provide no reason for not raising these arguments until now. Regardless, none of the new arguments justify the extraordinary relief Plaintiffs seek.

First, Plaintiffs contend that in § 2 *vote-dilution* cases, some courts have not required quantitative evidence to demonstrate vote-dilution. (*See* Doc. 210, at 8-9). None of the three vote-dilution cases cited by Plaintiffs are relevant to a disparate impact analysis in the vote-denial context. Two cases discussed the type of evidence that can

establish that a particular minority candidate is minority-preferred. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ*., 4 F.3d 1103, 1126 (3d Cir. 1993); *Sanchez v. State of Colo*., 97 F.3d 1303, 1320-21 (10th Cir. 1996). The third addressed, in *dicta*, how to prove the political cohesiveness of a minority group and racial bloc voting. *See Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) (noting that "an adequate statistical analysis was presented in this case").[9]

Second, Plaintiffs assert that the Court failed to consider the "totality of the circumstances" in assessing whether a disparate impact from H.B. 2023 was likely. (*See* Doc. 210 at 8-9). The argument fails on the facts and the law. As a factual matter, the Court's Order reflects a careful review of the complete record, which did not include any comparative evidence to show that H.B. 2023 was likely to have a disparate impact on minorities as compared to whites, much less any statistically significant impact. This analysis was consistent with *Gonzalez*, where the Ninth Circuit held that the presence of some Senate Factors could not save a § 2 claim when plaintiffs failed to prove that the voter ID law at issue resulted in Hispanic voters having less opportunity to vote as compared to white voters. *See Gonzalez*, 677 F.3d at 407. Moreover, as a legal matter, and as this Court has noted,[10] the totality of the circumstances analysis, "potentially

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[9] Plaintiffs contend that when § 5 preclearance requirements were used, the DOJ did not require covered jurisdictions to provide statistical evidence. (*See* Doc. 210, at 9). But that preclearance scheme, invalidated by the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), has little to no relevance to the disparate impact analysis here. Given the tens of thousands of preclearance submissions that DOJ previously received under § 5, covered jurisdictions could not have realistically been expected to provide statistical evidence and/or expert analysis for every single voting practice submitted for preclearance. By contrast, where plaintiffs file a lawsuit challenging a specific election practice as contrary to § 2, quantitative evidence is expected and provided as a matter of course. *See Veasey*, 2016 WL 3923868, at *17.

[10] (Doc. 204, at 8) ("The court need not reach the *Gingles* factors and totality-of-the-circumstances inquiry, however, unless the plaintiff proves the existence of a relevant

informed by the 'Senate Factors,'" only "comes into play" *after* the first element of a § 2 claim (disparate impact) has been established. *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *13 (6th Cir. Aug. 23, 2016); *see also Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at * 17 (5th Cir. July 20, 2016).[11]

Third, Plaintiffs contend that this Court's analysis "flies directly in the face" of the "broad remedial purpose" of § 2. (Doc. 210 at 8 (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991)). The *Chisom* Court made this statement, however, in holding that § 2 applied to a vote-dilution claim relating to state judicial elections. *See Chisom*, 501 U.S. at 403-04. The Supreme Court *never* suggested that the requisite disparate impact can be established without *any* hard numbers. Nor does § 2's remedial purpose negate the fact that a § 2 claim has two elements, the first of which requires a "comparative exercise" of the actual quantitative impact of the challenged practice on minority and white voters. (*See* Doc. 204, at 9 ("Disparate impact analysis necessarily is a comparative exercise.")).

The Motion also repeats an argument that this Court previously rejected—*i.e.*, that Plaintiffs should be excused from producing the quantitative evidence necessary to show disparate impact because the State does not track data on delivery of early ballots. This argument fails as well. As this Court recognized, Plaintiffs could not explain in prior briefing or at oral argument (and still cannot explain) why Defendants should bear the burden to provide data for Plaintiffs' § 2 claim. (Doc. 204, at 10 n. 3).

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disparity between minority and white voters at step one."); (*see also* Tr. of Proceedings dated 9/2/16, at 17) (statements by the Court regarding the "second step" of the analysis).

