

Daniel C. Barr (# 010149)
Sarah R. Gonski (# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788
Telephone: (602) 351-8000
Facsimile: (602) 648-7000
DBarr@perkinscoie.com
SGonski@perkinscoie.com

Marc E. Elias (WDC# 442007)*
Bruce V. Spiva (WDC# 443754)*
Elisabeth C. Frost (WDC# 1007632)*
Amanda R. Callais (WDC# 1021944)*
Alexander G. Tischenko (CA# 304743)†
PERKINS COIE LLP
700 Thirteenth Street NW, Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com
ATischenko@perkinscoie.com

Joshua L. Kaul (WI# 1067529)*
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703
Telephone: (608) 663-7460
Facsimile: (608) 663-7499
JKaul@perkinscoie.com

Attorneys for Plaintiffs

**Admitted pro hac vice*

† Not yet admitted in Washington, D.C.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' TRIAL BRIEF

INTRODUCTION

“Voting should be easy in America. In Arizona, it is not, and the burden falls heaviest on minority voters.” *Feldman v. Ariz. Sec’y of State’s Office*, 842 F.3d 613, 628 (9th Cir.) (“*Feldman II*”) (Thomas, C.J., dissenting), *reh’g en banc granted*, 840 F.3d 1164 (9th Cir. 2016).

This is nothing new: “Arizona has had a long history of imposing burdens on minority voters.” *Feldman v. Ariz. Sec’y of State’s Office*, 840 F.3d 1057, 1095-96 (9th Cir.) (“*Feldman I*”) (Thomas, C.J., dissenting), *reh’g en banc granted*, 841 F.3d 791 (9th Cir. 2016). “From 1912 to the early 1960s,” for example, “election registrars applied the literacy test to reduce the ability of African Americans, Native Americans, and Hispanics to register to vote.” *Id.* at 1095 (Thomas, C.J., dissenting). “Because of its long history of imposing burdens on minority voting, Arizona became one of nine states subject to the pre-clearance requirements of the Voting Rights Act after it was amended in 1975 to protect language minorities.” *Id.* at 1096 (Thomas, C.J., dissenting). The U.S. Department of Justice subsequently “vetoed four statewide redistricting plans proposed by Arizona that appeared to discriminate against minorities.” *Id.* (Thomas, C.J., dissenting). In addition, as a result of the adoption in 2004 of Proposition 200, a proof-of-citizenship requirement for voter registration, approximately 31,000 people had their voter registration forms rejected between 2005 and 2007. Ex. 89 (Berman Rpt. at 19).

This case challenges two voting rules that burden voters: (1) House Bill 2023 (“HB 2023”), which, subject to certain exceptions, criminalizes the possession and collection of another’s ballot, and (2) Arizona’s refusal “to count ballots cast out-of-precinct, even for races in which the citizen is entitled, qualified, and eligible to vote.” *Feldman II*, 842 F.3d at 628 (Thomas, C.J., dissenting). The evidence at trial will show that these rules burden Arizona voters in general and minority voters in particular, and that the State’s interest in the rules do not justify the burdens they impose. These rules should be enjoined.¹

¹ To the extent that Defendants assert that Plaintiffs do not have standing or failed to join necessary parties, or again raise another argument that Plaintiffs and/or the Court

PRELIMINARY INJUNCTION PROCEEDINGS

The merits phase of this case was preceded by preliminary injunction proceedings. In the course of those proceedings, the Ninth Circuit, sitting en banc, granted Plaintiffs' motion for an injunction of HB 2023 pending appeal. *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir.) (en banc) ("*Feldman III*"), stayed, *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016). The court explained that it was granting the motion "essentially for the reasons provided in" Chief Judge Thomas's panel dissent. *Id.* While the en banc court's decision was stayed—it was issued four days before Election Day and the primary dissent focused heavily on *Purcell v. Gonzalez*, 549 U.S. 1, 127 (2006), see *Feldman III*, 843 F.3d at 407 (O'Scannlain, J., dissenting)—it remains good law.² Chief Judge Thomas's panel dissent in *Feldman I* is thus highly instructive here.

Chief Judge Thomas's panel dissent in *Feldman II* is also pertinent. To be sure, that dissent was not expressly adopted by the en banc Ninth Circuit. But the Ninth Circuit ordered that *Feldman II* be reheard en banc. *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1164 (9th Cir. 2016) ("The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."). And, while the en banc court declined to grant Plaintiffs' motion for an injunction pending appeal of Arizona's rule disenfranchising OOP voters, the court, citing *Purcell*, expressly noted that it "decline[d] to issue any order that would potentially disrupt procedures in the upcoming election." *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165, 1166 (9th Cir. 2016) (per curiam). In other words, it denied the injunction pending appeal due to the proximity of the 2016 general

have previously addressed, Plaintiffs incorporate by reference their arguments from prior briefing in this case.

