No. 22-16490

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS et al.,
Plaintiffs-Appellees,
v.
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendant-Appellant,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellant,
and
KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,
Defendants.

On Appeal from the United States District Court
for the District of Arizona
Case No. 2:22-cv-01374-GMS

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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Dated: December 19, 2022

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Arizona Alliance for Retired Americans, Voto Latino, and Priorities USA hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

Earlier this year, the Arizona Legislature enacted Senate Bill ("SB") 1260, which includes two unjustified and unlawful limitations on the right of political expression.

The Felony Provision broadly criminalizes the act of knowingly providing a "mechanism for voting" to a person who is registered to vote in another state. A.R.S. § 16-1016(12). It does not clarify or limit the term "mechanism for voting," and by its plain text impermissibly criminalizes a wide array of protected voter advocacy and engagement activities.

The Cancellation Provision forces county recorders to disenfranchise lawful Arizona voters by cancelling their voter registrations—*without notice or authorization*—based on nothing more than "confirmation" from an election official that a voter is registered in another jurisdiction. *Id.* § 16-165(A)(10), (B). This heavy-handed approach ignores that it is common and lawful for voters to have more than one registration, especially young and transient voters—the latter of whom are more likely to be poor and non-white. Worse yet, this mandatory cancellation process can be initiated at *any* time by *any* third party, including voter-suppressive organizations, so long as they can

meet the minimal burden of providing a county recorder with "credible information" (a term SB 1260 fails to define) that a person is registered to vote in a different county.

SB 1260 was scheduled to take effect on Saturday, September 24, 2022—in the midst of the election season and just before voters began casting their ballots for the November general election.

More than a month before this effective date, Plaintiffs-Appellees Arizona Alliance for Retired Americans, Voto Latino, and Priorities USA ("Plaintiffs") challenged SB 1260, arguing that these provisions violate the U.S. Constitution and federal law. Their motion for preliminary injunction followed just weeks later and, on Monday, September 26, the District Court enjoined operation of the Felony and Cancellation Provisions. The District Court correctly held that the Felony Provision is unconstitutionally vague and threatens protected voter registration activities. It also rightly concluded that the Cancellation Provision violates the National Voter Registration Act ("NVRA"). In so ruling, the District Court properly considered the underlying facts and applied governing law—and rejected the kitchen-sink opposition mounted by Defendant-Appellant Mark Brnovich (the "Attorney General") and

Intervenor-Defendant-Appellant Yuma County Republican Committee ("YCRC," and together with the Attorney General, "Defendants").

Undeterred by SB 1260's plain text and the reasoned order below, Defendants now rehash the same meritless arguments that the District Court already rejected, supplementing their efforts with irrelevant new details about Arizona's existing voter registration procedures in the hopes of muddying what remains a clear case. Notably, they do not—and cannot—offer *any* plausible interpretations of the Felony and Cancellation Provisions that do not require significant and unsupported departures from SB 1260's plain text and Arizona's election rules generally. A conspicuous absence from this appeal underscores Defendants' incorrigibility: Katie Hobbs, the Arizona Secretary of State (the "Secretary"), has chosen not to contest the District Court's preliminary injunction or otherwise defend these unlawful provisions.

Ultimately, SB 1260's text speaks for itself. And while this Court need look no further, even a cursory examination of the surrounding statutory language and extrinsic evidence demonstrates that the Felony and Cancellation Provisions violate the U.S. Constitution and federal law. Far from abusing its discretion, the District Court correctly applied

well-established legal principles and exercised its equitable judgment consistent with precedent and the facts on the ground. The District Court properly granted the preliminary injunction, and this Court should affirm.

JURISDICTIONAL STATEMENT

Plaintiffs agree with the jurisdictional statements provided by the Attorney General and YCRC.

STATEMENT OF THE ISSUES

1. Whether the District Court had Article III jurisdiction over Plaintiffs' claims against the Felony Provision, where the provision's plain text criminalizes Plaintiffs' constitutionally protected activities and the Attorney General's limiting construction of the law was limited to this litigation.

2. Whether the District Court abused its discretion in holding that the Felony Provision is unconstitutionally vague, where the provision criminalizes "[k]nowingly provid[ing] a mechanism for voting" to someone registered in another state but fails to define its terms or otherwise provide any guidance as to its expansive scope.

3. Whether the District Court abused its discretion in holding that the Cancellation Provision violates the NVRA, where the provision requires county recorders to cancel a voter's registration based solely on "confirmation" from another election official that the voter is registered in another jurisdiction.

4. Whether the District Court abused its discretion in finding that the equities tipped in Plaintiffs' favor, where Plaintiffs would have suffered constitutional injury absent a preliminary injunction, the challenged provisions would have introduced confusion and uncertainty on the eve of voting, and Plaintiffs diligently pursued their case to ensure relief ahead of the 2022 general election.

STATEMENT OF THE CASE

Defendants appeal the District Court's order enjoining two provisions of SB 1260: the Felony and Cancellation Provisions. *See* A.R.S. §§ 16-165, 16-1060.

SB 1260 was enacted in June 2022 and scheduled to go into effect on September 24, 2022—*after* the state's August primary election and on the same day that military and overseas ballots were required to be mailed for the November general election. 2-ER-267; A.R.S. § 16-543(A).

The new law dramatically alters Arizona's election laws, criminalizing vast swaths of constitutionally protected political activities and disregarding federal protections aimed at ensuring that eligible electors are not improperly removed from the voter rolls.

I. The Felony Provision

The Felony Provision makes it a class 5 felony for anyone to "knowingly provide[] a mechanism for voting to another person who is registered in another state," regardless of the voter's eligibility to vote in Arizona or their intent (or lack thereof) to vote in more than one jurisdiction. A.R.S. § 16-1016(12). The term "mechanism for voting" is not defined; the only specification the statute provides is that it sweeps broadly enough to include the act of "forwarding an early ballot." *Id.* A class 5 felony under Arizona law is punishable by imprisonment of six months or more. *Id.* § 13-702(D).

II. The Cancellation Provision

The Cancellation Provision requires county recorders to cancel a voter's registration whenever a recorder (1) "receives confirmation from another county recorder that the person registered has registered to vote in that other county," A.R.S. § 16-165(A)(10), or (2) "receives credible

information that a person has registered to vote in a different county," at which point the county recorder "shall confirm the person's voter registration with that other county and, on confirmation, shall cancel the person's registration," *id.* § 16-165(B). County recorders must cancel a registration in these circumstances even if the voter does not intend to vote illegally—and even though it is otherwise perfectly legal to be registered to vote in more than one jurisdiction. *See Common Cause Ind. v. Lawson*, 937 F.3d 944, 960 (7th Cir. 2019) (exploring why voters might have multiple registrations and noting that such voters "will *vote* in only one place, even if they have open registrations in two"); *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 722 n.1 (7th Cir. 2021) (distinguishing between "double registration, which the vast majority of states do not make unlawful," and "[d]ouble voting," which "is widely criminalized").

The Cancellation Provision does not require or otherwise direct county recorders to notify a voter or ask for the voter's consent before cancelling their registration. In fact, the Cancellation Provision does not require that county recorders make *any* contact at all with the voter, let

alone confirm where the voter currently resides or intends to vote. *See* A.R.S. § 16-165(A)(10), (B).

Moreover, under the second prong of the Cancellation Provision, the term "credible information" is not defined, and the statutory text does not limit who can provide "credible information" about voters to county recorders. The Cancellation Provision thus gives third parties the ability to initiate voter registration cancellations by sending information to county recorders, who then need only confirm the voter's registration with another county before cancelling the registration without further inquiry or notice.

Finally, the Cancellation Provision does not provide any mechanism for county recorders to coordinate cancellations. There is thus no way to ensure that only a voter's outdated voter registration is cancelled and not a registration the voter intends to use—or to prevent two county recorders from *each* cancelling a voter's registration in their respective county upon receiving confirmation of the voter's registration in the other county, thereby stripping an eligible voter of *any* active registration.

III. Initiation of Plaintiffs' Lawsuit

On August 12, 2022, Plaintiffs sent a letter to the Secretary informing her that SB 1260 violated the NVRA. 2-ER-070–73. Plaintiffs then filed their complaint in the District Court on August 15. 3-ER-301–33.

On September 2, following the Secretary's failure to remedy the NVRA violation within the statutorily required 20-day notice period, *see* 52 U.S.C. § 20510(b)(2), Plaintiffs amended their complaint to add claims under the NVRA, 2-ER-266. Less than one week later, on September 8, Plaintiffs filed their preliminary injunction motion, seeking to enjoin both the Felony Provision (on the grounds that it is impermissibly vague and overbroad in violation of the First and Fourteenth Amendments) and the Cancellation Provision (on the grounds that it violates the NVRA and due process protections). In their motion, as in their complaint, "Plaintiffs did not challenge any of the existing statutory framework or the EPM [Election Procedures Manual]." Doc. 11 ("YCRC Br."), at 9. On September 14, the District Court entered an order setting an expedited briefing schedule for the motion and scheduled a hearing on the matter for September 22, without objection from any party. 2-ER-217–18.