[11] Plaintiffs suggest that *Veasey* held that there is some lesser threshold for quantitative evidence in § 2 claims involving "pre-election challenges to voting laws." (Doc. 210, at 10). That is not correct. Although *Veasey* did not require voter turnout data, *Veasey*, 2016 WL 3923868 at **29-30, the plaintiffs presented other statistical data, including expert analyses, on the number of minorities who lacked the necessary photo ID for voting. *See id.* at 21-22. By contrast, Plaintiffs here have presented *no statistical evidence* on the number of minority or white voters who rely on others to collect their early ballot.

Plaintiffs further ignore that in the absence of state-provided data, they had various options to procure the necessary quantitative evidence on the comparative impact of H.B. 2023. The ADP asserts that it has been involved in collecting early ballots, (Doc. 157, ¶ 4), yet provides no reason why it did not track data on these collection efforts. The ADP either knew or should have known of the importance of such data in potential litigation—as Plaintiffs recognize, the Legislature has considered bills with ballot collection provisions as early as 2011. (*See* Doc. 210, at 3). Alternatively, Plaintiffs could have engaged an expert to conduct a survey to determine the number of Arizona voters who rely on others to collect their early ballot, as well as those voters' "racial and ethnic composition." (Doc. 204, at 9). Plaintiffs cannot, however, "avoid their burden of proof simply because surveying the relevant population might be difficult." (*Id*., at 10 n.3).

Standing alone, Plaintiffs' failure to provide quantitative evidence relating to the impacts of H.B. 2023 necessitated the denial of their preliminary injunction motion.

B. Even if Quantitative Evidence Was Not Required, Plaintiffs Failed to Provide Sufficient Evidence of a Likelihood of Disparate Impact.

This Court's conclusion that Plaintiffs failed to show a likelihood of success on their § 2 claim did not rely entirely on the absence of quantitative evidence. The Court also correctly held that "[a]ssuming, *arguendo*, that a § 2 violation could be proved using non-quantitative evidence, Plaintiffs' evidence is not compelling." (Doc. 204 at 10).[12]

Plaintiffs characterize the Court's alternative analysis as "also deeply flawed." (Doc. 210 at 10). But in discussing these supposed flaws, Plaintiffs simply rehash the same evidence already deemed insufficient. *See Lands Council v. Packard*, 391 F. Supp. 2d 869, 871 (D. Idaho 2005) (denying motion for injunction pending appeal when plaintiffs simply "restated the arguments previously raised in support of their motion for

[12] This alternative holding further shows that, contrary to Plaintiffs' argument, this Court *did* consider the "totality of the circumstances."

temporary restraining order and/or preliminary injunction" and "declin[ing] the invitation to revisit those same issues"). In so doing, Plaintiffs do not challenge (or even address) many of the findings that supported the Court's alternative analysis, such as its conclusions that (1) Plaintiffs' "declarants predominately are Democratic partisans and members of organizations that admittedly target their GOTV efforts at minority communities," (Doc. 204, at 10), (2) "groups from all ideological backgrounds use ballot collection," (*id*., at 10 n. 4) (quoting Doc. 86, ¶ 18), (3) Plaintiffs provided no evidence "that minority voters are more likely to be elderly or homebound, to prefer to wait until Election Day to cast consequential votes, or to forget to mail their ballots," (Doc. 204, at 11), and (4) while some rural communities in Arizona are largely Hispanic, other rural communities are predominantly white. (*Id*.) Plaintiffs' selective discussion of the evidence provides no basis for this Court to reconsider its well-reasoned opinion.

Plaintiffs also suggest that this Court "erred in failing to consider" socioeconomic disparities in its disparate impact analysis. (Doc. 210, at 11). They cite no authority, however, stating that socioeconomic disparities are enough to establish a violation of § 2. Indeed, if that were the case, any election regulation may be subject to § 2 attack on the grounds that the regulation makes it slightly more inconvenient for individuals on the lower end of the socioeconomic scale to vote. *See Burdick v. Takushi*, 504 U.S. 428 (1992) ("Election laws will invariably impose some burden upon individual voters."); *see also Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) ("[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules.").[13]

Even if Plaintiffs had shown that H.B. 2023 disparately impacts minority voters (and they have not), H.B. 2023's limited restrictions on who may collect an early ballot

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[13] Plaintiffs cite *North Carolina State Conference of NAACP v. McCrory*, No. 16-1498, 2016 WL 4053033, at *2-4 (4th. Cir. July 29, 2016), but that case involved analysis of whether laws had been enacted with a racial discriminatory *intent*, not discriminatory *effect*.

does not "result[] in a denial or abridgement" of the opportunity to vote, as § 2 requires. 52 U.S.C. § 10301(a). Minimal inconveniences on voting do not violate § 2. *See Lee v. Va. State Bd. of Elections*, 2015 WL 9274922, at *9 (E.D. Va. 2015); *see also Frank*, 768 F.3d at 753 (photo ID requirement that did not make it "needlessly hard" to vote did not violate § 2). Because H.B. 2023 only imposes minor burdens, § 2 simply does not apply. (*See* Doc. 204, at 16-19).