² See, e.g., *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) ("[T]he default rule (at least in the Ninth Circuit) is that once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority. Thus, it appears that a stay of proceedings pending Supreme Court review does not normally affect the precedential value of the circuit court's opinion.") (quotation omitted).

election—and not because of any skepticism regarding the merits of Plaintiffs’ claims. Accordingly, this brief cites Chief Judge Thomas’s panel dissent in *Feldman II* for its persuasive value.

ARGUMENT

I. HB 2023

The evidence in this case—from voters, activists, election administrators, elected officials, and experts—will show that HB 2023’s ban on most forms of ballot collection makes it more difficult for many Arizonans to vote; that these burdens fall disproportionately on particular groups of voters, including racial and ethnic minorities and disabled voters; and that the State’s meager justifications for HB 2023 “do not conceal the State’s true motivation,” *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), of suppressing the vote of Arizona’s growing minority population. For three reasons, HB 2023 should be invalidated.

First, HB 2023 violates Section 2 of the Voting Rights Act (“VRA”). To prove a Section 2 claim, a plaintiff must show that (1) the challenged law “impose[s] a discriminatory burden on members of a protected class” and (2) the “burden [is] in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.” *Feldman I*, 840 F.3d 1091 (Thomas, C.J., dissenting). A court determining whether this burden has been met should read the VRA to “provide[] ‘the broadest possible scope’ in combating racial discrimination.” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). In addition, the challenged law need not make it *impossible*—but rather disparately more burdensome—for minorities to vote, and the total number of votes affected is not the relevant issue. *See generally* Opp. to Int.-Defs’ Mot. to Dismiss, Doc. 255 at 7-8, 10; *Feldman II*, 842 F.3d at 635 (Thomas, C.J., dissenting) (“the total number of votes affected is not the relevant inquiry; the proper test is whether minority votes are burdened”).

1 As set forth at length in Plaintiffs' Proposed Findings of Fact and Conclusions of
2 Law ("PFOFs"), the evidence here overwhelmingly establishes that HB 2023 disparately
3 burdens groups of minority voters. Dr. Jonathan Rodden reports, for instance, that rural
4 Native Americans lack mail service at "quite striking" rates, Ex. 97 (Second Rodden Rpt.
5 at 57), and the rates of vehicle access for Native Americans are quite low, *id.* at 58.
6 Compounding the problem, rates of disability among Native Americans are high, with "17
7 percent of Native Americans [] disabled in Apache County, 22 percent in Navajo County,
8 and 30 percent in Coconino County." *Id.* at 60. The prohibition on most ballot collection
9 thus makes it difficult, if not impossible, for some Native-American voters to utilize early
10 voting. *See also Feldman I*, 840 F.3d at 1093 (Thomas, C.J., dissenting) ("The record
11 evidence was plain and uncontroverted: H.B. 2023 places a disproportionate burden on the
12 voting opportunities of members of the Tohono O'odham tribe in comparison with the
13 population of white voters."). Similarly, "the rural communities of Somerton and San
14 Luis, which are comprised of 95.9% and 98.7% Hispanic voters, respectively, [a]re
15 without home mail delivery and reliable transportation." *Id.* at 1094 (Thomas, C.J.,
16 dissenting). And the evidence "show[s] a similar pattern in urban areas," where
17 "[m]inority voters encountered significant burdens in exercising their right to vote." *Id.* at
18 1093 (Thomas, C.J., dissenting).

19 These disparate burdens are clearly caused by or linked to Arizona's history and
20 the ongoing effects of discrimination. As discussed in the PFOFs, Arizona has an
21 extensive history of discrimination that has resulted in a host of socioeconomic disparities,
22 including disparities in areas such as access to the mail and health, *see* Ex. 97 (Second
23 Rodden Rpt. at 57); Ex. 91 (Lichtman Rpt. at 33, 42), which are directly related to the
24 degree to which HB 2023 is burdensome for a given voter. *See generally* Ex. 91
25 (Lichtman Rpt. at 38) ("Decades of research have demonstrated that socio-economic
26 standing significantly impacts the ability to fully participate in the political process.").
27 And, on a historical record that is very similar to that presented here, Chief Judge Thomas
28 found that Plaintiffs had established a likelihood of success on this second prong of the

1 Section 2 analysis. *Feldman I*, 840 F.3d at 1095-97 (Thomas, C.J., dissenting). This Court
2 should therefore hold that HB 2023 violates Section 2 of the VRA.

