No. 16-16698

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Defendant-Intervenors/Appellees.

On Appeal from the United States District Court
for the District of Arizona Cause No. CV-16-01065-PHX-DLR

BRIEF OF DEFENDANT-INTERVENOR ARIZONA REPUBLICAN PARTY

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FRAP 26.1 Corporate Disclosure Statement

Corporate Defendant-Intervenor Arizona Republican Party ("Party") hereby certifies that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in the abovementioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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I. STATEMENT OF JURISDICTION

Based on Plaintiffs' pleading of their claims,[1] the district court's jurisdiction rests on 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, as well as 42 U.S.C. §§ 1983 and 1988. On September 23, 2016, the district court issued the Order on appeal. ER0001-27.[2] That same day, Plaintiffs timely appealed pursuant to FRAP 3 and 4, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1), as the district court's order is an interlocutory order denying an injunction.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in finding Plaintiffs unlikely to succeed on their claims that H.B. 2023 violates Section 2 of the Voting Rights Act?

2. Whether the district court abused its discretion in finding

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[1] Defendant-Intervenor the Arizona Republican Party ("Party") has moved to dismiss Plaintiffs' Amended Complaint and Intervenor-Plaintiff's Complaint-in-Intervention, which joined in and incorporated by reference the Amended Complaint. That motion remains pending before the district court. *See* ER2845, at Doc. 108. The Party throughout refers to Plaintiffs and Intervenor-Plaintiff Bernie, 2016, Inc., collectively as Plaintiffs.

[2] The Party continues Plaintiffs' numbering of the Excerpts of Record, with Supplemental Excerpts of Record Volumes XIII and XIV, filed concurrently herewith.

Plaintiffs unlikely to succeed on their claims that H.B. 2023 violates the First and Fourteenth Amendments?

III. STATEMENT OF THE CASE

Plaintiffs brought this action in April 2016 alleging, among other things, that H.B. 2023, a not-then-in-effect election law banning mass ballot collection violated Section 2 of the Voting Rights Act and the First and Fourteenth Amendments to the Constitution. Almost two months later, in June 2016, Plaintiffs moved, based on those claims, to preliminarily enjoin H.B. 2023, which was still not in effect. Limited discovery, motion practice, and oral argument ensued, and on September 23, 2016, the district court denied Plaintiffs' motion.

The district court found that Plaintiffs were unlikely to succeed on the merits of their claims, that they had not shown that H.B. 2023 would cause them irreparable harm (or shown anything beyond speculation that H.B. 2023 would prevent certain people from voting), and that the balance of hardships and public interest weighed against enjoining the law. Plaintiffs appealed, and the district court's decision should be affirmed. The now-effective law has been in place, without

issue, for Arizona's most recent Primary Election and should not be enjoined with a General Election imminent—or at all.

IV. STATEMENT OF FACTS

A. H.B. 2023 Becomes Law.

After legislative hearings during which none of the Plaintiffs or their representatives appeared or objected, H.B. 2023 was signed into law on March 9, 2016, to prevent fraud and to import similar restrictions from in-person voting laws to Arizona's early voting laws—under which most Arizona voters exercise their rights. ER1065, at 61:14-16 ("[t]his bill merely catches us up to the evolution in voting practices that our state has experienced in the last 20 years."); *see* ER1077, ¶ 45.

H.B. 2023, now codified and in effect as A.R.S. § 16-1005(H), (I), provides:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:

1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.

2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:

   (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisting living home, residential care institution, adult day health care facility or adult foster care home.

   (b) "Collects" means to gain possession or control of an early ballot.

   (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.

   (d) "Household member" means a person who resides at the same residence as the voter.

For 25 years, Arizona has allowed early voting by mail.[3] Concurrently, State law restrictions regarding in-person voting have not generally been applied to regulate early voting by mail.[4] *See, e.g.*,

[3] *See* Act of April 30, 1991, ch. 51, § 16-541, 1991 Ariz. Legis. Serv. Ch. 51 (S.B. 1320) (West) (codified at A.R.S. § 16-541).

[4] *See also* ER1196-98, at 26:2-28:2 (ballot-harvesting groups had no internal protections such as background checks for volunteers or paid staff).

A.R.S. § 16-515 (no electioneering within 75 feet of a polling place); A.R.S. § 16-580 (only one person per voting booth at a time with limited exceptions); ER1065, at 61:4-6, 9-10 ("[T]here is a huge imbalance in the amount of security measures that are in place for polling place voting compared [to] early voting. . . . we have almost no prophylactic security procedures in place to govern that practice.").[5] H.B. 2023 thus serves to both modernize and streamline State election laws.

With more Arizonans voting by early ballot, the Arizona Legislature also found H.B. 2023 consistent with other State laws necessary to deter future fraud. ER1065, at 61:7-10. Without it, those with ill intentions could collect ballots and deliver them—or not—as they saw fit, with no voter recourse. *See* ER1271, ¶ 12; ER1077-78, ¶¶ 46-47; ER1283, ¶ 8; *see also* ER1322-23, ¶¶ 18-21 (referencing a ballot harvester impersonating an elections worker); ER1326-27, ¶¶ 9, 11.

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[5] Such restrictions have frequently been upheld as constitutional. *See PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113 (3d Cir. 2013); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004); *see also Luellen v. City of East Chicago*, 350 F.3d 604, 616 (7th Cir. 2003) (affirming district court's grant of summary judgment denying claims, including constitutional claims, of fire department employee suspected of ballot harvesting—a felony under Indiana law).

The Arizona Legislature recognized that H.B. 2023 is a narrowly tailored, prophylactic response to legitimate concerns of preventing election fraud and preserving ballot integrity. ER1077-78, ¶¶ 45-47. The law is limited, only penalizing "a person who *knowingly* collects voted or unvoted early ballots from another person." A.R.S. § 16-1005(H) (emphasis added). The *mens rea* required—higher than a reckless or negligence standard—is tailored to further the purpose of deterring mass ballot harvesting.[6] *See* ER1072, ¶ 23 (allowing flexibility in prosecution depending on nature of offense); ER1332, at 14:5-22 (the intent is "to go after large-scale, knowing, massive collection of ballots"). As the district court found, the law allows reasonable exceptions: "voters may return their own ballots, either in person or by mail, or they may entrust their ballots to family members, household members, or caregivers." ER0016; *see* Ariz. Rev. Stat. § 16-1005(H), (I); *see also* ER1336-37, ¶¶ 20-21; ER1345, ¶ 11. Plaintiffs' concerns about voters

[6] *See* A.R.S. § 13-105(10)(B) "'Knowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists."

not having an opportunity to vote without mass ballot collection campaigns are, therefore, unfounded.[7] *See* ER1326, ¶¶ 4, 7.