IV. The Preliminary Injunction Order

Four days after the hearing, on Monday, September 26—the first business day after SB 1260's effective date of Saturday, September 24—the District Court granted in part Plaintiffs' preliminary injunction motion and enjoined both the Felony and Cancellation Provisions. 1-ER-22. In its order, the District Court determined that the Felony Provision is unconstitutionally vague because it does not define "mechanism for voting" and could therefore encompass protected election-related activities, such as registering voters. 1-ER-005–06. The District Court concluded that it was "not possible for a person of average intelligence to know how [the Felony Provision] will be interpreted." 1-ER-007.

As for the Cancellation Provision, the District Court concluded that the law violates the NVRA because it is "precisely the scheme that the Seventh Circuit rejected" in *Common Cause Indiana v. Lawson* and *League of Women Voters of Indiana, Inc. v. Sullivan*. 1-ER-012. Specifically, the District Court determined that any written confirmation of a change in address under the NVRA "must unequivocally come *from the voter*," not from another county recorder as provided under the Cancellation Provision. 1-ER-013. The District Court also rejected

Defendants' argument that the Cancellation Provision merely codifies existing practice, finding that "SB 1260 is not at all identical to the EPM, and it does not incorporate the critical portions of the EPM procedures that Defendants say provide confirmation from the voter that she has moved jurisdictions." 1-ER-012.

V. Defendants' Appeal

On September 27, the day after the District Court's decision, Defendants noticed their appeal, 5-ER-401, and filed an emergency motion for a stay of the preliminary injunction, 2-ER-079. In their emergency motion, Defendants repeatedly noted that "the Court's Order enjoins the Cancellation Provision, but *not* identical procedures under state law." 2-ER-080; *see also* 2-ER-091 ("[O]nly parts of SB 1260 were enjoined by this Court's Order, not existing practices."). Indeed, the Secretary separately filed a notice on September 29 informing the District Court that she "believes that the PI Order provides certainty that no new procedures are required for the upcoming election, nor are state and county election officials subject to potentially conflicting criminal liability provisions" as a result of SB 1260. 2-ER-077.

On October 3, the District Court denied Defendants' emergency motion for a stay. 2-ER-025–30. It explained,

> Because Defendants raised the argument that the Cancellation Provisions are based on the existing EPM procedures, the Court has necessarily discussed and evaluated these procedures. It has also discounted the argument that the Cancellation Provisions are based on the EPM procedures. . . . [T]he Court enjoins only the operation of the Cancellation Provisions, leaving the status quo in place.

2-ER-029. The District Court also observed that "the requested injunction does not extend to the state's election procedures. The injunction enjoins a new state law from going into effect. Thus, the parties, for the moment, need not implement the new law. Nothing about that is confusing." 2-ER-028. Notably, Defendants did not subsequently ask this Court to stay the District Court's preliminary injunction pending appeal.

Instead, on October 17, Defendants moved for an extension of time to postpone briefing on this appeal until *after* the general election, citing "statutory duties" related to the "already underway 2022 General Election." Doc. 7-1, at 3. This Court granted that extension on October 18. Doc. 8. The general election was held on November 8, with the District Court's injunction of the Felony and Cancellation Provisions in effect.

Despite claiming that the injunction "inject[ed] unnecessary confusion into the process mere weeks before the election," YCRC Br. 37 n.11, Defendants have identified no disruptions or any other election-administration issues stemming from the District Court's order.

SUMMARY OF THE ARGUMENT

This Court should affirm the District Court's preliminary injunction. The District Court correctly held that the Felony Provision is unconstitutionally vague and that the Cancellation Provision violates the NVRA.

First, the District Court properly exercised jurisdiction over Plaintiffs' claims against the Felony Provision. Plaintiffs need not wait for a prosecution to challenge the provision as unconstitutionally vague and overbroad; under well-established standing principles, the fact that the Felony Provision by its plain language extends to Plaintiffs' constitutionally protected activities is sufficient to establish a concrete injury-in-fact. The (outgoing) Attorney General's assurances that he will not enforce the plain text of the provision do not change this analysis, as they have been offered exclusively in the context of this litigation and are not—and cannot be—binding on future attorneys general. Nor does the

absence of Arizona's county prosecutors from this litigation render Plaintiffs' claims nonjusticiable; it is sufficient that the relief provided by the District Court remedies the threat of injury posed by the Attorney General himself.

Second, the District Court correctly concluded that the plain text of the Felony Provision, which criminalizes the act of knowingly providing a "mechanism for voting" to a person who is registered in another state, is unconstitutionally vague and would criminalize and chill protected voter registration activities. Defendants' repeated attempts to reinterpret the Felony Provision are neither sufficient to cure this vagueness nor persuasive. And, because the Felony Provision implicates core First Amendment activity, Plaintiffs were permitted to bring a facial challenge.

Third, the District Court correctly determined that the plain text of the Cancellation Provision violates the NVRA by forcing county recorders to cancel voter registrations without complying with federal requirements—specifically, without first requiring that election officials receive direct authorization or confirmation from voters. Defendants' arguments to the contrary upend basic principles of statutory

interpretation: They ignore the challenged law's plain text while selectively emphasizing only those (ultimately irrelevant) statutory clues that purportedly support their position. Defendants also seek to distinguish the Seventh Circuit cases on which the District Court relied by focusing on superficial factual differences—distinctions that have no impact on the pertinent NVRA analysis.

Fourth, the District Court properly considered and balanced the equities when granting the preliminary injunction. Plaintiffs are at risk of irreparable injury due to the constitutional harms posed by SB 1260. Defendants' *Purcell* arguments both fundamentally misunderstand the contours of that doctrine and ignore the practical effects of the District Court's injunction—which *preserved* the status quo and *avoided* voter confusion and disenfranchisement—and are thus without merit. Nor did the District Court abuse its discretion when it rejected Defendants' baseless claim that Plaintiffs improperly delayed, given that Plaintiffs filed suit and expeditiously sought relief in advance of the general election.

STANDARD OF REVIEW

A preliminary injunction should issue where the moving party shows that (1) they are likely to succeed on the merits, (2) they will likely suffer irreparable harm in the absence of relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is a party, the balance of equities and public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Courts also consider whether the requested injunctive relief preserves or alters the status quo, as the latter is disfavored and subject to a heightened burden of proof. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

This Court "review[s] the District Court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). This review is "limited and deferential," and an order granting a preliminary injunction "will be reversed only if the District Court relied on an erroneous legal premise or abused its discretion." *Id.* (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982)); *see also Gregorio T. ex rel. Jose T. v. Wilson*, 59 F.3d 1002, 1004

(9th Cir. 1995) ("As long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion." (cleaned up)). The Court does "not review the underlying merits of the case," *Gregorio T.*, 59 F.3d at 1004, and "review[s] the district court's factual findings for clear error," *Norbert v. City & County of San Francisco*, 10 F.4th 918, 936 (9th Cir. 2021).

ARGUMENT

I. Plaintiffs' claims against the Felony Provision are justiciable.

At the outset, the Attorney General advances a scattershot jurisdictional challenge to Plaintiffs' claims against the Felony Provision, wrongly suggesting that the District Court lacked Article III authority to adjudicate them.[1] Because SB 1260 posed an imminent threat of injury to Plaintiffs and their protected activities—a risk that would be remedied by an injunction against the Attorney General's enforcement of the

[1] Notably, the Attorney General's jurisdictional challenge does *not* extend to Plaintiffs' claims against the Cancellation Provision.

Felony Provision—the specter of harm was neither conjectural nor remote, and the District Court properly exercised jurisdiction.

A. The Attorney General's litigation-related assurances do not render Plaintiffs' claims unripe or moot.

The Attorney General hinges much of his justiciability argument on his purported "disavow[al of] any interpretation of the Felony Provision that criminalizes ordinary voter outreach," which, he claims, eliminates any "genuine threat of imminent prosecution." Doc. 12 ("AG Br."), at 7 (quoting *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). But he both mischaracterizes the applicable legal standard and overemphasizes the significance of his litigation stance—flaws that are fatal to his standing challenge.

"The Supreme Court and this court have often emphasized that" plaintiffs can "establish standing to challenge a law or regulation that is not presently being enforced against them" by "demonstrat[ing] 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). "In such pre-enforcement cases, the plaintiff may meet constitutional standing requirements by . . . . 'allege[ing] an intention to

engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and . . . a credible threat of prosecution thereunder.'" *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (third alteration in original) (quoting *Babbitt*, 442 U.S. at 298).

Moreover, this Court has repeatedly observed that "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO*, 205 F.3d at 1155; *see also Lopez*, 630 F.3d at 785 ("[C]onstitutional challenges based on the First Amendment present unique standing considerations." (quoting *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003))). As such, this Court has "noted that the tendency to find standing absent actual, impending enforcement against the plaintiff is stronger in First Amendment cases, for free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *LSO*, 205 F.3d at 1155 (cleaned up) (quoting *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996)).

