No. 22-16490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiff-Appellees,
v.
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendant-Appellants,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellants,
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

INTERVENOR-DEFENDANT'S REPLY BRIEF

SNELL & WILMER L.L.P.

Brett W. Johnson
Eric H. Spencer
Colin P. Ahler
Tracy A. Olson
One East Washington Street,
Suite 2700
Phoenix, Arizona 85004
Telephone: (602) 382-6000
bwjohnson@swlaw.com
espencer@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Counsel for Yuma County Republican Committee

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INTRODUCTION

In seeking to strike down a voter-friendly and common-sense election law carefully designed to balance the important interests of election integrity and voter protection, Plaintiff-Appellees Arizona Alliance for Retired Americans, Voto Latino, and Priorities USA ("Plaintiffs") double down on the same faulty legal arguments that the district court wrongly accepted below. In particular, Plaintiffs review the challenged provisions in isolation rather than harmonizing them with the surrounding statutory context, fail to give words their reasonable and plain meaning, and rely on exaggeration and hyperbole to support their speculation that these provisions *might* lead to voter repression. For several reasons, Plaintiffs fail to demonstrate the requisite factors justifying the district court's entry of a preliminary injunction.

First, to support their manufactured fear of prosecution for engaging in ordinary voter registration activities, Plaintiffs continue to broaden the application of A.R.S. § 16-1016(12) (the "Felony Provision") well beyond its unambiguous language. By its plain terms, a "mechanism *for voting*" concerns the processes involved in casting a vote—not the prerequisite steps in becoming registered to vote. Because this has been

Yuma County Republican Committee's ("YCRC") position all along, Plaintiffs' waiver argument should be rejected. And Plaintiffs' facial vagueness challenge also fails, as they are unable to identify any statutory text to support their argument that the Felony Provision somehow extends to voter registration activities. Indeed, because the Felony Provision does not implicate the First Amendment or any other constitutionally protected activity, and is not vague in any of its applications, Plaintiffs had no grounds to bring a facial vagueness challenge to the Felony Provision in the first place.

Second, Plaintiffs continue to ignore the holistic statutory framework in which the A.R.S. § 16-165(A)(11)[1] and (B) (the "Cancellation Provision") rests. But when the entire Arizona election code is considered in harmony rather than isolation, Plaintiffs' case for preemption under the National Voter Registration Act ("NVRA") falls away. Moreover, Plaintiffs' continued reliance on non-binding and materially distinguishable Seventh Circuit cases remains unpersuasive.

[1] A.R.S. § 16-165 was amended effective January 1, 2023 to include a new subsection (A)(10), renumbering part of the Cancellation Provision as (A)(11).

Finally, in the absence of any constitutional deficiency, Plaintiffs cannot point to any non-speculative or probable irreparable harms that overcome the public's significant interest in preventing voter fraud. The district court erred as a matter of law in finding to the contrary, and the preliminary injunction should be vacated.

ARGUMENT

I. The District Court Erred in Finding that Plaintiffs Are Likely to Succeed on the Merits.

A. The District Court Erred in Holding that the Felony Provision is Unconstitutionally Vague.

Plaintiffs are unlikely to prevail in a facial challenge to the Felony Provision because the only reasonable interpretation of that Provision gives a person of ordinary intelligence fair notice of the prohibited conduct. Statutes need not be written with "mathematical" certainty, *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972), but need only be "intelligible, defining a 'core' of proscribed conduct that allows people to understand whether their actions will result in adverse consequences." *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir.), *amended*, 247 F.3d 903 (9th Cir. 2000), *and amended*, 260 F.3d 1159 (9th Cir. 2001). This is exactly what the Felony Provision does.

1. YCRC Has Consistently Explained that the Only Reasonable Interpretation of the Felony Provision Does Not Include Voter Registration.