B. Plaintiffs File Their Challenge.

Despite this, and nearly six weeks after H.B. 2023 was signed into law, Plaintiffs filed their challenge seeking to derail the November 8, 2016, general election ("General Election") in a number of ways, including by enjoining enforcement of H.B. 2023.

Four of Plaintiffs' claims targeted H.B. 2023.[8] These included the claims that: (1) H.B. 2023 allegedly violated Section 2 of the Voting Rights Act,[9] (2) H.B. 2023 allegedly severely burdened the right to vote, infringing the Equal Protection clause of the 14th Amendment, (3) H.B. 2023 allegedly infringes First Amendment freedom-of-association

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[7] In the district court's words: "Plaintiffs have been unable to produce a declaration or affidavit from a single voter who would be more than inconvenienced by H.B. 2023's limitations on who may possess another's early ballot." ER2819.

[8] Throughout the proceedings below, Plaintiffs have errantly focused on enactments or legislation that chronologically preceded H.B. 2023 to attempt to cobble together unsupported whiffs of discriminatory intent or effect for the current law. This is misguided and misplaced.

[9] Section 2 prohibits states from imposing any voting regulation that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a).

rights, and (4) H.B. 2023 allegedly violates the Equal Protection clause of the 14th Amendment via a "Partisan Fencing" theory.

On May 9, 2016, the Party timely moved to intervene in this matter in the district court. The Party presented to the district court that it will be significantly impacted by the relief that Plaintiffs seek in this action. Similar to certain Plaintiffs, the Party is a state committee, as defined by 52 U.S.C. § 30101(15) and A.R.S. §§ 16-801, *et seq.*, involved with working to elect Republican candidates to elected offices. Specifically, for this matter, the Party has an interest equal to those of the Arizona Democratic Party ("ADP"), the Democratic National Committee, and the DSCC, a.k.a. Democratic Senatorial Campaign Committee—all Plaintiffs in this matter—because it is dedicated to electing local, state, and national Republican candidates to public office in Arizona and throughout the United States.

Furthermore, the Arizona Republican Party has members and constituents from across Arizona, including many eligible voters who regularly support and vote for candidates affiliated with the Republican Party. These members and constituents have a significant interest in ensuring that a single political party, *i.e.,* the Democratic Party, does

not abuse judicial proceedings to create legal authorities that would impact Republican candidates' right to a fair election carried out with integrity. The Party sought intervention on behalf of its members and its candidates, as well as in its own right.

Upon no objection, the Party's motion was granted the following day during a telephonic status conference.[10]

Discovery took place in this matter, including production of voter registration information to Plaintiffs by the State Defendants, subject to protective order. ER2841 at Doc. 64. Defendants and Defendant-Intervenors also took depositions of Plaintiffs' experts Allan J. Lichtman and David R. Berman; as well as Plaintiffs' declarants Sheila Healy, executive director of Plaintiff ADP, and Randy Parraz, founder and former president of a non-profit organization that engaged in ballot collection from 2011 to 2014, including the delivery of "approximately nine thousand ballots" during an election in 2012. ER0219, ¶ 5.

[10] Intervention of Bernie, 2016, Inc., was granted at the same telephonic status conference. ER2839 at Doc. 44. Six days later, individual Defendant-Intervenors former Councilman Bill Gates, Councilwoman Suzanne Klapp, State Senator Debbie Lesko and State Representative Tony Rivero timely moved to intervene as individuals jointly represented with the Arizona Republican Party. Plaintiffs and Plaintiff Intervenor Bernie 2016, Inc., jointly opposed the motion, but the Court granted it over their objection on June 28, 2016. ER2847 at Doc. 126.

Plaintiffs elected—after noticing them and shortly before they were scheduled to begin—*not* to take the depositions of the experts who submitted reports with the Party's response opposing a preliminary injunction of H.B. 2023 and whose reports were relied upon by the State Defendants in their response. ER002866.

C. H.B. 2023 Takes Effect as A.R.S. § 16-1005(H), (I), and a Primary Election is Held.

H.B. 2023's effective date of August 6, 2016, came and went without a ruling from the district court or any request by Plaintiffs for an expedited ruling. Thus, the statute's restrictions were in effect for all but the first three days of early voting for Arizona's most recent Primary Election. Again, at no time did Plaintiffs request emergency relief or an expedited ruling from the district court based on irreparable harm occurring during the early voting period.

D. The District Court Enters Its Order.

On September 23, 2016, the district court entered its Order denying Plaintiffs' Motion for Preliminary Injunction of H.B. 2023, which had been fully briefed and orally argued after discovery, including expert discovery. ER0001-27. That same day, Plaintiffs filed a

Notice of Appeal, but did not move for reconsideration[11] of the district court's Order and delayed a further five days before filing with the district court a motion for injunctive relief pending appeal.

In the Order being appealed, the district court also denied the Joint Motion to Strike Portions of Plaintiffs' Reply Memorandum and Reply Exhibits. ER0005. Its reasoning included that, in ruling on Plaintiffs' motion to preliminarily enjoin H.B. 2023, "the Court must assess the likelihood that Plaintiffs will succeed on the merits of their claims," and that it "would disserve that end for the Court to blind itself to evidence" to be eventually presented in a summary judgment motion or at trial. ER0005.

The district court therefore properly denied Plaintiffs' request to preliminarily enjoin H.B. 2023 after fully considering all proposed evidence showing whether Plaintiffs might succeed on the merits of their claims—even evidence disclosed for the first time with a reply brief. *Id.* Plaintiffs have thus certainly been given the benefit of the doubt and full and proper consideration of their proposed evidence

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

below. A likelihood that they will succeed on the merits did not arise the first time around, and the district court should be affirmed.

In fact, an entire Primary Election was held with H.B. 2023 in effect—meaning Plaintiffs' estimation of "the approximately 80% of voters" on the Permanent Early Voting List in Arizona received their Early Voting ballots and, if they so desired, voted and lawfully submitted them to be counted, all under the sensible limitations imposed by H.B. 2023. ER2647.