3 *Second*, HB 2023 should be invalidated because it unduly burdens the right to vote
4 and infringes on the right to associate in violation of the First and Fourteenth
5 Amendments. In assessing this challenge, the Court should apply the *Anderson-Burdick*
6 balancing test, pursuant to which the Court must weigh an election regulation's harm to
7 First and Fourteenth Amendment rights "against the precise interests put forward by the
8 State as justifications for the burden imposed by its rule, taking into consideration the
9 extent to which those interests make it necessary to burden the plaintiff's rights." *Pub.*
10 *Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc)
11 (internal quotation marks omitted), *cert. denied*, 137 S. Ct. 1331 (2017).

12 Here, as touched upon above and discussed at length in the PFOFs and Chief Judge
13 Thomas's dissent in *Feldman I*, the elimination of most forms of ballot collection
14 effectively puts early by-mail voting out of reach for some voters. *See generally id.* at
15 1024 n.2 ("[C]ourts may consider not only a given law's impact on the electorate in
16 general, but also its impact on subgroups, for whom the burden, when considered in
17 context, may be more severe."). Given that early by-mail voting is by far the most
18 common form of voting in Arizona, and that "in-person voting opportunities are
19 significantly hindered by lack of polling places and significant changes in polling places,
20 all of which have caused extraordinarily long lines for voting in person" and have
21 rendered such "'opportunities' for alternative voting ... illusory," *Feldman I*, 840 F.3d at
22 1097 (Thomas, C.J., dissenting), this burden is severe.

23 "Against this burden, the state's justification for the law was weak." *Id.* at 1089
24 (Thomas, C.J., dissenting). As Chief Judge Thomas noted, "the sponsors of the legislation
25 could not identify a single example of voter fraud caused by ballot collection. Not one.
26 Nor is there a single example in the record of this case." *Id.* (Thomas, C.J., dissenting).
27 Indeed, Rep. Michele Ugenti-Rita, the sponsor of the bill, acknowledged that "[t]his bill
28 doesn't reference fraud. This bill doesn't tackle that. This is about -- this is about an

1 activity that could potentially lead to that.” Ex. 17 at 83:15-18; Ex. 91 (Lichtman Rpt. at
2 38) (“Again, this doesn’t -- there’s not fraud in this bill. It doesn’t directly address fraud.
3 It almost indirectly addresses it.”). Nor is there any evidence in the record that the practice
4 of ballot collection undermined confidence in elections, or that HB 2023—a bill that still
5 permits certain forms of ballot collection, has gone unenforced, and is clearly perceived
6 by some to be targeted at minority voters—would do anything to address such a lack of
7 confidence.

8 In an attempt to resuscitate the constitutionality of HB 2023, Defendants have
9 grasped at allegations of fraud, or potential fraud, in Yuma County from several years
10 before HB 2023 was enacted. But all of the “evidence” that will be presented is hearsay.
11 Moreover, there will be no evidence of a conviction or even criminal charges—because
12 there were none. And the evidence indicates that these charges were unfounded. *See*
13 PFOFs § V.C. Tellingly, in the legislative history of the various bills attempting to
14 regulate ballot collection, these incidents were never mentioned. Thus, these post-hoc
15 fraud allegations do nothing to alter Chief Judge Thomas’s conclusion that “the specter of
16 voter fraud by ballot collection is much like the vaunted opening of Al Capone’s vault:
17 there is simply nothing there.” *Feldman I*, 840 F.3d at 1090 (Thomas, C.J., dissenting).
18 HB 2023 cannot survive *Anderson-Burdick* scrutiny. *Id.* (Thomas, C.J., dissenting)
19 (“[W]hen one balances the serious burdens placed on minorities by the law against the
20 extremely weak justification offered by the state, one can only conclude under the
21 *Anderson-Burdick* analysis that the plaintiffs have established a likelihood of success on
22 the merits of their Fourteenth Amendment claim.”).