Plaintiffs contend (at 31–33) that YCRC's arguments on the meaning of "mechanism for voting" were not raised below. Not true. YCRC repeatedly asserted below that the plain language of "mechanisms for voting" does *not* include prerequisites to voting like voter registration activities. *See, e.g.*, 2-ER-111–12; SER-008–11. Similarly, YCRC consistently argued below that a "mechanism for voting" includes only the fundamental processes involving in the act of casting a vote, meaning those activities proximate to (1) completing and casting the ballot and (2) the tangential items (*i.e.*, associated documents) necessary to do so. *See* SER-009 ("In context, 'mechanisms for voting,' or the 'fundamental' process 'for voting,' consists of the actual ballot or other tangential items necessary to cast the ballot, such as a mail-in ballot envelope."); 2-ER-106 (the Felony Provision "only prohibits the minimal act of forwarding a ballot (or associated documents) to another person, while *knowing* the other person is registered in a different state." (emphasis in original)); 2-ER-111 ("The "mechanisms for voting"—*i.e.*, the 'fundamental' process 'for voting'—consists of the actual ballot. Examples include a mailed early

ballot or an emailed or faxed ballot to a federal Uniformed and Overseas Citizens Absentee Voting Act voter."). On appeal, YCRC continues to assert these same arguments.

The district court rejected YCRC's arguments below, concluding (erroneously) that a "mechanism for voting" could extend to voter registration activities. 1-ER-006–07. There is no waiver in these circumstances. *See W. Watersheds Project v. U.S. Dep't of Interior*, 677 F.3d 922, 925 (9th Cir. 2012) (there is no waiver if "the issue was raised, the party took a position, and the district court ruled on it.").

Plaintiffs quibble (at 32–33) over the precise phrasing that YCRC used at different times to describe the specific processes involving in casting a vote. But, regardless of any slight differences in wording, YCRC's position that a "mechanism for voting" does *not* extend to voter registration activities never wavered. YCRC has also provided specific, concrete examples to illustrate the type activities that fall under the Felony Provision, and all of these examples have been inextricably related to the fundamental process of casting a vote, such as: checking into a voting location, providing adequate voter ID; completing and timely submitting an in-person or mail-in ballot. [*See*, *e.g.*, Opening Br.

at 27]; *see also* 2-ER-106, -111; SER-009. Thus, contrary to Plaintiffs' assertions (at 29–30), YCRC's argument is not "newly minted" nor "contrary to the definitions [YCRC] offered below." A party need not copy-and-paste identical language or definitions in every filing to preserve an issue for appeal. *See W. Watersheds Project*, 677 F.3d at 925 ("The question with respect to waiver . . . is whether the issue was sufficiently raised for the trial court to rule on it.").[2]

Plaintiffs also misunderstand (at 34–35) YCRC's distinction between activities that occur every time a person goes through the process of casting a vote and pre-voting activities that occur only once. This difference is just one example of how voter registration and a "mechanism for voting" are materially different. Voter registration is an attenuated, *prerequisite* to voting and not an activity that occurs each election as part of the ballot-casting process. Only the latter qualifies as a "mechanism for voting," as YCRC has argued all along.

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[2] Plaintiffs also ignore that any slight variations in the precise wording used by YCRC in different briefing is a natural result of the highly expedited timeline below—which was largely caused by Plaintiffs' inaction and delay in moving for a preliminary injunction.

2. Plaintiffs' Attempt to Make the Felony Provision Vague Improperly Dismisses the Importance of the Felony Provision's Statutory Framework.

Plaintiffs attempt to inject ambiguity into the Felony Provision through an expansive reading of "mechanism," but they effectively ignore the two words that immediately follow and necessarily qualify this word—"for voting." Because these words are connected, the only "mechanisms" implicated by the Felony Provision are those necessary to cast a vote on the candidates or measures on a ballot (*i.e.*, "for voting"). Nothing in the phrase "mechanism for voting" casts a wide net over every act that has some tangential relationship to the actual process of casting a vote. No one casts a ballot, for instance, by submitting a voter registration form or by assisting another with registering. Nor does anyone vote by engaging in the type of outreach activities referenced by Plaintiffs (at 44), such as conducting voter education webinars or distributing pamphlets. Rather, Plaintiffs' examples only show how patently absurd their interpretation of the phrase "mechanism for voting" stretches. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) ("In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's

facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

While this Court need not go further than the plain words of "mechanism for voting" to reject Plaintiffs' vagueness claim, the statutory framework surrounding the Felony Provision repeatedly confirms that this phrase only encompasses the mechanisms used to cast a vote and does not extend to voter registration. This confirmation is found not only in the text of the Felony Provision itself, but also the broader statute and title in which that Provision resides. Plaintiffs try to attack the surrounding text on a piecemeal basis, but this approach only causes them to miss the forest for the trees and flaunt the directive to "read words *in context* and effectuate the plain meaning of [the statute] unless doing so would be absurd." *S. Point Energy Ctr. LLC v. Ariz. Dep't of Rev.*, 253 Ariz. 30, ¶ 14 (2022) (emphasis added); *see also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167-68 (2012) ("Context is a primary determinant of meaning.").