Plaintiffs have remained silent on the telling lack of an "intense public backlash" or any threatened referendum as to H.B. 2023 itself. ER2646. And, when faced with the deposition testimony of the Executive Director of the one Plaintiff that the district court found had standing to challenge the validity of H.B. 2023 (the ADP), Plaintiffs wholly discounted her sworn testimony and admissions as something on which the district court's reliance was "misplaced." ER2651.

If there were actually "substantial evidence that thousands of voters—including specifically Plaintiffs' core constituencies and registered Democrats—rely" on practices limited by H.B. 2023, then it is reasonable to expect that Plaintiffs would have presented such

evidence at some point in the record of their motion to preliminarily enjoin H.B. 2023, Ms. Healy would have testified to it,[12] or Plaintiffs would have gathered such evidence before and during the Primary Election that took place on August 30, 2016,[13] and immediately brought it before the district court. They have not done so.

E. Plaintiffs Notice this Appeal.

Plaintiffs noticed their appeal of the district court's order the same day it was entered, but did not move the district court for an injunction for another five days, and did not move this Court to expedite the appeal for another six days after that. In response to Plaintiffs' Joint Emergency Motion to Stay and Injunction Pending Appeal, the district court ordered expedited joint briefing: "Defendants and Defendant-Intervenors shall respond by no later than 5:00 p.m., 10/3/16." ER2857, at Doc. 211.

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[12] This is notwithstanding the fact that Ms. Healy had "not yet participated in a general election at ADP," as A.R.S. § 16-1005(H), (I) differs not in its applicability to Primary and General Elections. ER2651 at n.1.

[13] As the district court recognized in its Order, it is not the State's burden to collect this evidence for Plaintiffs, who repeatedly profess to know "thousands of voters" who rely on practices now limited by A.R.S. § 16-1005(H), (I), to vote. ER0010 at n.3.

Similarly, when this Court ordered briefing on Plaintiffs' Emergency Motion for Injunction Pending Appeal (Dkt. 16), its order (Dkt. 18) stated that "*[t]he* response is due," so the parties responding—the State Defendants and the Party—did so jointly and as believed ordered (Dkt. 24). Until directed to do so by the district court and by this Court's order, the State Defendants and the Party have filed separate briefs on substantive H.B. 2023 issues. *See* ER1041–2190 (Defendant-Intervenors' Response opposing Plaintiffs' motion for preliminary injunction of H.B. 2023); ER2858–3125 (State Defendants' Response) and do so now as well.

F. A General Election is Imminent and Early Voting Has Begun.

With the General Election imminent, this case is presently in a procedural and factual posture nearly identical to *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006). There, the Supreme Court vacated interim relief ordered by this Court and allowed a general election to go forward with the challenged law in effect. *Id.* at 4-5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *see also id.* at 6 (Stevens, J., concurring) (stating that "[a]llowing the election to

proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality," and that the court's action would "enhance the likelihood that [the constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation").

In *Purcell*, the plaintiffs sought to enjoin enforcement of Arizona requirements of (1) documentary evidence of citizenship to register, and (2) identification to vote at a polling place on Election Day, which in 2006 fell on November 7. *Purcell*, 549 U.S. at 2-3. This Court granted the injunction pending appeal on October 5, 2006, more than a month before the election. *Id.* at 3. To avoid the confusion caused by changing the rules of an election shortly before it took place, the Supreme Court vacated the interim relief on October 20, 2006. *Id.* at 5. Here, the concerns about changing the rules so close to an election are even more pronounced, because H.B. 2023 affects return of early ballots, which voters started to receive and return on October 12, 2016.

V. SUMMARY OF ARGUMENT

This Court should affirm the ruling of the district court denying Plaintiffs their requested preliminary injunction of H.B. 2023. Plaintiffs

sought this extraordinary remedy prior to the effective date of the facially neutral law. Yet, they have not—either pre- or post-effective-date—come forward with any evidence showing a statistically relevant disparity posed by H.B. 2023 in its treatment of minority as compared to white voters. And, any evidence they did provide was refuted. ER0012. Neither is their non-quantitative evidence compelling, so, as the district court properly held, Plaintiffs are unlikely to succeed on the merits of their Section 2 claim.

They are also unlikely to succeed on the merits of the remainder of their claims. The district court properly noted that "[n]ot all election regulations, however, raise constitutional concerns," but that "all election regulations 'invariably impose some burden upon individual voters.'" ER0015 (*quoting Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). The district court's weighing of the "nature and magnitude of the burden imposed by [H.B. 2023] against [the] state's interests in and justifications for it" was a proper consideration that reached a correct result. The district court did not abuse its discretion in finding Plaintiffs unlikely to succeed on their Fourteenth and First Amendment claims or on their "Partisan Fencing" theory. Its order should be

affirmed.

VI. ARGUMENT

A. Standard of Review

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146, 1157 (9th Cir. 2007). "Factual findings are reviewed for clear error, and legal conclusions are reviewed de novo." *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2013). This Court's determination that it "would have arrived at a different result if it had applied the law to the facts of the case" is not cause for reversal. *Sports Form, Inc. v. United Press Int'l, Inc.,* 686 F.2d 750, 752 (9th Cir. 1982); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015); *United States v. Hinkson,* 585 F.3d 1247, 1261–62 (9th Cir.2009) (en banc).

In fact, the "review is limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). This Court has "held that an order 'will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.'" *Id.* It does "not review the underlying merits of the case." *Id.* (internal punctuation omitted).

B. The District Court Properly Found that H.B. 2023 Does Not Violate Section 2 of the Voting Rights Act.

The district court properly found that Plaintiffs failed to show a likelihood of success on their Section 2 claim, which has two essential elements: (1) a challenged voting practice imposes a discriminatory burden on a minority group (2) as it interacts with social and historical conditions that have produced discrimination. *See Ohio Democratic Party v. Husted*, --- F.3d ---, No. 16-3561, 2016 WL 4437605, at *13-14 (6th Cir. Aug. 23, 2016); *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc); 52 U.S.C. § 10301. Plaintiffs here failed at both steps.