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

Because Plaintiffs failed to show a likelihood of success on the first step of a § 2 claim, this Court had no need to assess the second step. (*See* Doc. 204, at 14). Had the Court reached the second step, Plaintiffs would have failed at that stage too.

The second step of the § 2 analysis "asks . . . whether the challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions" that have produced discrimination against minorities. (Doc. 204, at 8) (quoting *Husted*, 2016 WL 4437605, at *14 (alterations omitted)). Here, the Motion focuses on social and historical conditions by providing yet another summary of Senate Factor evidence.[14] But, once again, Plaintiffs fail to show how these conditions interact with H.B. 2023 to produce a disparate impact. For example, Plaintiffs "highlight[] the challenges faced by voters" in largely Hispanic communities near the Mexican border, (Doc. 204, at 11), but they do not provide any evidence to show that the voting challenges in these communities is the result of discrimination instead of geography. In the absence of such evidence, Plaintiffs are not likely to succeed at the second step of a § 2 analysis.

[14] The Defendants have previously detailed the many defects in Plaintiffs' selective evidence on the Senate Factors. (*See* Doc. 152, at 7-8; Doc. 153, at 7-10).

D. Plaintiffs Are Unlikely to Succeed on the Merits of Their First and Fourteenth Amendment Claims.

Defendants acknowledge that handing an early ballot to a person who comes to a voter's home and offers to deliver it 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. But the constitutional standard is not one of convenience—the law must actually burden the right to vote to run the risk of violating the Fourteenth Amendment. *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 H.B. 2023. The evidence that Plaintiffs presented in support of their P.I. Motion—the same evidence on which they rely in the Motion—simply does not support a finding that H.B. 2023 meaningfully burdens the right to vote. This Court properly concluded that Plaintiffs were unlikely to succeed on the merits of their First and Fourteenth Amendment claims. (Doc. 204, at 21, 23). Nothing that they have argued in their Motion demonstrates a need for the extraordinary relief of an injunction pending appeal—which, because early voting commences in less than two weeks, would have precisely the same effect as the preliminary injunction that this Court denied.

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

As this Court recognized, it must apply the *Anderson-Burdick* test 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." (Doc. 204, at 15 (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* Healy Dep. 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."); Deposition of Randy Parraz, Doc. 153-1, Ex. 16, at 92:5 ("All voters can mail in their ballot.")).

Moreover, Plaintiffs have not shown that H.B. 2023 burdens voters' ability to vote in person on Election Day or at an early voting site, to vote by mail, to vote by a special election board, or by giving their ballot to a family member, household member, caregiver, or election worker. 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. 210, at 13-14). 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 this new type of burden are purely speculative, as they have not identified a single voter who will incur a substantial obstacle to voting in November due to H.B. 2023. In addition, while Plaintiffs highlight the fact that H.B. 2023 is a criminal law, they gloss over the fact that the penalty is faced by the ballot collector, not the voter. (*See id.*, at 13); A.R.S. § 16-1005(H). Furthermore, counties may still count a ballot even if it is returned in violation of H.B. 2023. *Compare* Cal. Elecs. Code § 3017(d) (mandating that ballots returned by

an unauthorized person not be counted).[15]

In sum, H.B. 2023 removes one convenience from voters who had previously been targeted by ballot collectors.[16] *See Ohio Democratic Party*, 2016 WL 4437605, at *6. In contrast, courts have considered far more extensive restrictions to be only minimal burdens. For example, 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 register to 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 traveling to government offices to obtain identification. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (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").