Here, Plaintiffs easily clear the "low threshold" that Article III imposes in pre-enforcement cases that implicate First Amendment-protected activities. *Lopez*, 630 F.3d at 792. As the District Court

recognized (and the Attorney General did not dispute), Plaintiffs have engaged in and will continue to undertake "election-related activities like registering voters and encouraging citizens to vote," 1-ER-005; 4-ER-341:7–9—core political expression protected by the First Amendment, *see infra* at 41–44. Moreover, neither the Attorney General nor YCRC disputes that Plaintiffs' planned future activities are "specific enough so that a court need not 'speculate as to the kinds of political activity [they] desire to engage in.'" *Lopez*, 630 F.3d at 787 (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 90 (1947)). As discussed in detail below, *see infra* at 29–38, such activities fall within the broad ambit of the Felony Provision. Accordingly, having "provide[d] adequate details about their intended [protected activities]"—activities to which "the challenged [] restriction by its terms is [] applicable," *Lopez*, 630 F.3d at 788—Plaintiffs have readily satisfied the "relaxed standing analysis" applied when activities protected by the First Amendment are implicated by a pre-enforcement challenge, *Canatella v. California*, 304 F.3d 843, 853 & n.11 (9th Cir. 2002).[2]

[2] Plaintiffs would satisfy the applicable pre-enforcement standing requirements even if their activities were not protected by the First

That the Attorney General disclaimed the plain text of the Felony Provision during this litigation does not change the standing analysis or otherwise render Plaintiffs' claims unripe or nonjusticiable. Although this Court has "held that plaintiffs did not demonstrate the necessary injury in fact where the enforcing authority expressly interpreted the challenged law as not applying to the plaintiffs' activities," it has also emphasized that "the government's disavowal must be more than a mere litigation position." *Lopez*, 630 F.3d at 788. To date, outside of the positions he has taken in his briefs and filings in this case, the Attorney General has neither affirmatively disavowed application of the Felony Provision to Plaintiffs' First Amendment activities nor stated that Plaintiffs would not be prosecuted under it for these types of activities. And even if he did so disavow, the Attorney General admitted that he

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Amendment. *See, e.g.*, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015–16 (9th Cir. 2013) (concluding that plaintiff "established a credible threat of prosecution" in vagueness challenge where she alleged intention to undertake actions that "f[ell] within the plain language" of statute because "the injury alleged—a credible threat of prosecution under [challenged statute]—is clearly traceable to [challenged statute], and can be redressed through an injunction enjoining enforcement of that provision").

cannot bind future attorneys general (nor future secretaries of state) to his interpretation of the Felony Provision. *See* 4-ER-340:15–341:1.

As the U.S. Supreme Court has observed, a mere promise that a statute will only be enforced in line with constitutional protections—even a less empty promise than the Attorney General can offer here, given that he cannot bind future attorneys general or secretaries of state—carries little weight where core rights are concerned. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). The Attorney General's failure and inability to disavow enforcement of the Felony Provision beyond the litigation arena is thus "a factor in favor of a finding of standing." *LSO*, 205 F.3d at 1155 (collecting cases).

In short, Plaintiffs' challenge to the Felony Provision is neither unripe (because Plaintiffs are at imminent risk of prosecution for their First Amendment activities under the plain text of the Felony Provision) nor moot (because the Attorney General's stance exclusive to this

litigation has no bearing). Plaintiffs have standing to bring their claims, and the District Court had the authority to adjudicate them.

B. Plaintiffs' risk of injury is not unduly speculative.

Relatedly, and again based on his litigation-related "disavow[al of] enforcement for *all* activities in which Plaintiffs seek to engage," the Attorney General wrongly claims that "Plaintiffs' injury-in-fact—*i.e.*, potential prosecution—is purely 'conjectural or hypothetical.'" AG Br. 12 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). But this is simply a rehash of his flawed argument discussed above, since this Court's precedent has emphasized that the government's litigation posturing alone does not defeat Article III standing in pre-enforcement challenges implicating First Amendment rights.

Significantly, it does not matter whether the Attorney General has actually threatened or initiated proceedings against Plaintiffs. In a "pre-enforcement challenge that alleges a free speech violation under the First Amendment," a plaintiff "need only demonstrate that a threat of potential enforcement will cause him to self-censor, and not follow through with his concrete plan to engage in protected conduct." *Protectmarriage.com–Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir.

2014); *see also, e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022) (allegations that "the law has chilled [plaintiff's] speech and that he has self-censored himself out of fear of enforcement" are sufficient to establish standing in First Amendment context); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) (concluding, where "there ha[d] not been any state action threatening [plaintiffs]" and challenged law "became effective one day *after* the lawsuit was brought," that claims were nevertheless "ripe for review" because "the very existence of the new rules may cause" injury to plaintiffs' free exercise rights).[3]

That is the case here, as the District Court recognized. *See* 1-ER-005–06 ("[A]bsent clarity as to whether registration is or is not a mechanism for voting, the statute will chill the Plaintiffs' registration activities or cause them to incur much greater expense and time in

[3] Although the Attorney General relies on the en banc *Thomas* decision to suggest that the risk of prosecution must be immediate to establish standing, *see* AG Br. 7, this Court later clarified that, "[i]n *Thomas* . . . , we held that we consider, as *one* of the factors in 'evaluating the genuineness of a claimed threat of prosecution,' 'whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings.' But we have never held that a specific threat is necessary to demonstrate standing." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) (citation omitted) (quoting *Thomas*, 220 F.3d at 1139).

conducting such activities."). The Attorney General's claim that the threat of prosecution posed by future attorneys general is "conjectural or hypothetical," AG Br. 12–13, is of little moment; the self-censorship and expenses imposed on Plaintiffs *regardless* of specific enforcement plans is sufficient in the First Amendment context to establish a concrete injury-in-fact.[4]

C. Plaintiffs did not need to join Arizona's county attorneys to satisfy the redressability requirement.

Finally, the Attorney General points to the absence of Arizona's 15 county attorneys from this case, *see* AG Br. 13–15—a red herring that has no impact on the District Court's jurisdiction.

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[4] At any rate, the Attorney General's theory that a future attorney general might ignore the plain text of the Felony Position—and thus render future enforcement merely conjectural—is flawed as well. The Arizona Supreme Court has not only explained that "[o]pinions of the Attorney General are advisory," but also *rejected* "proffered narrowing construction[s]" that "do[] not comport with the plain wording of the [text], and hence, with the plain meaning rule guiding our construction of statutes." *Ruiz v. Hull*, 191 Ariz. 441, 449 (1998); *see also Yniguez v. Arizonans for Official English*, 69 F.3d 920, 929 (9th Cir. 1995) (en banc) ("The Supreme Court has made clear that a limiting construction will not be accepted unless the provision to be construed is 'readily susceptible' to it." (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988))), *vacated on other grounds sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). And again, as the Attorney General admitted, he *cannot* bind future attorneys general to any specific interpretation of the Felony Provision. *See* 4-ER-340:15–341:18.

It is well established, as the District Court observed, that "the mere existence of multiple causes of an injury does not defeat redressability." 1-ER-012 n.6 (quoting *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015)); *see also WildEarth Guardians*, 795 F.3d at 1157 ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."). Enjoining the Attorney General's enforcement of the Felony Provision against Plaintiffs and their protected activities would redress an injury Plaintiffs suffer—period. That additional sources of injury might go unremedied does not change this analysis; the Attorney General cites no authority to suggest that a plaintiff is required under Article III to seek relief against every conceivable source of a particular harm. *Cf. Allee v. Medrano*, 416 U.S. 802, 811–12 & n.7, 821 (1974) (affirming injunction against specific law enforcement officers in challenge to constitutionality of Texas statutes).

Moreover, as a practical matter, it is highly unlikely that a local prosecutor would choose to enforce statutory provisions that a federal court has enjoined on constitutional grounds. *See Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1106 n.30, 1108–09 (E.D. Cal. 2002)

(finding that, in case where plaintiffs sought relief against attorney general but not county prosecutors, "[r]edressability is not a problem" because "it is likely that the District Attorneys will follow the court's ruling, especially given their tendency to look to the Attorney General for policy," and "for purposes of Article III, it is sufficient that redressability is likely; plaintiffs need not establish it with absolute certainty"), *aff'd sub nom. Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003); *cf. L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) ("Were this court to issue the requested declaration, we must assume that it is substantially likely that the California legislature, although its members are not all parties to this action, would abide by our authoritative determination."). Plaintiffs need not demonstrate that the relief the District Court ordered will eliminate all possibility of constitutional injury posed by Arizona's county attorneys—that is emphatically *not* required under Article III or any authority construing it—but the District Court's injunction can be assumed to achieve this result nonetheless.[5]

[5] The Attorney General further suggests that the failure to join the county attorneys renders Plaintiffs' claimed injuries unduly speculative

* * *

Ultimately, Plaintiffs have readily satisfied Article III's standing requirements. The Felony Provision, by its plain language, extends to protected activities that Plaintiffs undertake, and the Attorney General's exclusively litigation-related disavowals are insufficient to undo the risk of injury. Enjoining the Attorney General's ability to enforce the Felony Provision against Plaintiffs eliminates a source of harm, and thus redressability is established.