1. Plaintiffs Failure to Provide Any Quantitative Evidence Precludes Any Finding of a Likely Disparate Impact.

Analyzing the first element of a Section 2 claim, the district court correctly determined that "Plaintiffs are not likely to succeed . . . because there is insufficient evidence of a statistically relevant disparity between minority as compared to white voters" caused by H.B. 2023. ER0008.[14] The district court explained—and Plaintiffs have never

[14] The district court's order frequently referenced, and applied, the likelihood of success standard. *See* ER0008, 14, 21-22. Any contentions

disputed—that H.B. 2023 is facially neutral, and Plaintiffs "provide[d] no quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." *Id.*

Plaintiffs have attacked the district court's discussion of the complete absence of quantitative evidence as contrary to Section 2, notwithstanding the admission by their counsel that to conduct a disparate impact analysis, "you have to know roughly the proportion of minority voters versus the white voters affected." ER3172. That admission accurately reflects the controlling law.

Specifically, in *Gonzalez*, this Court explained that a Section 2 claim requires evidence that the challenged election law causes "some relevant statistical disparity between minorities and whites." *Gonzalez*, 677 F.3d at 405 (internal quotations and citation omitted). "[P]roof of causal connection between the challenged voting practice and a prohibited discriminatory result is *crucial*." *Id.* (internal quotations and citation omitted; emphasis added)). Accordingly, in *Gonzalez*, the presence of some "Senate Factors" in Arizona could not save a Section 2

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by Plaintiffs that the district court applied an incorrect standard are, therefore, incorrect.

claim when plaintiffs failed to prove that the voter ID law at issue caused Hispanic voters to have less opportunity to vote than white voters. *See id.* at 407.[15]

The district court's analysis was also consistent with other Section 2 vote-denial authorities, in which courts have stressed the importance of quantitative evidence to establish the requisite disparate impact. *See One Wisc. Inst., Inc. v. Thomsen*, 15-cv-324-jdp, 2016 WL 4059222, at *47 (W.D. Wis. July 29, 2016) ("[P]laintiffs' evidence of a disparate burden substantially consists of anecdotes and lay observations . . . This testimony does not establish a verifiable disparate effect."); *see also id.* at *49 ("Plaintiffs rely exclusively on anecdotal evidence to prove that observers intimidate or harass African Americans and Latino voters more often than white voters. This evidence is insufficient to prove a violation of the Voting Rights Act");[16] *Veasey v. Abbott*, No. 14-41127,

[15] The trial court in *Gonzalez* similarly concluded that the voter ID law did not violate Section 2 since it did "not have a *statistically significant* disparate impact on Latino voters." *Gonzalez*, 677 F.3d at 406 (internal quotations and citation omitted; emphasis added).

[16] Plaintiffs have argued that, similar to this case, *Thomsen* included evidence that minority voters change their residence more frequently than white voters. *See* Dkt. Entry 25 at 4. In *Thomsen*, however, this evidence directly related to the disparate impact from a *durational residency* requirement. *See Thomsen*, 2016 WL 4059222, at *36. Here,

2016 WL 3923868, at *17 (5th Cir. July 20, 2016) ("[C]ourts regularly utilize statistical analysis to discern whether a law has a discriminatory impact.").

Additionally, in other contexts, this Court has "recognized the necessity of statistical evidence in disparate impact cases." *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008) (Fair Housing Act claim); *see also Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) ("Summary judgment is appropriate when statistics do not support a disparate impact analysis" to support Age Discrimination in Employment Act claim); *Farrakhan v. Gregoire*, 623 F.3d 990, 996 (9th Cir. 2010) (Thomas, J., concurring) ("We have also noted that 'a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry'").[17] Plaintiffs have never provided

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by comparison, Plaintiffs' proposed evidence that minority voters move more often does not have a causal link to show that these voters are more likely to participate in early voting or have their ballot collected by someone else.

[17] Other courts have reached the same conclusion in discussing claims that required a showing of disparate impact. *See Cooper v. S. Co.*, 390 F.3d 695, 716 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (Title VII); *Rollins v. Alabama Cmty. Coll. Sys.*, No. 2:09-CV-636-WHA, 2010 WL 4269133, at *9 (M.D. Ala. Oct. 25, 2010) (Equal Pay Act); *Davis v. City of Panama City, Fla.*,

any "compelling reason why the method by which the Court determines whether a relevant disparity exists should change simply because this case arises under the VRA." ER0009. Nor could they. In election matters, requiring a plaintiff to support a claimed disparate impact with actual quantitative evidence serves an important purpose by deterring unsubstantiated or speculative claims from being tactically raised by partisan interests shortly before an election.

Plaintiffs have also never cited any case in which a disparate impact was proven without quantitative evidence. They have instead relied on Section 2 *vote-dilution* cases that addressed entirely different issues. *See* Dkt. Entry 16 at 9 (citing *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993) (discussing evidence to show that a minority candidate is minority-preferred); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320-21 (10th Cir. 1996) (same); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) (addressing proof of political cohesiveness and racial bloc

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510 F. Supp. 2d 671, 689 (N.D. Fla. 2007) (Title VII and 42 U.S.C. § 1983).

voting).[18]

Plaintiffs have further argued that quantitative evidence is not necessary given the VRA's "broad remedial purpose." Dkt. Entry 16 at 9 (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).) The *Chisom* Court talked about this purpose, however, in holding that Section 2 applied to a vote-dilution claim relating to state judicial elections. *See Chisom*, 501 U.S. at 403-04. The remedial purpose of Section 2 cannot nullify the claim's essential elements, the first of which necessarily requires a comparison of the actual quantitative impact on minority and white voters resulting from the challenged election practice. *See Gonzalez*, 677 F.3d at 405; *Husted*, 2016 WL 4437605, at *13-14; ER0009.

Additionally, Plaintiffs have consistently argued they should be excused from producing quantitative evidence because the State does

[18] Plaintiffs have argued that when Section 5 preclearance requirements were used, the Department of Justice ("DOJ") did not require covered jurisdictions to provide quantitative evidence. That preclearance scheme, invalidated by the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), has little to no relevance to the disparate impact analysis, particularly given the tens of thousands of preclearance submissions that DOJ previously received under this scheme. Plaintiffs' continued efforts to import Section 5 requirements into a Section 2 analysis should be rejected.

not track the data. But Plaintiffs were unable to explain below (and still cannot explain) why Defendants should bear the burden to provide data for Plaintiffs' Section 2 claim, particularly when no law that requires them to do so. ER0010 n.3. Moreover, Plaintiffs had several options over multiple elections to procure quantitative evidence on H.B. 2023's impact in the absence of State-provided data. Specifically, the ADP has asserted that it has long been involved in collecting early ballots, ER0299-300, yet provides no reason why it did not track data on these collection efforts over the years that bills with ballot collection provisions were before the Legislature. Plaintiffs failed to identify even a single voter that contacted them during the Primary Election seeking services in delivering their ballot. Alternatively, Plaintiffs could have obtained an expert survey on the racial and ethnic composition of Arizona voters who rely on others to collect their early ballot. Plaintiffs cannot, however, "avoid their burden of proof simply because surveying the relevant population might be difficult." ER0010 n.3 (quoting Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 476 (2015)).