Starting with the text of the Felony Provision, Plaintiffs downplay (at 36) the indisputable fact that the specific example of prohibited conduct in the Felony Provision—"forwarding an early ballot addressed to [another] person"—concerns the act of casting a ballot and has *nothing* to do with voter registration. A.R.S. § 16-1016(12). That this example is illustrative, not exhaustive, is beside the point. What matters is that the Arizona Legislature's sole example is entirely consistent with the only reasonable reading of "mechanism for voting." If the Legislature intended a more expansive reading that exceeded the plain text and incorporated attenuated pre-voting activities, it could have said so directly, such as by providing an example of prohibited conduct that actually related to voter registration. It did not do so.

Turning to the broader statute where the Legislature placed the Felony Provision (A.R.S. § 16-1016), Plaintiffs contend that it does not matter that *all* of the prohibited activities in this statute concern "Illegal voting." Attempting to circumvent this limitation, Plaintiffs argue (at 36–37) that because § 16-1016 extends to some activities that occur immediately *after* voters cast their ballots (such as ballot destruction), the statute is not limited only to acts that are "inextricably related to the

act of casting a ballot." That distinction is irrelevant. All illegal acts prohibited by § 16-1016 implicate the actual voting process, such as voting without eligibility (subsection 1), voting more than once (subsections 2 through 4), and vote tampering with the ballot, ballot box, poll list, or vote totals (subsections 5 through 11). That some of these activities occur just before or just after the literal casting of a ballot does not change that these acts are inextricably related to the process of casting a valid vote. Plaintiffs' attempt to broaden the scope of the types of prohibited activities in § 16-1016 to voter registration activities is a bridge too far—it strains credulity to say that pre-voting activities such as registration is related to the act of casting a ballot in the same way as voting twice or vote tampering.

Plaintiffs also dismiss (at 37) the fact that the Legislature placed the processes for voting and registration in different chapters of Title 16. But this placement is yet another indicator that a "mechanism for voting" does not include registration activities. The point is not whether the various prohibitions on illegal voting in § 16-1016 happen to implicate activities regulated in other sections, as Plaintiffs suggest. Rather, all prohibitions in § 16-1016 criminalize acts that occur in connection with

the actual voting process—a process that is separate from the registration process. For instance, the illegal activity committed by one who "[n]ot being entitled to vote, knowingly votes" is not a lack of qualifications—which exists pre-voting and is obviously not, by itself, illegal—but rather the actions that occur proximately to the process of casting a ballot (*i.e.*, knowingly votes). Nothing in § 16-1016 criminalizes any activity even remotely related to pre-voting activities such as registration.

At bottom, the plain language of the Felony Provision, including "mechanism for voting," is clear, especially "when considered in context of [the challenged ordinance], other applicable ordinances, and common sense." *Recreational Devs. of Phoenix, Inc. v. City of Phoenix*, 83 F.Supp.2d. 1072, 1087 (D. Ariz. 1999). Plaintiffs fail to offer any reasonable justification for their expansive interpretation of the Felony Provision to criminalize voter registration activities. Accordingly, the district court committed legal error in finding the Felony Provision unconstitutionally vague.

3. Even If the Felony Provision Somehow Implicates Registration, the Scienter Element Protects Against Prosecution of Ordinary Voter Registration Activities.

To salvage their misguided and hypothetical fears of prosecution, Plaintiffs dismiss the Felony Provision's inclusion of a scienter requirement. However, the Felony Provision's requirement that a violator must "*[k]nowingly* provide[] a mechanism for voting to another person who is registered in another state," A.R.S. § 16-1016(12), makes clear that even if the Felony Provision somehow applies to registration (it does not), it still does not prohibit the ordinary voter registration activities in which Plaintiffs engage. The scienter requirement instead provides even more notice of the conduct actually prohibited by the Felony Provision.

"[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Flores-Figueroa v. United States*, 556 U.S. 646, 652–57 (2009) (in interpreting a statute enhancing the sentence of a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," finding that the defendant must knowingly "transfer[], possess[], or use[]" another's

identification *and* know that the "means of identification" at issue belonged to another person). This concept is fundamentally analogous to the series-qualifier canon, in which modifiers at the beginning of a phrase or list apply to that entire phrase. Scalia & Garner, *supra*, at 147.