Consequently—and contrary to the Attorney General's intimations, *see* AG Br. 15–17—the District Court's order is not an improper advisory opinion. Plaintiffs suffered a concrete risk of constitutional harm, the District Court's injunction served to eliminate that threat as posed by the Attorney General, and this matter is therefore justiciable.

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and unripe. *See* AG Br. 9–10. But, as discussed above, the Attorney General's failure and inability to disavow enforcement of the Felony Provision against Plaintiffs outside of this litigation—and the self-censorship and costs borne by Plaintiffs as a result—are alone sufficient to establish a concrete injury-in-fact.

II. The District Court correctly held that the Felony Provision is void for vagueness.

Having failed to find any error in the District Court's justiciability analysis, Defendants next attempt to rehabilitate the Felony Provision on the merits. But none of their arguments succeeds in undermining the District Court's conclusion that the provision is void for vagueness.

The Felony Provision cannot be saved by Defendants' newly minted interpretation of the statute: The interpretation lacks merit, was not raised below, and in any event does not subvert the District Court's conclusion that persons of reasonable intelligence would struggle to understand the provision. Moreover, the District Court properly determined that the Felony Provision is subject to facial attack because it implicates conduct that the First Amendment protects, and vagueness permeates the law. Accordingly, the District Court did not err in concluding that Plaintiffs had a reasonable likelihood of success on the merits of their vagueness claim.

A. Defendants' new interpretation of the Felony Provision is implausible and, in any event, cannot cure the provision's constitutional infirmities.

The District Court correctly determined that the Felony Provision is unconstitutionally vague. Seeking to salvage the provision, Defendants

now present an interpretation that is contrary to the definitions they offered below, divorced from the statutory text, and in any event incapable of curing the Felony Provision's constitutional infirmities.

A statute is void for vagueness when it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" or "authorize[s] or even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Here, the Felony Provision punishes anyone who "knowingly provides a mechanism for voting to another person who is registered in another state, including by forwarding an early ballot addressed to the other person." A.R.S. § 16-1016(12). The District Court concluded that the Felony Provision was void for vagueness because the provision and its "surrounding text [did] not offer enough guidance about what falls within the definition of 'mechanism for voting.'" 1-ER-007.

Seeking to undercut the District Court's conclusion, Defendants offer their own interpretation of "mechanism for voting," insisting that it cures the provision of all constitutional defect. In particular, YCRC now claims that "mechanism for voting" *includes* "fundamental steps necessary to cast a vote in each election," such as "receiving an early

ballot, opening the mail-in envelope, completing the ballot, and timely submitting the ballot," but *excludes* voter registration and other activities undertaken by Plaintiffs. YCRC Br. 26–27. This gambit is unavailing.

At the outset, even if Defendants' definition were plausible, the question before the District Court was not which interpretation of the Felony Provision is the right one. Instead, the issue was whether people of ordinary intelligence have "fair notice of the conduct it punishes." *Johnson v. United States*, 576 U.S. 591, 595 (2015). As the District Court correctly found, "mechanism for voting" on its face encompasses myriad activities, and the Felony Provision contains no definition or other limitation that could guide prosecutors, election officials, volunteers, or voters in understanding what it prohibits. 1-ER-006–08. For that reason alone, the provision must fail.

Moreover, this is at least the *third* distinct definition of "mechanism for voting" that Defendants have offered in this litigation. In the proceedings below, the Attorney General and YCRC offered multiple divergent definitions of the phrase and, importantly, never once argued that "mechanism for voting" includes only actions that must occur each

time a voter casts a ballot. Consider the various definitions offered by Defendants below:

- In its proposed motion to dismiss, YCRC argued that "mechanism for voting" refers to "the actual ballot or other tangential items necessary to cast the ballot, such as a mail-in ballot envelope." SER-11.

- Just over a week later, YCRC suggested, in the opening pages of its opposition to Plaintiffs' preliminary injunction motion, that "mechanism for voting" constitutes a "ballot (or associated documents)." 2-ER-104.

- A few pages later *in that same brief*, YCRC pivoted and claimed that "mechanism for voting" consists of only "the actual ballot." 2-ER-109.

- The Attorney General, meanwhile, argued in his opposition to Plaintiffs' preliminary injunction motion that "mechanism for voting" means "a ballot and ballot affidavit envelope *and nothing else*." 2-ER-201 (emphasis added).

Now, YCRC—joined by the Attorney General through incorporation, *see* AG Br. 1—offers a novel, laborious, wholly invented definition:

> The process referenced in the statute refers only to the fundamental steps necessary to cast a vote in each election (*i.e.*, the process for completing a ballot in each election). For in-person voting, steps like checking into a voter's voting location, providing adequate voter ID, completing the ballot, and submitting the ballot are the fundamental steps [] necessary to vote. Similarly, for mail-in voting, steps like receiving an early ballot, opening the mail-in envelope, completing the ballot, and timely submitting the ballot (either in the mail or at a drop box location), are the fundamental steps necessary to vote. These are the steps (or "mechanisms") that must be repeated each cycle in order to execute a voter's fundamental right.

YCRC Br. 27.

The significance of Defendants' ever-shifting definition of "mechanism for voting" is twofold. First, because Defendants' latest interpretation was not raised before the District Court (and is in fact inconsistent with their position below), it is waived. *See Momox-Caselis v. Donohue*, 987 F.3d 835, 841 (9th Cir.) (finding arguments waived where they were either "not raised before the district court" or "inconsistent with positions employed there"), *cert. denied*, 142 S. Ct. 402 (2021). Second, and more revealingly, the fact that Defendants

themselves are unable to settle on a single definition of "mechanism for voting" underscores the District Court's conclusion that people of ordinary intelligence would struggle to discern what the Felony Provision actually means. Stated plainly, if the Attorney General—the "chief legal officer of the state," A.R.S. § 41-192(A)—cannot figure out what a "mechanism for voting" is, then Defendants cannot expect anyone else to either.

In any event, Defendants' newly proffered definition fails on the merits. They now insist that "mechanism for voting" "refers only to the fundamental steps necessary to cast a vote *in each election*." YCRC Br. 27 (emphasis added). Seizing on their use of the limiting "in each election" qualifier, Defendants insist that "mechanism" does not encapsulate voter registration, which happens only once. *Id.*

If Defendants' proposed definition seems contrived toward a specific outcome, that is because it is. As explained in more detail below, the parties to this litigation agree that voter registration constitutes protected conduct under the First Amendment. *See infra* at 41–44. Therefore, if the Felony Provision reaches voter registration activities, it is subject to a facial challenge for vagueness. Realizing this problem,

Defendants have reverse-engineered a definition of "mechanism for voting" in order to exclude voter registration and Plaintiffs' other protected activities. Such a definition, however, does not withstand even the most cursory review.

First, there is nothing in the plain meaning of "mechanism for voting" that limits its reach to only those activities that recur each election; a mechanism is a mechanism, whether it is used multiple times or just once. Resort to dictionaries only worsens Defendants' problem. As they acknowledge, "mechanism" is defined as "the *fundamental processes* involved in or responsible for an action, reaction, or other . . . phenomenon." YCRC Br. 26 (alteration in original) (quoting *Mechanism*, Merriam Webster (Dec. 5, 2022)). Defendants further cite the definition of "process," which is a "series of actions or operations conducing to an end." *Id.* (quoting *Process*, Merriam Webster (Dec. 7, 2022)). Nothing in either definition suggests that "mechanism for voting" should be cabined to the steps required for voting in each election. On the contrary, the definitions by necessity encapsulate *any* steps required for casting ballots, even those that happen only once.

Second, Defendants point out that the Felony Provision includes an example of what it prohibits—namely, "forwarding an early ballot addressed to [another] person," YCRC Br. 28 (quoting A.R.S. § 16-1016(12))—but this single example does not salvage their position. Rather, the provision's use of the word "including" suggests that the provision was intended to be more capacious than the single example provided. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) (use of term "includes" in statute "is significant because it makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive").

Third, Defendants rely on the statutory context of the Felony Provision, but these arguments fare no better. Arizona Revised Statutes § 16-1016, they argue, is "framed as a way to prevent 'illegal voting'" and "takes aim at criminalizing fraud during different steps of the voting process that are inextricably related to the act of casting a ballot, such as voting twice or tampering with ballots that have been submitted." YCRC Br. 28–29. But this characterization of § 16-1016 is simply incorrect. The statute is not limited only to acts that are "inextricably related to the act of casting a ballot." Instead, it reaches further to activities that occur

after voters cast their ballots.[6] There is simply no basis in § 16-1016's preexisting prohibitions for Defendants' arbitrarily (and strategically) limited interpretation of the Felony Provision that excludes Plaintiffs' voter registration activities.