In short, the district court correctly determined there must be

some quantitative data to support a claimed disparate impact. As none exists here, Plaintiffs' request for a preliminary injunction was properly denied.

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

Even if Plaintiffs were correct that a disparate impact can be shown without *any* quantitative evidence (and they are not), they still failed to provide sufficient evidence on this necessary element of Section 2. Of note, the district court did not rely solely on Plaintiffs' admitted failure to provide statistical evidence on disparate impact, but also concluded that "[a]ssuming, *arguendo*, that a § 2 violation could be proved using non-quantitative evidence, Plaintiffs' evidence is not compelling." ER0010.

The district court reached this conclusion after a careful examination of Plaintiffs' evidence, explaining that:

- Plaintiffs' declarations were "predominantly from Democratic partisans and members of organizations that admittedly target their [get out the vote] efforts at minority communities," and thus provided an incomplete picture of

ballot collection, which is used by "groups from *all* ideological backgrounds." ER0010, 10 n.4 (internal quotations and citation omitted; emphasis added).

- Plaintiffs argued that H.B. 2023 will disparately harm voters in Arizona's rural communities but failed to rebut the evidence showing that many of these communities are predominantly white. ER0011.
- Plaintiffs asserted that H.B. 2023 will harm voters who are elderly or homebound, prefer to wait until Election Day to cast their vote, or forget to mail their early ballot, but provided no evidence that minorities are more likely to fall into these categories. *Id.*
- The legislative history referenced by Plaintiffs was "largely duplicative" of their insufficient declarations, which provided only a limited picture of early ballot collection. ER0011-12.
- Contrary to Plaintiffs' contentions, none of the declarations provided by the Arizona Republican Party contained any "admissions that minority voters disproportionately rely on ballot collection." ER0012.

- In relying on a DOJ preclearance file concerning a 2011 omnibus bill on election regulations, Plaintiffs took isolated quotations out of context and failed to recognize that the file lacked any statewide information on early ballot collection. ER0012-14.

Plaintiffs cannot show that the district court abused its discretion in any of these factual findings. Indeed, Plaintiffs failed to even address these factual findings in their motion for an injunction pending appeal.

Plaintiffs have instead argued that that the district court should have relied on unrelated socioeconomic inequalities between minority and white voters to find a disparate impact. Dkt. Entry 16 at 11. But the mere existence of socioeconomic disparities cannot establish that any particular minority group is more likely to use the specific practice impacted by H.B. 2023—*i.e.*, the use of someone else to collect an early ballot. Moreover, if socioeconomic disparities were enough to show disparate impact, despite the prevalence of such disparities nationwide, this would result in an "implausible" reading of "§ 2 as sweeping away almost all registration and voting rules." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) ("It is better to understand § 2(b) as an equal-

treatment requirement (which is how it reads) than as an equal-outcome command."). The sensible interpretation of Section 2 is that the "Senate Factors"—including socioeconomic inequalities (Factor 5)—only "come[] into play" *after* a plaintiff has shown the requisite disparate impact. *Husted*, 2016 WL 4437605, at *13; ER0008.[19]

Additionally, even if Plaintiffs had provided sufficient evidence of a disparate impact, H.B. 2023's limited restrictions on who may collect an early ballot do not "result[] in a denial or abridgement" of the opportunity to vote, as Section 2 requires. 52 U.S.C. § 10301(a). Minimal inconveniences on voting do not violate Section 2. *See Frank*, 768 F.3d at 753 (photo ID requirement that did not make it "needlessly hard" to vote did not violate Section 2); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (Section 2 requires "a denial of '*meaningful* access to the political process'") (quoting *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004)) (emphasis added). As recognized by the district court, because H.B.

[19] The "Senate Factors" derive from a Senate Report accompanying 1982 amendments to the VRA, ER0006 n.2, and provide a non-exhaustive list of items to be considered in determining whether a challenged voting practice interacts with social and historical conditions to produce a disparate impact. *See Thornburg v. Gingles,* 478 U.S. 30, 36-37 (1986); ER0006-7.

2023 only imposes minor burdens on voters, Section 2 does not require an injunction of the law. ER0014.

3. Plaintiffs Failed to Establish Any Link between H.B. 2023 and Any Social or Historical Conditions that Produce Discrimination.

Because Plaintiffs failed to show a likelihood of success on the first step of a Section 2 claim (disparate impact), the district court had no need to reach the second step. ER0014. Had it done so, Plaintiffs would have failed at that stage too.

Plaintiffs' argument that some Senate Factors may be present is not enough to establish a likelihood of a Section 2 violation. *Gonzalez*, 677 F.3d at 407 (rejecting Section 2 claim despite presence of some of the same Senate Factors in Arizona). Rather, Plaintiffs had to put forth actual evidence showing that H.B. 2023 "*interacts* with social and historical conditions that have produced discrimination" against minorities currently, in the past, or both to produce a disparate impact. *Husted*, 2016 WL 4437605, at *14 (emphasis added). Plaintiffs failed to do so. Instead, Plaintiffs argued that potential minority voters in rural communities near the Arizona-Mexico border will face a disproportionate burden in voting because of H.B. 2023. *See* ER0011.

But, Plaintiffs provided no evidence to show that discrimination actually caused the ethnic and racial composition of, or limited mail delivery in, these communities. The district court noted that Plaintiffs failed to provide evidence of the number of voters in those communities who choose to vote early, despite the lack of mail service, and that they failed to provide comparable evidence regarding mail delivery service in known rural white communities. ER0011. Similarly, Plaintiffs asserted that H.B. 2023 disparately harms elderly and homebound voters or voters who forget to mail their ballot in time, *id.*, but provided no evidence that discrimination against minorities that meet these undefined categories has any relation to this alleged harm.