Plaintiffs complain that the Court applied the wrong standard to their Fourteenth Amendment claim—that it used rational basis review to deny a preliminary injunction. (Doc. 210, at 15). By seizing on one word in the Court's 27-page Order, the Plaintiffs ignore the full picture of the Court's analysis, in which it determined that "[b]ecause H.B. 2023 imposes only minimal burdens, Arizona must show only that it serves important regulatory interests." (Doc. 204, at 19 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008))). Thus, the Court did not shift the burden to the Plaintiffs to demonstrate that there was no rational basis for H.B. 2023. And it relied

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[15] It does not appear that Plaintiffs have ever challenged California's more restrictive ballot collection prohibition. Such selective litigation is telling regarding Plaintiffs' motives in Arizona, where they do not hold the political advantage that they have in California.

[16] Notably, the "burden" imposed by H.B. 2023 is only new for those who were targeted by ballot collectors in the past. Most Arizonans who vote by mail have delivered their ballots to elections officials without ballot collection for many years.

on state interests that the Supreme Court has repeatedly recognized as the type of important regulatory interests that justify the minimal burden that H.B. 2023 may impose on voters. *See Crawford*, 553 U.S. at 195 (combatting election fraud); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (preserving public confidence in the electoral process).

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

With no new evidence, Plaintiffs reiterate their argument that H.B. 2023 burdens their associational rights. (Doc. 210, at 14). 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 Court "undervalued the expressive significance of participation in, and the assistance of others in participating in, the political process." (Doc. 210, at 14). In fact, the Court properly disentangled Plaintiffs' expressive and associational conduct from the ministerial act of delivering ballots. (Doc. 204, at 22 (citing *Voting for Am. v. Steen*, 732 F.3d 382, 389, 392 (5th Cir. 2013))). As Plaintiffs' witnesses acknowledged, H.B. 2023 does not limit their expressive activity. (Healy Dep. at 99:19-103:13; Parraz Dep., Doc. 153-1, Ex. 16, 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.*) 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).

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 *Burdick* test to a claim

that state election law violated First Amendment associational rights). As noted above, 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 Court properly concluded that Plaintiffs are not likely to succeed on their First Amendment claim. (*See* Doc. 204, at 23).

IV. AS THE COURT PROPERLY FOUND, THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST WEIGH AGAINST PLAINTIFFS' RELIEF.

Plaintiffs assert that this Court erred when it did not consider whether they had raised "serious questions on the merits and [whether] the balance of hardships tips sharply in their favor." (Doc. 210, at 17). 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 v. Nat. Res. Def. Council, Inc.* 555 U.S. 7 (2008)). Because Plaintiffs have failed to make a showing on any of the prongs of the *Winter* test, they are not entitled to an injunction pending appeal.

Here, the public interest and balance of equities tip strongly in the State's favor. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) ("[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 rely on public statements by county officials, and the lack of an update to the Secretary of State's Election Procedures Manual to argue that the

State has no interest in enforcing H.B. 2023. (Doc. 210, at 17). 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.

Plaintiffs seek an injunction against 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. The Ninth Circuit has therefore 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 Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). "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).

V. CONCLUSION

For the foregoing reasons, the State and Intervenor Defendants request that the Court deny the relief sought by Plaintiffs' Motion. No good cause or reason exists for a stay of the Court's Order and injunction of the ongoing implementation and enforcement of H.B. 2023 pending resolution of Plaintiffs' appeal. Moreover, no just terms might be applied to protect the opposing parties' rights to the ongoing implementation and enforcement of this sensible state law while the appeal is resolved. *See* Fed. R. Civ. P. 62(c). Accordingly, Plaintiffs' Motion should be denied.

RESPECTFULLY SUBMITTED this 3rd day of October, 2016.

MARK BRNOVICH
Attorney General

By: s/ Karen J. Hartman-Tellez
Kara Karlson
Karen J. Hartman-Tellez
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for State Defendants

SNELL & WILMER LLP

By: s/ Sara J. Agne (w/ permission)
Brett W. Johnson
Sara J. Agne
Colin P. Ahler
Joy L. Isaacs
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Timothy A. La Sota
2198 E. Camelback Road, Suite 305
Phoenix, Arizona 85016

Attorneys for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

s/ Maureen Riordan

5355361

EXHIBIT 1

MARK BRNOVICH
Attorney General
Firm Bar No. 14000
Kara Karlson (029407)
Karen J. Hartman-Tellez (021121)
Assistant Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
Telephone (602) 542-4951
Facsimile (602) 542-4385
kara.karlson@azag.gov
karen.hartman@azag.gov
Attorneys for State Defendants