Relatedly, Defendants' observation that the Legislature placed the processes for voting and registration in different chapters of the Arizona Revised Statutes proves nothing. Many of the acts criminalized under § 16-1016 involve procedures regulated elsewhere in the election code. For example, § 16-1016(1), the first subsection of the statute in Chapter 4 that houses the Felony Provision, punishes anyone who "not being entitled to vote, knowingly votes." However, whether one is "entitled to vote" is a matter of voter qualifications—which, like voter registration, falls under the heading of Chapter 1.

In short, Defendants' arguments on the merits amount to little more than a request that this Court rewrite the Felony Provision to save

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[6] For example, it punishes anyone who knowingly "detains, alters, mutilates or destroys ballots or election returns," A.R.S. § 16-1016(11); "adds to or mixes with ballots lawfully cast, other ballots, while they are being canvassed or counted, with intent to affect the result of the election, or to exhibit the ballots as evidence on the trial of an election contest," *id.* § 16-1016(8); or "destroys a polling list, ballot or ballot box with the intent to interrupt or invalidate the election," *id.* § 16-1016(10).

it—an entreaty they cannot make. *See Xi v. INS*, 298 F.3d 832, 839 (9th Cir. 2002) ("[A] decision to [rearrange] or rewrite the statute falls within the legislative, not the judicial, prerogative."). Their newly invented interpretation of the Felony Provision is divorced from the plain meaning of the statutory text, whereas a faithful reading of the Felony Provision establishes that it does not pass constitutional muster. Accordingly, this Court should affirm the District Court's reasoned conclusion.

B. Defendants' other attempts to remedy the Felony Provision's vagueness are unpersuasive.

Defendants' other efforts to find clarity in the Felony Provision's text fall flat. And their further attempts to salvage the provision through assurances that they will use the provision responsibly fare no better.

First, the Felony Provision cannot be rescued by its inclusion of a scienter requirement. The District Court was clear: Because the Legislature "failed to define 'mechanism for voting' with sufficient clarity," the Felony Provision "is too vague to give people of ordinary intelligence notice of whether knowingly registering out-of-state voters is a crime." 1-ER-006. In reaching this conclusion, the District Court did not need to interpret the term "knowingly" in the Felony Provision. Whether a person "knows" they are providing a "mechanism for voting" to another

individual has nothing to do with whether the statute adequately defines what a "mechanism for voting" is in the first place. The same is true with respect to whether a person knows that the individual to whom the "mechanism for voting" is being provided is registered out of state: That knowledge sheds no light on what the nebulous phrase "mechanism for voting" means. Thus, the District Court aptly refrained from construing the Felony Provision's scienter requirement because there is *no* construction of "knowingly" that would clarify the meaning of "mechanism for voting."

That said, Defendants' emphasis on scienter is unpersuasive even on its own terms. Reading the Felony Provision most naturally, the term "knowingly," an adverb, modifies the single verb that follows, "provides." There is no successive *series* of verbs for "knowingly" to modify. Defendants thus misapply the "series-qualifier canon," which applies only where there is "a straightforward, parallel construction that involves all nouns or verbs in a series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) (emphasis added); *see also* YCRC Br. 30 (citing same). This canon might apply, for instance, if the Felony Provision made it a crime to "knowingly

provide, supply, or make available" a mechanism for voting. Or, as illustrated in the case Defendants cite, where an adjective ("internal") is followed by a parallel series of nouns ("personnel rules" and "practices of an agency"), it modifies each item in the series. *See* YCRC Br. 30 (citing *Jordan v. U.S. Dep't of Just.*, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc)). No such parallel series of verbs or nouns appears in the Felony Provision.[7]

Second, the Attorney General's assurance that he will not interpret the Felony Provision to prosecute Plaintiffs does not remedy the

[7] Defendants' invocation of legislative history does not make their scienter argument any more persuasive. Contrary to their assertions, SB 1260's sponsor did not specify that the "knowingly" scienter term applies both to "provid[ing] a mechanism for voting to another person" and "is registered in another state." YCRC Br. 31. Rather, the bill's sponsor merely stated that the "knowingly" term was meant to capture intentional wrongdoing. *See Hearing on SB 1260*, Ariz. State Legislature (Jan. 31, 2022), https://www.azleg.gov/videoplayer/?eventID=2022011106 (video at 39:37–40:34). And though some of SB 1260's proponents asserted in committee meetings that the law is limited to preventing acts of illegal voting, these assertions similarly fail to clarify whether a deliberate wrongdoer must know that they are providing a mechanism for voting to a person who happens to be registered to vote in another state, or whether the supposed wrongdoer must also know the other person's out-of-state voter registration status. *See id.* (video at 40:10–40:16). In any event, nothing in the actual text of the Felony Provision restricts it only to those activities that facilitate or lead to illegal or fraudulent voting in Arizona.

provision's vagueness problem. The District Court correctly placed little stock in this assurance, as the Attorney General's interpretation cannot bind his successor in office. *See* 1-ER-006–07 & n.1.[8] And even if he could, a disavowal made only in adversarial court briefing carries no weight. *See Lopez*, 630 F.3d at 788 (recognizing that, to be meaningful, "the government's disavowal [of enforcement] must be more than a mere litigation position").

None of Defendants' many efforts to salvage the Felony Provision cure its unconstitutional vagueness. This Court should therefore affirm the District Court's ruling that the Felony Provision likely violates the due process clause of the Fourteenth Amendment.

C. The Felony Provision is subject to a facial challenge.

The District Court correctly concluded that the Felony Provision was facially invalid. In response, Defendants argue that the District Court erred in striking down the provision in its entirety. *See* YCRC Br. 32–34. Facial vagueness challenges, YCRC asserts, are only available in cases where the challenged law implicates First Amendment rights—

[8] The District Court did not "refus[e] to consider" the Attorney General's disavowal, as YCRC suggests. YCRC Br. 31 n.10. It simply found it unpersuasive.

which, under Defendants' arbitrarily limited definition of "mechanism for voting" discussed above, the Felony Provision does not do. This is, in short, simply a rehash of Defendants' unsuccessful textual argument. It fails for the same reasons.

At the outset, the parties appear to agree that voter registration efforts are protected by the First Amendment, *see* YCRC Br. 33–34, as several courts have held, *see, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019) (striking down law that burdened voter registration efforts); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158–59 (N.D. Fla. 2012) (same); *see also Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (First Amendment protects "interactive communication concerning political change that is appropriately described as 'core political speech.'"). Defendants do not dispute that Plaintiffs engage in voter registration activities. *See* 4-ER-345:2–9. Nor do they dispute that, to the extent the Felony Provision reaches First Amendment activity, it is subject to facial challenge. *See* YCRC Br. 32–33. Indeed, as this Court has held, "a facial challenge is

permissible when the statute in question clearly implicates free speech rights." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 n.10 (9th Cir. 1998).[9]

Accordingly, the outcome of Defendants' argument on this point hinges on how the Court resolves the interpretive issue described above—namely, whether the Felony Provision reaches voter registration activities. *See supra* at 29–38. Because voter registration activities fall

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[9] Incidentally, Defendants mischaracterize the law governing facial vagueness challenges. At best, it is unsettled whether a facial vagueness challenge can be maintained that is not based on the First Amendment. *Compare, e.g.*, *Morales*, 527 U.S. at 53–54 (concluding, in case involving anti-loitering statute that did not implicate First Amendment, "that the vagueness of this enactment makes a facial challenge appropriate"), *with United States v. Mazurie*, 419 U.S. 544, 550 (1975) ("It is well established that vagueness challenges to statues which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *see also Dickerson v. Napolitano*, 604 F.3d 732, 743 (2d Cir. 2010) ("Whether a facial void-for-vagueness challenge can be maintained when, as here, a challenge is not properly based on the First Amendment is unsettled."). Notably, however, *this* Court has contemplated facial challenges even where "no constitutional overbreadth problem exists" so long as the challenged statute—like the Felony Provision—"is impermissibly vague in all of its applications." *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346–47 (9th Cir. 1984) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 497 (1982)). Ultimately, Defendants' mischaracterization on this point is academic: Because the District Court correctly concluded that the Felony Provision implicates Plaintiffs' First Amendment-protected activities, a facial challenge is appropriate regardless.

within the Felony Provision's expansive language,[10] the provision implicates First Amendment rights and is therefore subject to facial challenge—as the District Court correctly held.

III. The District Court correctly concluded that the Cancellation Provision violates the NVRA.

The NVRA's express purpose is to protect the "fundamental right" to vote while ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501. Even setting aside the practical consequences of the Cancellation Provision's far-reaching application—mass purges of voter registrations based on ill-defined reports of otherwise-lawful conduct, disenfranchisement caused by an absence of coordination between county recorders, and so on—the provision is clearly inconsistent with and therefore preempted by federal law. As the District Court correctly determined, the NVRA is violated when a statute

[10] Voter registration aside, the Felony Provision also reaches other activities that are protected by the First Amendment. Any number of advocacy efforts could constitute "provid[ing] a mechanism for voting," from conducting online webinars that inform voters about permissible forms of voter identification to distributing pamphlets to help voters find ballot drop boxes in their counties. Each of these activities "involves both the expression of a desire for political change and a discussion of the merits of the proposed change," an activity described by the Supreme Court as "core political speech." *Meyer*, 486 U.S. at 421–22, 428.

permits the cancellation of valid voter registrations without complying with the statute's procedural safeguards. *See* 1-ER-008–09. This is precisely what the Cancellation Provision does, and this Court should affirm the District Court's conclusion.