To the contrary, Plaintiffs' purported examples of historical discrimination have nothing to do with the specific act of collecting an early ballot. Plaintiffs (and their experts) instead point to such irrelevant events as: (1) initially failed ballot measures concerning a Martin Luther King holiday for state workers, which Arizona voters approved in 1992; (2) the Legislature's repeal of a voting literacy law in 1972, which Plaintiffs contend should have been done sooner; and (3) state legislation from 1996 concerning employee wrongful termination

suits. *See* ER0149, 0984-86.[20] These events are far too attenuated to support a Section 2 claim in 2016.

4. Plaintiffs' Selective Senate Factor Evidence is Insufficient to Show a Likelihood of Success on Their Section 2 Claim.

Even setting aside Plaintiffs' failure to show any interaction between the Senate Factors and H.B. 2023, as Section 2 requires, their limited and selective evidence on the Senate Factors suffers serious defects, all of which made the extraordinary relief of a preliminary injunction improper. *See* ER1048-49, 1390-1409, 1985-2032, 2864-67. In *Gonzalez*, this Court explained that Section 2 requires consideration of the "totality of the circumstances." *Gonzalez*, 677 F.3d at 405. Contrary to that directive, Plaintiffs simply ignore any evidence that clearly undermines the asserted existence of the Senate Factors.

For example, in their analysis of alleged discriminatory practices and lack of responsiveness to minorities (Senate Factors 1, 3, and 8), Plaintiffs fail to consider: (1) positive trends in minority voting; (2) the Arizona Independent Redistricting Commission ("AIRC") and its

[20] Despite their characterization of the allocation of polling places in the 2016 presidential preference election in Maricopa County, Arizona, as an alleged example of a discriminatory practice, Plaintiffs voluntarily agreed to dismiss their claims on this issue. ER2856 at Doc. 203.

extensive consideration of minority interests;[21] (3) the Citizens Clean Elections Commission's funding of candidates to create a more diverse slate; (4) Medicaid expansion; and (5) increased public school funding. *See* ER1390-91, 1407-09, 1958, 1976-78, 1996-97, 2009-11, 2028. Moreover, Plaintiffs rely on Proposition 200 as an example of discrimination, ER0150, 0985, despite this Court's holding in *Gonzalez* that this ballot measure did *not* violate the VRA. *See Gonzalez*, 677 F.3d at 406-07.

On racially polarized voting (Factor 2), Plaintiffs rely on a *draft* AIRC report that only assessed majority-minority districts and elections involving a Hispanic candidate. *See* ER1395-99, 3017-24. But Plaintiffs do not consider whether factors other than race accounted for the election results; nor do they compare the alleged polarization in Arizona to any other state. This is not the first time that Plaintiffs' expert on this issue has presented a polarization analysis with similar deficiencies. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1270 (M.D. Ala. 2013), *vacated and remanded on other*

[21] *See Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1308 (2016) (noting the AIRC "went through an iterative process, involving further consultation, to adjust the plan's initial boundaries in order to enhance minority voting strength").

grounds, 135 S. Ct. 1257 (2015) (criticizing racial polarization analysis by Dr. Allan Lichtman); *Johnson v. Mortham*, 926 F. Supp. 1460, 1474-75 (N.D. Fla. 1996) (same).[22]

In assessing the number of elected minority public officials (Senate Factor 7), Plaintiffs ignore county and municipal elections where minority candidates have been highly successful. *See* ER1972-75. Plaintiffs also fail to consider how many minority candidates actually ran for any office in Arizona or how Arizona fares against other states on elected minorities, and they improperly rely on data concerning *appointed* state court judges who only undergo retention elections and must meet specific (non-racial) criteria to hold the judicial position. *See* ER3033-37. Such selective assertions, coupled with misinterpretation of Arizona history, clearly do not meet the required totality of circumstances test.

Perhaps most significantly, the district court properly recognized that H.B. 2023 furthers the legitimate and non-tenuous goals (Senate Factor 9) of preventing fraud and promoting public confidence in

[22] Plaintiffs' assessment of racial appeals in political campaigns (Factor 6) relies on a small number of weak examples, with no consideration of how the candidates actually fared in the pertinent election. *See* ER1406.

election integrity. *See* ER0019-21. In reaching this conclusion, the district court correctly noted that "absentee voting presents a greater opportunity for fraud" than in-person voting. ER0020 (citing numerous cases); *see also* ER1980-81 (admission by Plaintiffs' expert that absentee ballot fraud is more prevalent than in-person voting fraud). Indeed, the evidence below included reports of ballot collectors in Arizona impersonating election officials, ER1076, 1322-23, as well as a criminal indictment describing tampering with voted absentee ballots by New Jersey ballot collectors. ER2167. Thus, the district court properly recognized that "[o]utlawing criminal activity before it occurs is not only a wise deterrent, but also sound public policy." ER0021 (citing *Lee v. Virginia State Bd. of Elections*, --- F. Supp. 3d ---, No. 3:15CV357-HEH, 2016 WL 2946181, at *26 (E.D. Va. May 19, 2016)) ("Lee II").

C. The District Court Properly Found that H.B. 2023 Does Not Violate Either the First, Or the Fourteenth, Amendment.

The district court employed the proper standard, ER0015, 0025, to find that Plaintiffs were unlikely to succeed on their constitutional claims. As noted by this Court recently in *Pub. Integrity All., Inc. v.*

City of Tucson, No. 15-16142, 2016 WL 4578366, at **3-4 (9th Cir. Sept. 2, 2016), this is "a balancing and means-end fit analysis."

> The Supreme Court delineated the appropriate standard of review for laws regulating the right to vote in *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). *Burdick* recognized that governments necessarily 'must play an active role in structuring elections,' and '[e]lection laws will invariably impose some burden upon individual voters.'
>
> . . .
>
> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'
>
> (internal punctuation and citations omitted).