23 *Third*, HB 2023 is unconstitutional because it was intended, at least in part, to
24 suppress minority voting in violation of the Fourteenth and Fifteenth Amendments. In
25 assessing claims of this nature, courts look to several factors, including a law’s
26 disproportionate impact, contemporaneous statements of legislators, and the historical
27 background and sequence of events leading to a law’s enactment. *Vill. of Arlington*
28 *Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

1 These factors weigh heavily in support of a finding of intentional discrimination.
2 As discussed elsewhere in this brief and other filings in this case, HB 2023
3 disproportionately burdens minority votes, and its proponents knew it would; Arizona has
4 a lengthy history of discrimination against minority voters; and the justifications offered
5 for HB 2023 were meager.

6 The sequence of events preceding the enactment of HB 2023 is also highly
7 revealing. As the en banc Ninth Circuit explained,

8 In 2012, Arizona submitted a previous iteration of H.B. 2023 for
9 preclearance. The Department of Justice expressed concern and refused to
10 preclear the bill, S.B. 1412, without more information about its impact on
11 minority voters. Rather than address this concern, Arizona withdrew S.B.
12 1412 from preclearance and repealed it the following session. Now,
unhindered by the obstacle of preclearance, Arizona has again enacted this
law—a mere seven months before the general election—with nothing
standing in its way except this court.

Feldman III, 843 F.3d at 369.

13 Although the details differ, this history calls to mind the sequence of events leading
14 to the enactment of discriminatory voting legislation in North Carolina, where,
15 “immediately after *Shelby County*, the General Assembly vastly expanded an earlier photo
16 ID bill and rushed through the legislative process the most restrictive voting legislation
17 seen in North Carolina since enactment of the Voting Rights Act of 1965.” *McCrory*, 831
18 F.3d at 227. There, the Fourth Circuit found these facts “devastating” and concluded that
19 “[t]he district court erred in refusing to draw the obvious inference that this sequence of
20 events signals discriminatory intent.” *Id.* Here, although the facts are not as extreme, they
21 likewise support an inference that HB 2023 was enacted with discriminatory intent. *See*
22 *also id.* at 229 (noting that after *Shelby County*, the General Assembly moved forward
23 with a bill “that restricted voting mechanisms it knew were used disproportionately by
24 African Americans, and so likely would not have passed preclearance”) (internal citation
25 omitted).

26 Statements made by HB 2023’s proponents support a finding of discriminatory
27 intent as well. In the House, Rep. Fernandez urged legislators “to consider voters in places
28

like San Luis,” who do not have mail delivery; she explained that in San Luis there are 12,498 post office boxes, but no home mail delivery, and 1,900 of the Tohono O’odham Nation’s members cannot receive home delivery. Ex. 19 at 23:1-24:9; 5/16/17 Fernandez Dep. 126:10-127:11. But Rep. Ugenti-Rita dismissed concerns like this as “not my problem.” Ex. 19 at 32:6-7. When Rep. Fernandez, who represents Native-American communities, described “what it’s like to live ... sometimes 40 miles away from the nearest post office box” and said that “over 10,000” voters could be disenfranchised, many legislators laughed. *Id.* at 35:15-37:18. And HB 2023’s supporters characterized the voters who would be burdened by HB 2023 as lazy, seeking “special treatment,” or not taking “responsibility.” PFOFs § V.B. “They certainly take care of themselves in other situations,” Rep. Ugenti-Rita said, “so I don’t know why we have to spoon-feed and baby them over their vote.” *Id.* In light of these statements, as well as the other evidence in this case, HB 2023 should be found to have been motivated, as least in part, by a desire to suppress minority voting.

II. OOP PROVISIONAL VOTING

Since 2006, Arizona has rejected—that is, refused to count—well over 100,000 votes. That is not normal. Arizona “leads the nation, by a wide margin, in the number of provisional ballots rejected, and therefore not counted.” *Feldman II*, 842 F.3d at 629 (Thomas, C.J., dissenting). One of the main reasons for this dubious distinction is that Arizona is the national leader in the rejection of OOP ballots as a share of all in-person ballots cast. *Id.* (Thomas, C.J., dissenting).

Section 2. Under the two-part test described above, Arizona’s refusal to count OOP ballots violates Section 2 of the VRA. “Statistically significant evidence shows that this practice disproportionately and adversely impacts minority voters.” *Feldman II*, 842 F.3d at 628 (Thomas, C.J., dissenting). Indeed, “[t]he numbers are startling.” *Id.* at 631 (Thomas, C.J., dissenting); *see also* PFOFs § IV.A. Further, these disparities are directly linked to the ongoing effects of discrimination in Arizona. As Chief Judge Thomas wrote:

The plaintiffs tendered significant evidence showing that Arizona

1 minorities suffered in education and employment opportunities, with
2 disparate poverty rates, depressed wages, higher levels of unemployment,
3 lower educational attainment, less access to transportation, more residential
4 transiency, and poorer health. ... These factors directly contribute to the
statistically significant disparity in out-of-precinct voting by minorities as
compared to whites. Indeed, these considerations go to the heart of why
Arizona's refusal to count legitimate out-of-precinct votes most severely
affects Arizona's minority voters.