A. The Cancellation Provision is unlawful because it requires cancellation of voter registrations without following mandated procedural safeguards.

SB 1260 amends Arizona law by directing county recorders to cancel voter registrations on two new grounds. The first prong of the Cancellation Provision requires a county recorder to cancel a voter's registration "[w]hen the county recorder receives confirmation from another county recorder that the person registered has registered to vote in that other county." A.R.S. § 16-165(A)(10). The second prong requires voter registration cancellation "[i]f the county recorder receives credible information that a person has registered to vote in a different county" and subsequently "confirm[s] the person's voter registration with that other county." *Id.* § 16-165(B).

Based on the Cancellation Provision's "plain text," the District Court determined that "[n]either provision requires direct authorization from voters or compliance with the NVRA's notice provisions prior to a

county recorder removing a voter's registration from the rolls," and thus that the provision violates the NVRA because county recorders are now directed to remove voters from the voting rolls without adhering to specific NVRA procedures applicable to a voter's change of residence. 1-ER-008; *see also* 52 U.S.C. § 20507(a)(3)(A), (d)(1) (requiring that voter's registration be cancelled only upon request of voter or following written confirmation or failure to respond to notice). In so ruling, the District Court rejected Defendants' argument—which they now recycle on appeal—that a voter's registration form can impliedly constitute either a request or a written confirmation to cancel an older registration, noting that the Seventh Circuit has also twice rejected this reasoning. 1-ER-008–10, 012–13; *see also infra* at 53–57.

The District Court's analysis was straightforward: Applying federal law and persuasive authority, it rightly concluded that the Cancellation Provision directly violates the NVRA's requirements. None of Defendants' reheated responses change this analysis or result.

B. Defendants' arguments rely on mischaracterizations of the law and Arizona's election code.

Defendants argue that the District Court's ruling constitutes legal error because it did not take into account "the surrounding statutory

context and the operation of Arizona's voter registration laws." YCRC Br. 18, 20. This argument fails for several reasons.

First, Defendants' reliance on legal requirements *outside* the Cancellation Provision flips principles of statutory interpretation on their head. The District Court correctly found that the Cancellation Provision was incompatible with the NVRA because the plain text of that provision did not require "direct authorization from voters or compliance with the NVRA's notice provisions prior to a county recorder removing a voter's registration from the rolls." 1-ER-009; *see also* 1-ER-010 (rejecting YCRC's arguments that Arizona's election system implies voter authorization of registration cancellation). "[T]he best and most reliable index of a statute's meaning is the plain text of the statute." *State v. Christian*, 205 Ariz. 64, 66 (2003). Indeed, "[w]hen the plain text of a statute is clear and unambiguous," as it is here, "there is no need to resort to other methods of statutory interpretation." *Id.* Under the Cancellation Provision, voter registrations are to be cancelled once a county recorder receives confirmation from another election official that a person is registered to vote in another jurisdiction. A.R.S. § 16-165(A)(10), (B). There is simply no requirement that county recorders notify, receive

authorization from, or otherwise communicate at all with affected voters prior to cancelling their registrations.

Second, even if the broader context of Arizona's election law were scrutinized, Defendants ignore that Arizona law *already* provides a mechanism by which county recorders can cancel voter registrations in compliance with federal law. The NVRA provides that a voter's registration can be cancelled "at the request of the registrant," 52 U.S.C. § 20507(a)(3)(A), or if "the registrant . . . confirms in writing" that they have changed residences to another jurisdiction, *id.* § 20507(d)(1). Prior to SB 1260, Arizona law already provided that a county recorder must cancel a registration "[a]t the *request* of the person registered," A.R.S. § 16-165(A)(1) (emphasis added), or "[w]hen the county recorder receives *written information* from the person registered that the person has a change of address outside the county" or when the person fails to respond to a notice, *id.* § 16-165(A)(9) (emphasis added).

Comparing these provisions of state law with the NVRA, it is clear that Arizona's election code already directly tracked the very requirements of federal law that Defendants rely on to justify the Cancellation Provision—and thus that the new law cannot be reasonably

defended on this basis. Indeed, if Defendants' interpretation were correct, the Cancellation Provision would be rendered entirely superfluous. *See United States v. Leon H.*, 365 F.3d 750, 753 (9th Cir. 2004) (courts "avoid statutory interpretations that render entire sections of the statute superfluous").

In response to this straightforward analysis, Defendants attempt to distinguish the Cancellation Provision from these preexisting laws, stating that the Cancellation Provision requires county recorders to cancel registrations "when the voter directly communicates with *another election official*," whereas under existing law county recorders cancel a registration "upon direct communication with the *voter*." YCRC Br. 20 n.5 (emphases added). But this is a distinction without a difference. If Defendants were correct that, under the Cancellation Provision, a voter's registration form serves both as both a "request" and a "written confirmation" to cancel an older registration consistent with the NVRA—which, to be clear, the form cannot, *see infra* at 51–53—then the Cancellation Provision would operate in the exact same manner as § 16-165(a)(1) and (a)(9). It would be entirely duplicative, providing no independent grounds to cancel a voter's registration. Simply put, if

Defendants are correct that the Cancellation Provision is consistent with the NVRA, then it is superfluous; and if they are not, it is preempted.[11]

Third, Defendants unpersuasively argue that, because a voter's registration form is an "official public record" accompanied by proof of residence, it qualifies as written confirmation of a change of voting address as contemplated by the NVRA. *See* YCRC Br. 15 (citing A.R.S. §§ 16-161(A), 16-123). This argument conflates two entirely different concepts. Whether Arizona law considers a voter registration form to be a public record is relevant only as to whether that form is subject to open inspection by others. *See* A.R.S. § 39-121. It is not relevant to assessing whether a registration form, accompanied by proof of residence, qualifies as evidence that the voter has "confirm[ed] in writing" a change of address for the purpose of cancelling a prior registration, as required under the NVRA. And, because the registration form is at most implied,

[11] This argument also conflicts with Defendants' repeated assurance that the Cancellation Provision merely codifies existing practice. *See* YCRC Br. 6–8, 16–18. To be clear, it does not—as Defendants admitted below. *See* 2-ER-091 ("[O]nly parts of SB 1260 were enjoined by th[e District] Court's Order, not existing practices."); *see also supra* at 9 (Plaintiffs do not challenge existing practices).

indirect authorization to cancel an old registration, it does not. *See* 1-ER-008–14.

Fourth, Defendants spend several pages explaining how Arizona's voter registration database checks for duplicate registrations and argue that, because the submission of a voter registration form triggers this cross-check process, a registration form serves as the "equivalent" of a request to cancel an old registration because it should eventually lead to the cancellation of a prior registration in the database. YCRC Br. 16–18. The length and circuity of Defendants' explanation underscores what the District Court already concluded: A voter's registration form is *at best* an implied or indirect request to cancel a prior registration, which is not sufficient under the NVRA.

Again, Defendants do not and cannot argue that, at any point in time, the Cancellation Provision requires any direct communication between a voter and the election official responsible for cancelling their registration. And, as the District Court correctly concluded, "inference[s] from information . . . indicating that a voter has registered in another jurisdiction is neither a request for removal nor is it from the registrant, as required" by the NVRA, which mandates that the "direct

authorization" to cancel a registration "unequivocally come *from the voter*." 1-ER-009–10, 013; *accord Common Cause*, 937 F.3d at 960 ("Drawing an inference . . . indicating that a voter has registered in another jurisdiction is neither a request for removal nor is it from the registrant, as required under the terms of § 20507(a)(3). It is only an action that allows an inference that the voter is relinquishing her . . . domicile, but the NVRA requires more than such an inference.").