1. H.B. 2023 Does Not Infringe Voting Rights.

The district court properly found Plaintiffs unlikely to succeed on the merits of their constitutional "*Anderson-Burdick*" claim. ER0016-21.[23] Plaintiffs' alleged "severity" of H.B. 2023 was based entirely on

[23] The Party has a pending motion to dismiss asserting that Plaintiffs do not even state a facially plausible claim that H.B. 2023 violates the 14th Amendment by imposing a "severe" and "unjustified" burden on early voting. *See* ER2845, at Doc. 108

conjecture.[24] Plaintiffs did not provide a *single* declarant asserting that H.B. 2023 would prevent him or her from voting or make it substantially more difficult to do so and neither did depositions reveal such persons. Instead, Plaintiffs provided mere speculation from non-parties who suggest that H.B. 2023 "may" disenfranchise them in an unspecified future election should they neglect to mail their early ballot on time. *See* ER0206, ¶ 13; ER0211,¶ 10; ER0216,¶13; ER0227,¶ 14; *see also 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."). Here, the district court was proper in not countenancing such speculation, concluding: "H.B. 2023 does not significantly increase the usual burdens of voting. It does not eliminate or restrict any method

[24] Plaintiffs contended that H.B. 2023 worked "in concert with the other policies, practices and procedures challenged in this action" to impose a severe burden on voting. ER0184. As discussed above, Plaintiffs have voluntarily sought to dismiss some of their claims, and also at Plaintiffs' request, full briefing on Plaintiffs' motion for a preliminary injunction on those other issues did not occur until after H.B. 2023 became effective. The district court also properly denied Plaintiffs a preliminary injunction of Arizona's election system on those other grounds, and Plaintiffs noticed an appeal on October 15, 2016.

of voting, it merely limits who may possess, and therefore return, a voter's early ballot." ER0015-16. These limitations are very similar to those placed on voters who vote in-person. *See* A.R.S. § 16-580.

Plaintiffs referenced below alleged "voters in rural and Native American communities who do not have mail service," but did not provide any declarations from anyone living in such a community. ER0019.[25] ("Given the severe burdens Plaintiffs allege H.B. 2023 will place on rural voters without reliable transportation or access to secure outgoing mail, it is telling that they have not produced a single declaration from a voter who fits this profile.").[26] Moreover the Executive Director of the ADP admitted in her deposition that the ADP had encouraged voters residing in the Navajo Nation to vote in person instead of relying on ballot collection or early voting by mail. ER0017.

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[25] Peterson Zah, former Chairman and First President of the Navajo Nation, is a named Plaintiff and a registered voter in Apache County, but has not provided a declaration in this matter, despite Plaintiffs' allegations in their Complaint "on information and belief" that H.B. 2023 would "directly harm the members of the Navajo Nation . . . ." ER0001, 39.

[26] *Compare* ER2117, ¶¶ 5, 8 (describing partisan practices driving mass ballot collection in rural and tribal communities).

Similarly, Plaintiffs speculated about alleged voters who lack access to a "secure mailbox" and "reliable transportation," but again provided no declarations from anyone who states that these conditions will prevent him or her from voting or make voting significantly more difficult.[27] ER0176. There was simply no way of determining, on the record before the district court, why these unidentified persons could not use public transportation, a ride from a friend, or some other means to vote in person or to deliver (or have their family member, household member, or caregiver deliver) their early ballot.[28] To the contrary, after careful consideration of the record, the district court found that "many voters who entrust their ballots to collectors do so not out of necessity, but for convenience or because they prefer a trusted volunteer to deliver their ballots." ER0017.

Mere inconvenience does not constitute a *severe* burden, as the district court properly found. ER0018. *See Frank*, 768 F.3d at 745

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[27] Although State Senator Martin Quezada contended that he lacked access to a secure mailbox at his personal residence, he did not state that he lacks access to reliable transportation or could not drop off his early ballot at or near the Legislature. ER0271, ¶ 22.

[28] As discussed above, Plaintiffs provided no quantitative evidence to allow the district court to assess the number of voters who allegedly rely on early ballot collection.

("inconvenience" of obtaining photo ID "surely does not qualify as a substantial burden on the right to vote"); *Lee v. Virginia State Bd. Of Elections*, 155 F. Supp. 3d 572, 583 (2015) ("Inconvenience alone does not qualify as a substantial burden on the right to vote.") ("*Lee I*"). That is particularly true when, as the district court also correctly recognized, "Arizona's election regime . . . alleviates many of the burdens H.B. 2023 might impose on the types of voters Plaintiffs have described." ER0016-17. In particular, the district court found:

- "[V]oters who have great difficulty timely returning their early ballots need not vote by mail. These voters may vote in person at polling places on Election Day or at an on-site early voting location during any one of Arizona's 27 early voting days." *Id.*
- "Arizona also accommodates disabled voters and those who work on Election Day" with special election boards for ill and disabled voters and time off work for voting for those on shift, with prohibitions for employers from penalizing those who exercise that right. ER0017, citing A.R.S. §§ 16-549, 16-402.

And the district court further found that Plaintiffs simply misunderstood the new law—"Several of Plaintiffs' declarants

erroneously contend that H.B. 2023 will prevent them or others from delivering ballots on behalf of family members, despite the law's clear language to the contrary." ER0017 at n.8.[29]

The absence of any severe burden was also confirmed by the indisputable fact that H.B. 2023 only regulates early voting. As courts have repeatedly held, voting by early or absentee ballot is not a fundamental right but a privilege granted by states. *See, e.g.*, *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1238 (M.D. Fla. 2012) ("All parties agree that there is no fundamental right to an early voting option."); *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990) ("voting absentee[] is a privilege and convenience").[30]

As for the State interest in H.B. 2023, Plaintiffs did not dispute that the State has a legitimate interest in election integrity and fraud prevention. *See Purcell*, 549 U.S. at 4 ("Confidence in the integrity of

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[29] The remedy for this would seem to be *not* an injunction of H.B. 2023, but rather the further voter education that Plaintiff ADP intends to engage in now that the law is in effect. ER2223 at ¶ 7.

[30] *See also McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 810-11 (1969); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1192 (Ill. App. 2005) (quoting *Griffin v. Roupas*, No. 02 C 5270, 2003 WL 22232839, at *3 (N.D. Ill. Sept. 22, 2003)) ("there is no corresponding fundamental right to vote by absentee ballot").

our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *see also Prete v. Bradbury*, 438 F.3d 949, 969 (9th Cir. 2006) ("[The Secretary of State] has an important regulatory interest in preventing fraud and its appearances in its electoral processes.")