5 *Id.* at 638 (Thomas, C.J., dissenting). Arizona's policy of disenfranchising OOP voters
6 should therefore be invalidated under Section 2.

7 Anderson-Burdick. Arizona's treatment of OOP voters also unduly burdens the
8 right to vote in violation of the First and Fourteenth Amendments. As noted, the severe
9 burden imposed by Arizona's regime—disenfranchisement—impacts thousands of voters
10 per general election. In the 2012 and 2014 elections alone, approximately 14,500
11 Arizonans were disenfranchised because they cast their ballot OOP. Ex. 95 (Rodden Rpt.
12 at 26). And the evidence at trial will show that some of these voters are disenfranchised
13 through no fault of their own. The burden imposed by Arizona's refusal to count OOP
14 votes is therefore severe.

15 “The State's articulated interest here is administrative efficiency,” *Feldman II*, 842
16 F.3d at 640 (Thomas, C.J., dissenting)—an interest that Chief Judge Thomas found
17 wanting. While the State argued that it would “take up to 15 minutes to process legitimate
18 out-of-precinct votes,” he noted that “voters were waiting for between 4 to 6 hours to cast
19 their ballots” in Maricopa County and “many voters who ended up voting in the wrong
20 precinct traveled there using public transportation and may have had to take time off
21 work.” *Id.* (Thomas, C.J., dissenting). He thus concluded that “[s]pending a few minutes
22 of administrative time to permit these citizens' votes to be counted pales in comparison
23 with the sacrifice made by these voters in pursuit of the exercise of their franchise.” *Id.* at
24 640-41 (Thomas, C.J., dissenting).

25 As Chief Judge Thomas also found, “when one analyzes how provisional ballots
26 are treated, the burdens are relatively low for the State.” *Id.* at 641 (Thomas, C.J.,
27 dissenting). The State:
28

1 already manually examines the provisional ballots and manually compares
2 addresses. If the ballot is cast in the correct precinct, it is counted. If not, the
3 only additional burden that would be imposed would be to count the votes
4 for the race for which the voter is qualified and eligible to vote. Arizona law
5 provides the State ten days to count provisional ballots. The State is already
using manual procedures as to write-in and damaged ballots. These
administrative burdens should not be discounted, but in comparison to the
hardships faced by minority voters on election day, the scales weigh in favor
of the voters.

6 *Id.* (Thomas, C.J., dissenting). Indeed, 20 states partially count OOP ballots,
7 demonstrating that it is eminently feasible to do so. PFOFs § IV.A.

8 Accordingly, “[t]he State’s interest in administrative efficiency simply does not
9 justify the means employed: disenfranchisement of out of precinct voters.” *Id.* at 641
10 (Thomas, C.J., dissenting). Arizona’s policy of discarding OOP votes fails the *Anderson-*
11 *Burdick* test and should be invalidated under the First and Fourteenth Amendments.

12 CONCLUSION

13 For the reasons set forth above, Plaintiffs respectfully request that the Court grant
14 the relief they have requested in this case.

1
2 Dated: September 25, 2017

s/ Joshua L. Kaul

Daniel C. Barr (# 010149)
Sarah R. Gonski (# 032567)
PERKINS COIE LLP
2901 North Central Avenue, Suite 2000
Phoenix, Arizona 85012-2788

Marc E. Elias (WDC# 442007)*
Bruce V. Spiva (WDC# 443754)*
Elisabeth C. Frost (WDC# 1007632)*
Amanda R. Callais (WDC# 1021944)*
Alexander G. Tischenko (CA# 304743)†
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960

Joshua L. Kaul (WI# 1067529)*
PERKINS COIE LLP
One East Main Street, Suite 201
Madison, Wisconsin 53703

*Attorneys for Plaintiffs the Arizona
Democratic Party, the DSCC, and the
Democratic National Committee*

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a Notice of Electronic Filing was transmitted to counsel of record.

s/ Amanda Callais

General Information

Court	United States District Court for the District of Arizona; United States District Court for the District of Arizona
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:16-cv-01065
Status	CLOSED