Defendants' fundamental misconception of what constitutes direct authorization from a voter is, ultimately, a critical and fatal flaw in their argument. They provide only conclusory assertions that a voter's registration form constitutes a direct request to cancel an old registration. There is certainly no evidence demonstrating that a registration form contains *any* indication of a voter's intention to do anything other than register to vote in another jurisdiction, and Defendants concede that registration forms in Arizona do not contain any check box or notation to cancel old registrations. *See* YCRC Br. 23. In the absence of an explicit indication that a voter intends to cancel an old registration, a registration form can at most serve only as the basis for an *inference* that the voter is seeking such a cancellation. But mere

inference is not enough under the NVRA. "The only way to know whether voters want to cancel their registration is to ask them." *Common Cause*, 937 F.3d at 960. Because the Cancellation Provision allows for cancellation of a registration without direct voter contact or approval, it runs afoul of federal law. *See Sullivan*, 5 F.4th at 724 (concluding that Indiana law that allowed State to "cancel a voter's registration without either direct communication from the voter or compliance with the NVRA's notice-and-waiting procedures" was "impermissibl[e]").[12]

C. *Common Cause* and *Sullivan* are not materially distinguishable from the case here.

As the District Court correctly noted, both *Common Cause* and *Sullivan* are "indistinguishable from this case on all of the relevant points." 1-ER-010. The Indiana laws at issue in those cases, like the Cancellation Provision, directed election officials to cancel voter

[12] Nor, indeed, would this inference even be naturally drawn. The fact that an Arizona voter can have only one residence at a time does not mean that they must cancel all of their older voter registrations; under the election code, they are legally required only to be a resident at the time of registering to vote and at least 29 days before the next election. *See* A.R.S. § 16-125 (voter who moves within 29 days of election is "deemed to be a resident and registered elector of the county from which the elector moved until the day after the [election]"). There is thus no basis to infer that a registration form would necessarily authorize cancellation of a prior registration.

registrations based on information provided by a source other than voters themselves. *See Sullivan*, 5 F.4th at 718–19; *Common Cause*, 937 F.3d at 958. In both cases, the Seventh Circuit held that the laws in question violated the NVRA because they allowed cancellations based solely on the inference that a voter intended to cancel a registration by registering in another jurisdiction, rather than by making direct contact with the voter to notify them or confirm that intent, as required by the NVRA.[13]

Defendants' attempts to distinguish *Common Cause* and *Sullivan* are unpersuasive.

First, Defendants argue that the Cancellation Provision applies only to the cancellation of registrations when a voter has registered in another county within Arizona, whereas *Common Cause* and *Sullivan* dealt with the cancellation of registrations where the voter registered to vote in a different state. But, as the District Court correctly noted, "[n]othing in the text of the statute limits [the Cancellation Provision's]

[13] The Indiana laws at least required the second registration to postdate the voter's original Indiana registration before the original registration could be cancelled. As discussed above, no such timing requirement or coordination is included in the Cancellation Provision, so it is unclear which registration—and possible that both—would be cancelled in Arizona. *See supra* at 6–8.

application to only county recorders in Arizona." 1-ER-011. Indeed, the Secretary stated that she interpreted the Cancellation Provision as applying to confirmation "from an out-of-state jurisdiction's voter registration official . . . that the voter has registered to vote in that jurisdiction." 2-ER-180. At any rate, even if the Cancellation Provision only required the cancellation of registrations where a voter moved *within* Arizona, that is legally insignificant for purposes of the NVRA. The NVRA's protections do not hinge on whether a voter has moved intrastate or interstate. When a voter changes residence to another jurisdiction, the NVRA does not authorize the cancellation of that voter's registration without written confirmation from that voter or the voter's failure to respond to a notice—regardless of where their move began and ended. *See* 52 U.S.C. § 20507(d)(1).[14]

[14] Defendants suggest that the District Court reached this conclusion by reading "county recorders" inconsistently. YCRC Br. 21–22. But the District Court's conclusion was drawn directly from the plain text of the provision, which allows for the cancellation of a voter's registration based on information received from unspecified sources. *See* A.R.S. § 16-165(B) ("If the county recorder *receives credible information that a person has registered to vote in a different county*, the county recorder shall confirm the person's voter registration with that other county, and on confirmation, shall cancel the person's registration[.]" (emphasis added)). There is nothing in the text of the Cancellation Provision that would

Second, Defendants argue that the facts here are distinguishable from the facts in *Common Cause* and *Sullivan* because, unlike the Indiana statutes at issue in those cases—which required election officials to draw inferences from third-party databases—the Cancellation Provision instead relies on "direct communicat[ions] with the voter" via the "official voter registration forms *from voters themselves* maintained in a central statewide database." YCRC Br. 22–24. This argument fails because, as discussed above, the Cancellation Provision *does not require* direct communication to or from a voter prior to cancellation. *See supra* at 45–53.

Moreover, Defendants misconstrue the Seventh Circuit's holdings in *Common Cause* and *Sullivan*. Those opinions did not hinge on the fact that voter registration information came from a third-party database. Instead, the dispositive fact was the NVRA's requirement that election officials make direct and personal contact *with voters* before registrations

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exclude out-of-state election officials from the universe of sources that could provide that information. Moreover, to avoid rendering § 16-165(B) as duplicative of § 16-165(A)(10), the former must involve something beyond the exchange of information between two Arizona county recorders. *See Leon H.*, 365 F.3d at 753 (courts "avoid statutory interpretations that render entire sections of the statute superfluous").

can be cancelled. *See Common Cause*, 937 F.3d at 959 (Indiana law "d[id] away with the process of personal contact with the suspected ineligible voter," thus allowing Indiana election officials to "remove a person from the rolls . . . *without direct notification of any kind*" in violation of NVRA); *Sullivan*, 5 F.4th at 724 (Indiana law "impermissibly allows Indiana to cancel a voter's registration without either direct communication from the voter or compliance with the NVRA's notice-and-waiting procedures"). As the District Court correctly recognized, that the two Seventh Circuit cases involved a third-party database is (yet another) distinction without a difference. *See* 1-ER-010.

In short, the Seventh Circuit cases are not distinguishable from the case here. And, for the same reasons those cases explored, the Cancellation Provision conflicts with the NVRA and is thus preempted.

IV. Defendants' equitable arguments are without merit.

As a last-ditch effort to undo the District Court's preliminary injunction, Defendants raise a host of baseless equitable challenges—many of which simply recycle their unsuccessful standing and merits arguments.

A. Plaintiffs are at risk of irreparable injury.

As YCRC concedes, Plaintiffs' success on the merits establishes irreparable harm because SB 1260 causes constitutional injury. *See* YCRC Br. 34 (citing *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997)). Accordingly, YCRC's other arguments regarding irreparable harm are irrelevant and, in any event, meritless:

- Plaintiffs were not required to identify individual voters who would be harmed by SB 1260 because *Plaintiffs themselves* would be injured as a result of the constitutional violations effectuated by the new laws. *See Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009); *cf. Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) ("Plaintiff need not identify *specific* aspiring eligible voters who . . . will be barred from voting; it is sufficient that some inevitably will.").

- The Felony Provision's plain text is vague and would criminalize and chill Plaintiffs' protected voter registration activities. *See supra* at 29–44.

- Because the Attorney General's purported disavowal of the Felony Provision is restricted exclusively to briefing and argument in this

litigation, Plaintiffs' concerns of unconstitutional enforcement and self-censorship are not unduly speculative. *See supra* at 18–25.

- The Cancellation Provision poses a risk to both old and current voter registrations, and thus poses a risk of injury to Plaintiffs' members. *See supra* note 13.

- Enjoining the Cancellation Provision will provide relief to Plaintiffs because it does not simply duplicate preexisting statutes and procedures. *See supra* at 48–50.[15]

In short, the District Court properly concluded that Plaintiffs demonstrated a sufficient risk of irreparable harm, both because "the loss of constitutional rights like due process 'for even minimal periods of time, unquestionably constitutes irreparable injury,'" and because Plaintiffs "are likely to suffer irreparable harm in the absence of an injunction

[15] In contesting the District Court's finding of irreparable harm, YCRC baldly claims that "the District Court conceded that the identical statutes and procedures that require the State's election officials to cancel outdated voter registrations were not challenged or affected by the District Court's order." YCRC Br. 35. But the District Court expressly explained that "the underlying procedures and the text of SB 1260 are *not* identical" and thus that, "[t]o the extent that SB 1260 grants county recorders even broader authority to cancel voter registrations without the voter's written confirmation, it puts the Plaintiffs' members at risk of disenfranchisement." 1-ER-020 (emphasis added).

against the Cancellation Provisions to the extent that Plaintiffs assert that they must divert resources to combat the negative effects of the law." 1-ER-020 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Moreover, contrary to YCRC's intimations, *see* YCRC Br. 36–37, the District Court properly balanced the risk of disenfranchisement and self-censorship posed by SB 1260 with the (nonexistent) risk of voter fraud that purportedly justified the challenged provisions. These determinations were amply supported by the District Court's factual findings, consistent with precedent, and not abuses of discretion.

B. *Purcell* did not require the District Court to deny Plaintiffs' requested relief.

Both the Attorney General and YCRC sound the drumbeat of *Purcell*, arguing that "[e]njoining a reasonable voter administration law like SB 1260 during the critical weeks before a voter's registration is solidified and early ballots are distributed is a quintessential violation of the *Purcell* doctrine." AG Br. 18; *see also* YCRC Br. 37 n.11. Their invocation of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), is hardly surprising—in contemporary voting rights cases, *Purcell* has reliably emerged as the last refuge for parties looking to defend laws that deny or dilute the franchise. But their arguments nevertheless betray a

fundamental misunderstanding of the doctrine and a striking disregard for the operative facts in this case.