UNITED STATES DISCTRICT COURT
DISTRICT OF ARIZONA

Leslie Feldman, et al., Plaintiffs, v. Arizona Secretary of State's Office, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **THIRD DECLARATION OF KAREN J. HARTMAN-TELLEZ**

I, Karen J. Hartman-Tellez, declare:

1. I am an attorney employed by the Office of the Arizona Attorney General as an Assistant Attorney General and I represent the Arizona Secretary of State's Office, Arizona Secretary of State Michele Reagan, and Arizona Attorney General Mark Brnovich (collectively, the "State Defendants") in this matter. I am a member in good standing of the State Bar of Arizona. I make this Declaration in support of the State and Intervenor Defendants' Joint Response in Opposition to Plaintiffs' Joint Emergency

Motion for Stay and Injunction Pending Appeal. I have personal knowledge of the facts stated herein and if called upon, could testify competently to them.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts of the Deposition of Sheila Healy (July 14, 2016).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this 3rd day of October, 2016 in Phoenix, Arizona.

s/ Karen J. Hartman-Tellez
Karen J. Hartman-Tellez

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LESLIE FELDMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. CV-16-1065-PHX-DLR
	)	
ARIZONA SECRETARY OF STATE'S OFFICE, et al.,	)	
	)	
Defendants.	)	

DEPOSITION OF SHEILA HEALY

Phoenix, Arizona
July 14, 2016
9:01 a.m.

Prepared by:
MICHAELA H. DAVIS
Registered Professional Reporter
Certified Realtime Reporter
Certified LiveNote Reporter
AZ CR No. #50574

CARRIE REPORTING, LLC
Certified Reporters
4032 North Miller Road
Suite A-100
Scottsdale, AZ 85251
(480) 429-7573

(COPY)

I N D E X

* * *

E X H I B I T S

* * *

DEPOSITION OF SHEILA HEALY commenced at 9:01 a.m. on July 14, 2016 at the law offices of SNELL & WILMER, ONE ARIZONA CENTER, 400 EAST VAN BUREN, PHOENIX, ARIZONA, before MICHAELA HERMAN DAVIS, a Certified Reporter, in and for the County of Maricopa, State of Arizona.

* * *

A P P E A R A N C E S

FOR THE INTERVENOR-DEFENDANTS ARIZONA REPUBLICAN PARTY, BILL GATES, SUZANNE KLAPP, DEBBIE LESKO, AND TONY RIVERO:

SNELL & WILMER
BY: MS. SARA J. AGNE
ONE ARIZONA CENTER
400 EAST VAN BUREN
PHOENIX, ARIZONA 85004-2202

FOR DEFENDANTS ATTORNEY GENERAL, SECRETARY OF STATE, AND THE SECRETARY OF STATE'S OFFICE:

OFFICE OF THE ATTORNEY GENERAL
BY: MS. KAREN J. HARTMAN-TELLEZ
STATE OF ARIZONA
1275 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007

FOR MARICOPA COUNTY:

MARICOPA COUNTY ATTORNEY'S OFFICE
BY: MS. ANDREA CUMMINGS
222 NORTH CENTRAL AVENUE
SUITE 1100
PHOENIX, ARIZONA 85004

(Continued.)

FOR THE PLAINTIFFS:

PERKINS COIE, LLP
BY: MS. AMANDA R. CALLAIS
700 13TH STREET NW
SUITE 600
WASHINGTON DC 20005-3960

PERKINS COIE, LLP
BY: MS. SARAH R. GONSKI
2901 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

FOR INTERVENOR-PLAINTIFF BERNIE 2016, INC.:

COPPERSMITH BROCKELMAN PCL
BY: MR. ANDREW S. GORDON
2800 NORTH CENTRAL AVENUE
SUITE 1200
PHOENIX, ARIZONA 85004

Phoenix, Arizona
July 14, 2016
9:01 a.m.

SHEILA HEALY, called as a witness herein, having been first duly sworn, was examined and testified as follows:

* * *

E X A M I N A T I O N

BY MS. AGNE:

Q. Ms. Healy, I'm Sara Agne. We met a bit earlier. I represent the Arizona Republican Party in the matter of Feldman, et al., versus Arizona Secretary of State, et al.

I'm here to ask you some questions today because you gave a declaration in this matter. And I understand you're the executive director of the Arizona Democratic Party who is also a plaintiff in the matter; is that correct?