Thus, the use of "knowingly" in the Felony Provision applies to each element described in the Felony Provision: to be criminally liable, a person must both (1) "knowingly provide[] a mechanism for voting to [another] person"; and (2) know that this person "is registered in another state." A.R.S. § 16-1016(12). This reading has been supported time and again, with SB 1260's sponsor and the now-former Arizona Attorney General both confirming that the statute would not "criminalize . . . ordinary voter outreach." 2-ER-203; *Jan. 31, 2022 Hearing on SB 1260 Before S. Comm. on Gov't*, 55th Leg., 2d Reg. Sess. at 36:25–36:29, 39:00–40:40 (Ariz. 2022); 2-ER-203; *see also* 2-ER-126–28 ¶¶ 4, 8, 11–13.[3] Applied to Plaintiffs' vagueness claim, the scienter requirement defeats

[3] Plaintiffs' focus on the non-binding nature of the Attorney General's interpretation conflates their standing arguments and is irrelevant in this context. What matters here is that these numerous credible sources have properly interpreted the statute to exclude Plaintiffs' activities—consistent with the plain language of a "mechanism for voting," "knowingly," and other statutory context.

any suggestion that Plaintiffs cannot tell whether they may engage in ordinary voter registration activities without fear of prosecution. Even if the Felony Provision applied to such activities (again, it does not), Plaintiffs would have to know that the person they are assisting is registered in another state to commit a violation.

4. The Felony Provision Cannot Be Subject to a Facial Challenge.

Because Plaintiffs fail to provide any reasonable interpretation in which the Felony Provision encompasses voter registration activities, the Felony Provision does not implicate any First Amendment activity or any other constitutionally protected activity. Thus, a facial challenge is not appropriate here. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 945 n.7 (1982) ("*Flipside*") (holding that "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.").

Plaintiffs allude (at 43 n.9) to a nuanced exception under the "ordinary rule against facial statutory review," which applies only if "'no standard of conduct is specified *at all*' . . . that is, if the statute 'is impermissibly vague in *all of its applications*.'" *See Schwartzmiller v.*

Gardner, 752 F.2d 1341, 1347 (9th Cir. 1984) (quoting *Parker v. Levy*, 417 U.S. 733, 755 (1974) (first quote), *Flipside,* 455 U.S. at 497 (second quote)) (emphasis added). But as discussed at length, the Felony Provision is not vague in *any* of its applications. And even if it was, it explicitly specifies at least some prohibited activities by including the illustrative example of "forwarding an early ballot addressed to the other person." A.R.S. § 16-1016(12). This goes well beyond providing "no standard of conduct."

Accordingly, the Felony Provision is not subject to a facial challenge because it does not implicate speech or any other other constitutionally protected conduct. *See Schwartzmiller*, 752 F.2d at 1346; *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 392–93 (9th Cir. 2016) (holding that the act of collecting ballots is not protected speech); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (similar). Nor does the Felony Provision fit within the narrow exception *sometimes* permitted for other types of facial vagueness challenges. The district court should not have entertained a facial vagueness challenge and, for this additional reason, Plaintiffs' challenge to the Felony Provision fails.

B. The District Court Improperly Concluded that the Cancellation Provision Violates the NVRA.

1. The District Court and Plaintiffs Improperly Read the Cancellation Provision in Isolation.

To manufacture a preemption issue with the NVRA, Plaintiffs continue to analyze the Cancellation Provision through tunnel vision and without regard to the broader statutory scheme in which it resides. However, it is well-established that "[s]tatutory provisions should be read in context to determine meaning, with an aim at effectuating the legislature's intent." *State v. Ariz. Bd. of Regents*, 253 Ariz. 6, 12 ¶ 24 (2022). "In construing a specific provision, [courts] look to the statute as a whole and [] may also consider statutes that are *in pari materia*—of the same subject or general purpose—for guidance and to give effect to all of the provisions involved." *Stambaugh v. Killian*, 242 Ariz. 508, 509 ¶ 7 (2017); *see also Goulder v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 177 Ariz. 414, 416 (App. 1993) ("Statutory provisions are to be read in the context of related provisions and of the overall statutory scheme. The goal is to achieve consistency among the related statutes." (citations omitted)); *Sciranko v. Fid. & Guar. Life Ins. Co.*, 503 F. Supp. 2d 1293, 1319 (D. Ariz. 2007) ("It is a well-settled canon of statutory construction that the

provisions of a unified statutory scheme should be read in harmony. . .” (internal citation and quotations omitted)). Under these standards, context is not simply another method of statutory interpretation to be considered only when the language is ambiguous [Answering Br. at 47], but remains a fundamental requirement in the analysis of any statutory text.