By cherry-picking language from the *Purcell* caselaw, the Attorney General implies that the doctrine should serve to discourage adjudication of voting rights cases whenever injunctive relief is sought around the time of an election. But significantly, even Justice Kavanaugh's concurrence in the *Merrill v. Milligan* stay order stressed that *Purcell* is *not* "absolute" and is instead simply "a sensible refinement of ordinary stay principles for the election context." 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). *Purcell* was never intended as a blanket requirement that district courts abstain from remedying injuries simply because an election is close at hand—and it is certainly not a license for courts to abdicate their responsibility to safeguard the constitutional right to vote. Instead, the *Purcell* Court addressed a particular feature of election cases: that the risk of disenfranchisement created by a challenged rule must be weighed against the risk that judicial intervention could "result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4–5. Although subsequent court activity has broadened application of *Purcell* beyond this foundational

directive, each of those decisions has emphasized that use of the doctrine is a heavily fact- and context-specific exercise, one dependent upon the unique circumstances of a given case. The District Court recognized this imperative, explaining that "courts considering motions for preliminary injunctions that challenge state election laws are required to weigh 'considerations specific to election cases' like the disenfranchising effect of orders that disrupt the status quo 'just weeks before an election.'" 1-ER-021 (quoting *Purcell*, 549 U.S. at 4).[16]

Here, the facts on the ground readily demonstrate why *Purcell* did not militate against the relief Plaintiffs sought. This was not an instance where a court was asked to make a "last-minute challenge to [a] decades-old rule." AG Br. 19 (quoting *Yazzie v. Hobbs*, 977 F.3d 964, 969 (9th Cir. 2020) (per curiam)). SB 1260 was enacted on June 6, 2022, and set to go into effect on September 24—after Arizona's August primary. As such, had the District Court not enjoined the Felony and Cancellation Provisions, the November general election would have been conducted

[16] Notably, the NVRA—one of the bases for Plaintiffs' challenge to the Cancellation Provision—expressly contemplates that litigation might be initiated close in time to an election. *See* 52 U.S.C. § 20510(b)(2) (shortening pre-litigation notice period when NVRA "violation occurred within 120 days before the date of an election").

under a different set of rules than the primary. Indeed, contrary to Defendants' repeated and desperate assertions to the contrary, neither the Felony Provision nor the Cancellation Provision represented mere codification of the status quo; instead, as discussed above, these provisions introduced novel rules and requirements that posed a clear and unacceptable risk of disenfranchisement and disruption to Plaintiffs' protected political expression, as the District Court recognized. *See* 1-ER-021 ("Defendants have not suggested that enjoining the Felony Provision would prevent the State from administering existing election procedures."); 1-ER-026 ("[T]he Cancellation Provisions do not, on their face, codify any existing procedures."). It was not Plaintiffs who introduced confusion and potential disenfranchisement in the runup to an election, but SB 1260 itself.

Had the Legislature wanted to avoid voter confusion and administrative disruption—the very concerns that animate the *Purcell* doctrine—it could have either set SB 1260's effective date before the August primary or delayed it until after the general election, as it did with other election-related legislation this year. *See* SB 1638, § 4, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (providing that HB 2492, which imposes

new proof-of-citizenship requirements, "is effective from and after December 31, 2022"). But it did not, and instead sought to introduce a late-hour rule change in the midst of the election season—indeed, on the same day that military and overseas ballots were required to be mailed for the November election. The District Court's order thus preserved the status quo in the leadup to the general election; it did not disrupt it.

This case is thus materially different from *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081 (9th Cir. 2020), on which the Attorney General places significant weight. There, the plaintiffs challenged a *preexisting* law, and "the District Court enjoined the law and ordered Arizona to create and to institute a *new* procedure." *Id.* at 1084–85 (emphasis added). Here, by contrast, the District Court's order had the effect of preserving Arizona's preexisting election laws and avoiding imposition of a novel, mid-election rule change. *Hobbs* does not support Defendants' *Purcell* argument; it wholly undermines it.

Subsequent events confirmed the propriety of the District Court's injunction. Following the District Court's order, the Secretary filed a notice on the docket in which she—as Arizona's chief election official—stated that, based on her understanding of Arizona's election code and

procedures and her communications with county recorders, "the PI Order *provides certainty* that no new procedures are required for the upcoming election" and "that a *stay* of the PI Order would inject unnecessary confusion and administrative burdens on elections officials at this stage, as the 2022 General Election rapidly approaches." 1-ER-075 (emphases added). Accordingly, this is not a case where "the injunction ma[de] it considerably more difficult for [the Secretary] and other election officials to fulfill their statutory obligations in administering the election," *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020); the Secretary represented as much to the District Court.

In the end, the looming specter of voter purges facilitated by the Cancellation Provision—which would have allowed any third party to submit ill-defined "information that a person has registered to vote in a different county," A.R.S. § 16-165(B), and in turn require cancellation of registrations without the voters' knowledge or consent—was avoided.[17]

[17] The threat of such purges is neither idle nor exaggerated; such third-party efforts have become an all-too-common feature of American elections. *See, e.g.*, *Common Cause*, 937 F.3d at 948–49; Dhruv Mehrotra, *Inside the 'Election Integrity' App Built to Purge US Voter Rolls*, Wired (Nov. 8, 2022), https://www.wired.com/story/true-the-vote-iv3-app-voter-fraud.

And the general election unfolded without the sort of confusion and disenfranchisement that would have counseled in favor of applying *Purcell*'s discretionary restraint—a result forecasted not only by Plaintiffs and the Secretary, but the District Court, which recognized that its injunction preserved the status quo. *See* 1-ER-027 ("[T]he Court enjoins only the operation of the Cancellation Provisions, leaving the status quo in place. This is what *Purcell* demands.").[18]

It is, ultimately, curious for Defendants to loudly trumpet *Purcell* at this juncture, after Arizona's election officials successfully administered the general election. They could have moved to stay the District Court's order pending appeal following the denial of their emergency stay motion on October 3—but they did not. It is only now, post-election, that they ask this Court to second-guess the District Court's reasoned application of an equitable *pre*-election doctrine. Their *Purcell* arguments would fail in any event—by enjoining a mid-election change in the law, the District Court preserved the status quo and

[18] Although the Attorney General suggests that the preliminary injunction "caused undue confusion regarding how county recorders may maintain accurate voter rolls," AG Br. 20, he provides no evidence or support to substantiate this claim.

mitigated any risk of voter confusion—but their lack of celerity is nonetheless revealing.

C. Plaintiffs did not unduly delay in bringing suit.

The Attorney General's final equitable gambit is an accusation that Plaintiffs unduly delayed in seeking relief, suggesting that the District Court "abused its discretion by failing to account for this critical consideration." AG Br. 25. This argument is neither persuasive nor sincere.

At the outset, the Attorney General is simply incorrect that the District Court ignored the issue of delay. At the September 22 hearing, the District Court concluded that Plaintiffs had not "forfeited" the ability to challenge SB 1260 by any delay in the time of their filing, which was "within just a few months" and "before the law became effective." 4-ER-393:20–24. The District Court did not disregard the issue of delay; it simply disagreed with the Attorney General's contention.

Moreover, the District Court's determination on this issue was consistent with Plaintiffs' underlying actions. SB 1260 was signed into

law in June 2022; Plaintiffs initiated this lawsuit in mid-August;[19] and their preliminary injunction motion followed just one month later, after they amended their complaint to add an NVRA claim that only became ripe after the Secretary failed to respond to their pre-litigation letter within the statutorily required 20-day notice period. *See* 52 U.S.C. § 20510(b)(2). As the District Court noted, all of Plaintiffs' actions occurred *before* the challenged provisions went into effect.

Significantly, the timing at issue here is a matter of only months, not years, as in the cases on which the Attorney General relies. *See Miracle v. Hobbs*, 808 F. App'x 470, 473 (9th Cir. 2020) ("The likelihood of imminent and irreparable harm is further undermined by the length of time between the enactment of the Strikeout Law in 2014 to filing suit in July 2019, thus allowing the law to remain in place for multiple election cycles."); *Oakland Trib., Inc. v. Chron. Publ'g Co.*, 762 F.2d 1374, 1374 (9th Cir. 1985) (denying request for preliminary injunction of contract provisions that existed "for many years" and were "customary in

[19] As one court has observed, "cases discussing undue delay in connection with the *Purcell* doctrine usually refer to the timing of the complaint," not subsequent motions practice. *VoteAmerica v. Raffensperger*, No. 1:21-CV-01390-JPB, 2022 WL 2357395, at *19 (N.D. Ga. June 30, 2022).

the industry"). Once more, what Defendants blithely dismiss as an abuse of discretion by the District Court was actually a sound equitable determination supported by the facts.

CONCLUSION

Having considered the evidence before it and correctly applied governing caselaw, the District Court properly enjoined the Felony and Challenge Provisions, thus ensuring that the 2022 general election in Arizona was conducted free from confusion, disenfranchisement, and the violation of constitutional rights. For these reasons and those above, this Court should affirm the District Court's preliminary injunction.

Respectfully submitted this 19th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

I am an attorney for the party filing this brief in the above-captioned case. This brief contains 13,679 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

/s/ Daniel A. Arellano

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I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2022.

/s/ Daniel A. Arellano