A. Yes.

MS. CALLAIS: Sara, Amanda Callais. Can I just interject and just for the record state that Ms. Healy was noticed in her personal capacity as a witness in the case and not on behalf of the Arizona Democratic Party as a representative.

MS. AGNE: Okay. Understood.

MS. CALLAIS: She'll be testifying today in

Exhibit 1 to your deposition is Document 100 as filed in this matter, and it states on the front Declaration of Sheila Healy in Support of Plaintiffs' Motion for Preliminary Injunction.

Do you see that on the front?

A. Yes.

Q. And then if you flip to the last page -- excuse me, second-to-last page of the declaration document, it's numbered 12 at the bottom and 12 of 13 at the top dated June 9, 2016, is that your signature on the signature line?

A. Yes.

Q. You recall giving this declaration in this matter?

A. Yes.

Q. Why did you decide to do that?

A. Because I agreed with the premise of this lawsuit.

Q. And did you give the declaration in your official capacity as executive director of the Democratic party?

A. Yes.

Q. If you'll turn to page 2 of your declaration, and then paragraph 5 states: "As part of its efforts to elect Democrats, ADP engages in extensive voter

registration, get out the vote, and voter protection activities."

Did I read that sentence correctly?

A. Yes.

Q. What are some of the party's extensive voter registration activities?

A. We organize volunteers and have staff members register voters to vote.

Q. Does ADP maintain chain of custody of voter registration forms in Arizona?

A. What does that -- could you clarify what you mean by "maintain chain of custody"?

Q. You described earlier in your career you had a database system and ID numbers for voter registration forms that you worked with in a previous role. Do you have a similar role in Arizona?

A. We have a similar process for tracking voter registration forms to the one I described in Florida, yes.

Q. And that process involves a database and ID numbers?

A. Yes.

Q. And do you know if you received a receipt from the county for how many registration forms are turned in?

A. I don't know.

Q. What is your role in relation to voter

registration activities?

A. I manage many staff to register voters.

Q. How many staff?

A. We have slightly over 115 staff members.

Q. Do you also manage volunteers?

A. No. Not directly.

Q. Do volunteers engage in voter registration activities?

A. Yes.

Q. And staff under you manage the volunteers, I imagine?

A. Yes.

Q. What are the get out the vote activities of the party?

A. The get out the vote activities we engage in are typically -- typically revolve around knocking on doors, making phone calls to our voters, educating them about issues and candidates, and telling them where to vote, how to vote, when to vote, and talk to them about voting by mail.

Q. What sorts of things are voters told by the party about voting by mail?

A. We encourage all voters to do so. We encourage them to sign up for the permanent early voter list. And -- yes.

Q. Does the party educate voters about the proper way to mail in a ballot, an early voting ballot?

A. Yes.

Q. Do you know the specifics of the information offered on that?

A. Yes. We tell them to fill out their form completely and mail it in.

Q. And when you mention their form, you mean their ballot?

A. Their -- right now we're primarily focussed on encouraging people to send in a permanent early voter list application.

Q. Okay. At election time in the weeks before the election when ballots are being filled out, does the party encourage voters to fill those out and mail those in?

A. We are planning on it.

Q. And then for the voter registration activities you described, HB2023 will not impact those, to your knowledge?

A. Impact the voter registration activities?

Q. Correct.

A. No, not to my knowledge.

Q. And the get out the vote activities that you described, HB2023 will not impact those?

A. Well, that, I don't know because we -- I have no

way of knowing if and how many voters could be impacted by our inability to offer to mail their ballot for them. We imagine that there are those voters and -- yes.

Q. For previous elections in Arizona, the May 17th special election for example, were there voters that asked the party to mail in their ballots -- or to turn in their ballots for them that you recall?

A. Yes.

Q. And what were they told?

A. I personally recall a voter dropping off two ballot applications -- I'm sorry. Now I'm not totally remembering.

I personally recall that a voter in some way asked us while I was sitting at the front desk or towards the front desk to mail in ballots for them, but I don't recall if it was for the May 17th election.

Q. And did the party do that for the voter?

A. I don't recall.

Q. Do you recall any voters asking the party to mail in a presidential preference election ballot?

A. I don't recall.

Q. In paragraph 5, the first sentence of your declaration, you also mention voter protection activities. What sort of activities are those?

A. Typically, in other states that I've worked in

polling place locator services to voters?