Here, each statute within Title 16 shares the same general subject (elections) and purpose (to reasonably regulate the right to vote) as the Cancellation Provision. As laid out in YCRC’s opening brief, the Title 16 statutes are interrelated and represent a cohesive and statewide system to manage the state’s voting system, including voter registration. [Opening Br. at 6–8, 14–18.] The Cancellation Provision must be read harmoniously with this context.

However, Plaintiffs’ and the district court’s isolated reading of the Cancellation Provision does not “give effect to all the provisions involved” and fails to achieve “consistency among [] related statutes.” *Stambaugh*, 242 Ariz. at 509 ¶ 7; *Goulder*, 177 Ariz. at 416. This flaw is fatal to Plaintiffs’ preemption arguments because when the Cancellation Provision is harmonized with the surrounding statutory context, the

statutes are unambiguously consistent with NVRA requirements. That is, when considered within the statutory framework in which it resides, a voter's re-registration form serves as a direct—not implied—request to cancel his or her old registration. This works in perfect harmony with the NVRA's requirements.

Plaintiffs' first interpretive error in reconciling the entire statutory scheme is misconstruing (at 50–51) the relevance of re-registration form's status as an "official public record." Plaintiffs focus on the idea that a document's status as a public record has no bearing on the document's qualification as a request to cancel a registration or a confirmation in writing that a voter has moved. But this misunderstanding avoids the fundamental point: a signed voter registration form expressly includes an attestation by the voter that the information they are providing is true, including the voter's residential address.[4] That document is then linked to the voter's profile in the statewide voter database and, in that sense, becomes the official, verified statewide registration for the voter. A.R.S. §§ 16-161(A), 16-166(B); 2019 Election Procedures Manual ("EPM") at 22.

[4] https://recorder.maricopa.gov/pdf/Voter_registration_fillable_form.pdf.

The idea that the authenticated re-registration form becomes the voter's one and only registration in the State of Arizona is underscored by Arizona's one-residence rule. A.R.S. §§ 16-101(B) (restricting voters from having more than one residence for voting purposes), 16-120(A) (noting voter is only qualified to vote where he resides); 16-123 (requiring proof of location of residence to register to vote). In other words, because a voter can only have one residence, and because he is only qualified to vote where he resides, by operation of law, when a voter submits a new, signed voter-registration form verifying his residence, it serves as a request to cancel his registration at the former address. *Id.* §§ 16-166(B) (requiring county recorder to change the general register to reflect the voter's updated address); 16-164(A) ("On receipt of a new registration form that effects a change of . . . address . . . the county recorder *shall* indicate electronically in the county voter registration database that the registration has been canceled and the date and reason for cancellation." (emphasis added)); EPM at 22. Plaintiffs' contention (at 7) that it is "perfectly legal" to be registered to vote in multiple locations in Arizona would fail to give meaning to these statutes providing for one residence

and requiring cancellation of outdated registrations upon receipt of a voter's re-registration form.

The entire framework similarly defeats Plaintiffs' insinuation (at 52) that the registration form must include an option, such as a checkbox, for a voter to opt into cancellation. The proper, holistic reading of the Title 16 statutes makes plain that the re-registration form serves as a removal request directly from the voter and not merely "indication of a voter's intention to . . . register to vote in another jurisdiction." [Answering Br. at 52.] Whether the form contains a checkbox to "cancel" the outdated registration is irrelevant and would be superfluous because the re-registration form itself constitutes a cancellation request as a matter of law. No inference about voter intent is required to reach this conclusion.

Nor is the request indirect. The NVRA requires that "each *State* shall . . . provide that the name of a registrant may not be removed from the official list of eligible voters except . . . at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A) (emphasis added). Because county recorders are required to update the State's general register when a voter submits a new form (thereby requesting an update to his profile) and

cancel any outdated registration, Arizona's statewide system naturally fulfills this requirement. A.R.S. § 16-166(B); A.R.S. § 16-164(A). Consistent with the existing framework, the Cancellation Provisions triggers the same process upon receipt of a form from another Arizona county recorder.[5]

The NVRA does not require that voters only communicate with one subset of the State's jurisdiction. Indeed, had Congress wanted to require that voters speak directly with specific state election officials, they would have indicated as much. *See, e.g.*, 52 U.S.C. § 20507(a)(2) (noting that "each State shall . . . require the appropriate State election official to send notice to each applicant . . ."). Arizona's several county recorders are subparts to the State; they are not separate entities under this provision of the NVRA like the different State registrations described in the Seventh Circuit cases, discussed *infra*. And nothing in the NVRA prohibits the voter's direct request from being communicated from one county recorder to another recorder who ultimately performs the

[5] Plaintiffs still are not objecting to the current system, and the district court clarified that it was not meant to impact the current system. 2-ER-029. The Cancellation Provision, however, codifies effectively the same system that is currently used by county recorders. *See infra*.

cancellation, as both officials have access to the same statewide database for confirmation. The voter need only request his removal. *Id.* § 20507(a)(3)(A).

Plaintiffs' concerns about who can provide "credible information" is also a red herring, as county recorders who receive this information must still verify that a voter has directly communicated their intent to re-register in another county before cancelling. A.R.S. § 16-165(B). Neither federal or state law requires the "belt and suspenders" demanded by Plaintiffs— *i.e.*, to fill out two forms for the same purpose. Implementing such an approach would require this Court to ignore not only the Cancellation Provision, but several other provisions of Arizona election law.

Instead of considering how the Cancellation Provision can be harmonized with the statutory framework, Plaintiffs claim (at 48–49) that YCRC's reading of the Cancellation Provision renders it superfluous. Not so. The Cancellation Provision simply provides an additional mechanism for Arizona's election officials to comply with the NVRA:

- Where the voter communicates directly with the official cancelling the record (§ 16-165(A)(1) and (A)(9)); or

- Where the voter communicates directly with another election official, who then alerts the official cancelling the record, who must verify this information against the statewide database (§ 16-165(A)(11) and (B)).

Prior to SB 1260, subsections (A)(1) and (A)(9) did not allow for cancellation upon receipt of information from another Arizona county recorder who has received the voter's re-registration form. This is not a distinction without a difference, because the latter provides a new and independent grounds to cancel a voter's registration.

2. *Common Cause* and *Sullivan* are Materially Distinguishable.

Plaintiffs continue to rely on non-binding Seventh Circuit authority to impose their isolated interpretation of the Cancellation Provision. However, the election systems in both *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), and *League of Women Voters of Indiana Inc. v. Sullivan*, 5 F.4th 714, 724 (7th Cir. 2021), remain materially distinguishable from the system in Arizona, and therefore do not support Plaintiffs' theory of preemption.

First, nothing in the challenged Indiana systems prohibited voters from maintaining registrations in *two different states*. *Cf. Common*

Cause, 937 F.3d at 958. However, because of the one-residence rule under A.R.S. §§ 16-101(B) and 16-120(A), which Plaintiffs conveniently ignore, voters are *not* permitted to hold more than one voter registration at different addresses in Arizona. Therefore, once voters notify a county recorder that they desire to register with a new county, their re-registration form can serve as their direct request to cancel their old voter registration.

Plaintiffs again avoid this key distinction by looking at the Cancellation Provision in isolation to stretch its application to out-of-state county recorders. However, this is divorced from the rest of Title 16, in which "county recorder" consistently refers only to *Arizona* county recorders. *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015) (courts assume that identical words have the same, consistent meaning throughout an act); *see also* Scalia & Garner, *supra*, at 170. That "county recorder" is limited to those in Arizona is legally significant because, under the Arizona election system, county recorders must work together to ensure uniformity and avoid duplicate registrations within the Statewide database—a system in which out-of-state recorders would

not have access. The district court committed legal error by refusing to read the Cancellation Provision in the proper context. *See* 1-ER-012.

Second, Plaintiffs ignore that Arizona's electoral system prohibits voters from having multiple addresses for voting purposes and, as such, requires voters to verify that their new address is their residence for voting purposes. A.R.S. §§ 16-101(B), 16-120(A), 16-123. This requirement removes the inferences about voter intent that characterized the holdings in both *Common Cause* and *Sullivan*. For instance, *Common Cause* required an inference of voter intent from a third-party database, which supplied the information that a voter was registered in another district and required no communication from the voter *at all*. 937 F.3d at 960–61. Similarly, in *Sullivan*, the State did not receive a copy of the voter's out-of-state registration and therefore could not have concluded that this document served as the voter's written request. 5 F.4th at 724. Because Plaintiffs continue to rely on misplaced assumptions that the re-registration form does not constitute direct communications from the voter (it does), Plaintiffs fail to meaningfully address these important distinctions.