A. Yes.

Q. And are you aware if any government agencies in the state provide polling place locator information to voters?

A. Yes.

Q. Do you know what those are?

A. I know that the Maricopa County elections website has a polling place locator. And I believe the secretary of state's website does as well.

Q. Do counties provide notice of polling place locations when they send out early -- not early ballots, sample ballots?

MS. CALLAIS: Objection; form.

THE WITNESS: I can't speak to how that process has worked in past election cycles. And I don't know what their plan is to roll that out this year.

BY MS. HARTMAN-TELLEZ:

Q. HB2023 has not prohibited the Arizona Democratic Party from talking to people about issues and candidates for the upcoming elections, has it?

A. No.

Q. And it won't prohibit you from doing that in the future?

A. No, it won't prohibit us from talking to people

about issues and candidates.

Q. And HB2023 has not prohibited the Arizona Democratic Party from assisting citizens with registering to vote for upcoming elections, has it?

A. No. We'll still be able to register people to vote.

Q. So also in the future, you'll be able to assist? HB2023 will not prohibit that?

A. No.

Q. And HB2023 has not prohibited the Arizona Democratic Party from helping citizens to request early ballots, has it?

A. No. We can still encourage people to request early ballots, yes.

Q. And you can tell them how they can get on the permanent early voting list?

A. Yes.

Q. And if they don't want to be on the permanent early voting list but they still want an early ballot how they can request one for a particular election?

A. We can still tell them that, yes.

Q. Do you assist voters who request assistance in filling out their ballots?

MS. CALLAIS: Objection; form.

THE WITNESS: Yes. If somebody is disabled

and unable to fill out their ballot and specifically asks one of our staff members or volunteers for help, I believe as long as they sign, they are able to sign the affidavit on the back of the form, that would be within the confines of the law.

BY MS. HARTMAN-TELLEZ:

Q. And we're talking about early ballots; correct?

A. Yes.

Q. And HB2023 won't prohibit you from providing that assistance; correct?

A. No, I don't believe so.

Q. In paragraph 27 of your declaration, you state that: "HB2023 will prohibit ADP from helping early voters ensure that their ballot is counted in the upcoming 2016 general election and other future elections"; is that correct?

A. Yes.

Q. But HB2023 will not prohibit ADP from telling voters what the deadline is for returning early ballots by mail, will it?

A. No, but "helping" here is defined in a broader context than that.

Q. HB2023 will not prohibit the ADP from telling voters the several ways that they may return their early ballots, will it?

A. No, it won't prohibit us from talking to them.
Q. And HB2023 will not prohibit the ADP from telling voters that early ballots returned by mail will be counted if they are returned on time, will it?
A. No, it won't prohibit us from doing that.
Q. And it will not prohibit the ADP from telling voters how they may vote early other than by mail-in ballot, will it?
A. No.
Q. And HB2023 will not prohibit the ADP from assisting voters who are eligible to obtain assistance in casting a ballot pursuant to ARS 16-549, which is Exhibit 3 or 4 regarding special election boards?
MS. CALLAIS: Objection; form.
MS. HARTMAN-TELLEZ: It's Exhibit 3.
BY MS. HARTMAN-TELLEZ:
Q. And I know you weren't terribly familiar with that law when you first saw it, but you do understand that it provides for special election boards for disabled or ill voters; correct?
A. Yes. So I'm sorry, could you repeat the question?
Q. Sure.
HB2023 will not prohibit the Arizona Democratic Party from assisting voters who are eligible to obtain

assistance in casting a ballot pursuant to that law; correct?

MS. CALLAIS: Same objection.

THE WITNESS: Well, it wouldn't prohibit us from telling them about special election boards, but it would still -- it would still inhibit our ability to physically help them mail in their ballot.

BY MS. HARTMAN-TELLEZ:

Q. HB2023 will not prohibit the Arizona Democratic Party from telling voters who have mobility impairments that they may request curbside voting at their polling place, will it?

A. No, we'd still be able to tell them about it.

Q. And HB2023 will not prohibit the Arizona Democratic Party from telling voters who have mobility impairments that if they are able to get a ride to the polling place, that they may ask a poll worker to come out of the polling place to retrieve their sealed early ballot, will it?

MS. CALLAIS: Objection; form.

THE WITNESS: If they can find a polling worker, yes.

MS. HARTMAN-TELLEZ: Well -- okay.

I have no further questions.

MS. CUMMINGS: I have just a couple.