II. The District Court Erred in Finding that Plaintiffs Satisfied the Other Preliminary Injunction Factors.

Plaintiffs' subsequent preliminary injunction arguments remain premised on their erroneous assumption that they have experienced constitutional injury. However, the overwhelming evidence shows that the district court erred in determining that Plaintiffs are likely to succeed on their vagueness and preemption claims. *See, e.g.*, *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997). This determination directly caused the district court to improperly weigh the equities against the Defendants.

Even setting aside this error, Plaintiffs still fail to explain how they are *likely* to experience any kind of irreparable harm under the Felony Provision. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." (emphasis in original)). For instance, Plaintiffs cannot name *any* entity who has threatened to prosecute them or any of their members for ordinary voter registration activities. *Cf. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (irreparable harm established because attorneys general made clear that they would seek

to enforce the challenged guidelines). For such a drastic remedy as preliminary relief, mere concern that an entity *might* agree with their fanciful expansion of the statute is simply not enough. And because they have experienced no constitutional harm, Plaintiffs cannot dispute that they and their members' alleged harms, including self-reported chilled speech and resources spent, are self-imposed. *See Conchatta, Inc. v. Evanko*, 83 F. App'x 437, 443 (3d Cir. 2003) (irreparable harm not established where the statute has not been enforced or threatened to be enforced against the plaintiffs, and thus its effects were self-imposed).

Plaintiffs also argue without evidence (at 59) that the Cancellation Provision could lead to the cancellation of both old and current voter registrations. However, the Cancellation Provision plainly contemplates cancellation of the *older* voter registration once a voter has moved from another county. Nothing in the text allows for cancellation of the second-in-time registration. *See* A.R.S. § 16-165(A)(11). Further, the statewide voter registration database, AVID, provides a practical means for recorders to ensure that only the first-in-time registration is cancelled. *See id.* § 16-168(J). In the absence of any evidence to the contrary, Plaintiffs again resort to impermissible speculation.

Plaintiffs also ignore that the 2022 general election has passed, and they no longer are "likely" at risk of disenfranchisement from the Cancellation Provision. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020). This is especially true when the district court did not enjoin the same cancellation procedures already followed by the State. *See, e.g.*, 2-ER-215 ¶ 8 (noting that under current procedure, when MCRO "receives confirmation from another county that a person is registered in Maricopa County, registered to vote in that county," the MCRO cancels the Maricopa County registration and the "voter information is merged to the voter record in the new county through the voter registration systems"); *see also* 2-ER-029, -059. Plaintiffs failed to establish any likelihood of irreparable harm.

On the other side of the equities scale, the district court failed to give the proper weight to the public interest. Plaintiffs say that voter fraud is "nonexistent" (at 60), but they ignore the myriad of evidence submitted by YCRC showing the magnitude of harms created by voter fraud, both real and perceived. 2-ER-120–21, 127 ¶ 7, 133–35 ¶¶ 12–21. And Plaintiffs do not meaningfully dispute the State's compelling interest in preserving the integrity of its elections. *Eu v. S.F. Cnty.*

Democratic Central Comm., 489 U.S. 214, 231 (1989) (per curium), nor do they dispute the negative consequences of voter fraud on the franchise in Yuma County. Accordingly, the equities tip in Defendants' favor, and the district court erred in holding to the contrary.

CONCLUSION

For the foregoing reasons, Intervenor-Defendant respectfully requests that the Court vacate the district court's preliminary injunction.

Respectfully submitted this 9th day of January, 2023.

SNELL & WILMER L.L.P.

By: *s/ Brett W. Johnson*
Brett W. Johnson
Eric H. Spencer
Colin P. Ahler
Tracy A. Olson
SNELL & WILMER, LLP
One East Washington Street
Suite 2700
Phoenix, Arizona 85004
(602) 382-6000
bwjohnson@swlaw.com
espencer@swlaw.com
cahler@swlaw.com
tolson@swlaw.com

Attorneys for Intervenor-Defendant Yuma County Republican Committee

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FOR THE NINTH CIRCUIT

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9th Cir. Case Number 22-16490

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Signature *Brett W. Johnson* **Date** January 9, 2023

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