These interests are served by H.B. 2023 because, as previously stated, the district court properly recognized that absentee ballot fraud is more prevalent than in-person voting fraud, *see* ER0020, ER1980-81, at 282:16-283:6, and H.B. 2023's legislative history included extensive testimony concerning abuses of the existing early ballot collection process, such as impersonation of election officials. ER1076, ¶ 40; ER1322-23, ¶¶ 18-21; ER1385-86, ¶ 74. The Legislature had no obligation to confirm the veracity of these reports before enacting H.B. 2023, and respectfully, the courts should not second-guess its work based on the record Plaintiffs have generated. *See F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data").

Similarly, Plaintiffs provided no authority to support their contention that a state can only enact anti-election-fraud legislation in response to past fraud within the state. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) (state "need not show specific local evidence of fraud in order to justify preventative measures."); *Lee II*, 2016 WL 2946181, at *26 (recognizing "sound public policy" of deterring fraud before it occurs). And they simply ignore the documented incidents in other states citing tampering by ballot harvesters. ER1077 ¶ 46; ER2167.[31]

In any event, the "public perception that [election fraud is] a legitimate concern," in and of itself, provides a compelling reason to enact "preemptive legislation deterring such criminal activity." *Lee II*, 2016 WL 2946181, at *23; *see also Beatie v. Davila*, 132 Cal. App. 3d 424, 433 (1982) (despite finding no actual fraud, the court stated that "because of the potential for wrongdoing, we suggest the Legislature reexamine the practice of absentee ballot solicitation"). That justification further applies here, where one of Plaintiffs' experts readily

[31] *Available at* http://www.nj.gov/oag/newsreleases09/pr20090903d-Small-et-al-Indictment.pdf

admitted that there is a widespread impression among Americans that election fraud is a problem. ER1982, at 289:15-18.

It was eminently reasonable for the Legislature to believe that, like many other states, Arizona needed legislation to prevent the mass collection of early ballots and ensure steps are taken to ensure the purity and integrity of elections.[32] Further, it was not unreasonable for the Legislature to conclude that in order to deter such conduct, criminal penalties were necessary. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 623 F. Supp. 657, 664 (D. Haw. 1985), *judgment aff'd in part, rev'd in part on other grounds*, 849 F.2d 1176 (9th Cir. 1988) ("[E]ven if absentee balloting creates a greater potential for fraud, this does not warrant invalidation of absentee voting . . . especially where other measures, such as criminal laws, exist to protect the integrity of

[32] *See, e.g.*, Cal. Elec. Code § 3017; C.R.S.A. § 1-7.5-107; Nev. Rev. Stat. §§ 293C.330, 293C.317, 193.130; N.M.S.A. §§ 1-6-10.1, 1-20-7, 3-9-7; ER2082-83, at 9-10. Though Plaintiffs contended in their reply in support of their Emergency Motion (Dkt. 25) that California "repealed its ballot collection law" last week, in reality, California only amended its law—which still has felony-penalty provisions—to allow voters to designate a person to return their ballot, which person may not receive any form of compensation for doing so. *See* Calif. Assembly Bill 1921 (2016). These amendments will take effect on January 1, 2017, well after the upcoming General Election. *See* CAL. CONST. art. 4, § 8(c)(1).

elections."); *see Peterson v. City of San Diego*, 34 Cal. 3d 225, 231 (1983).

Simply, Plaintiffs' belated second-guessing of the Legislature's wisdom should have been directed to the legislative or referendum processes. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("[Legislative] decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them."). Plaintiffs had every opportunity to participate in the legislative process, present facts, or otherwise object to H.B. 2023. They also had the opportunity to seek a referendum on the legislation, but instead decided to wait until after the bill was signed into law to bring a judicial action.

The duly considered factual findings discussed above underpin the district court's conclusion that H.B. 2023 "imposes only minor burdens not significantly greater than those typically associated with voting." ER0019. Such burdens are not unlike other simple requirements of participation in our democracy, including those associated with jury duty, obtaining a driver's license in-person, and selective military service registration. ER2547-48. As the district court also found that the

interests put forth by the State—"[f]raud prevention and preserving public confidence in election integrity[—]are important state regulatory interests," its conclusion should be affirmed. ER0020.

2. H.B. 2023 Does Not Infringe Associational Rights.

The district court properly found Plaintiffs unlikely to prevail on their claim that H.B. 2023 infringes on the freedom of association of those that harvest ballots—a claim that requires application of the same *Anderson-Burdick* test. "First Amendment protection [extends] only to conduct that is inherently expressive." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006). As the district court stated, "there is nothing inherently expressive or communicative about receiving a voter's completed early ballot and delivering it to the proper place." ER0022; *see also Voting for Am.*, 732 F.3d 382, 392 (5th Cir. 2013) ("[T]here is nothing inherently expressive about receiving a person's completed [voter registration] application and being charged with getting that application to the proper place.") (internal quotation and citation omitted).

Even if H.B. 2023 does implicate associational rights, "it does not impose *severe* burdens." ER0022 (emphasis added). Nothing in

H.B. 2023 prevents an individual or association from (1) asking voters whether they have returned their early ballot or providing reminders; (2) educating voters on how to complete their early ballots or applicable deadlines; or (3) explaining how and where an early ballot may be returned. ER1351-54, at 99:19-103:22. Nor does H.B. 2023 prevent anyone from transporting voters to outgoing mailboxes or polls, helping them register to vote, or otherwise engaging with them as constituents. A.R.S. § 16-1005(H), (I).

Moreover, Arizona has many laws that reasonably restrict association with individuals actively engaged in the voting process, as discussed above. These laws do not violate the First Amendment. *See PG Publ'g Co.*, 705 F.3d at 113 ("there is no protected First Amendment right of access to a polling place"); *United Food & Commercial Workers Local 1099*, 364 F.3d at 748 ("[A] state may require persons soliciting signatures to stand 100 feet from the entrances to polling places without running afoul of the Constitution.").

Plaintiffs' attempt to draw a comparison to cases involving regulations on voter registration correctly failed when they argued that "there is no principled distinction between criminalizing the collection

of voter registration forms and early ballots." ER0186. Voter registration forms and *voted* ballots raise significantly different election integrity concerns; by destroying or altering early ballots, a ballot harvester might change an election result. *See* ER1387-88, ¶ 79 (detailing prosecutions for early ballot fraud in other states where perpetrators sought to do just that). Simply, H.B. 2023 does not infringe on the freedom of association.

3. "Partisan Fencing" is Not An Independent Cause of Action, But, Even if It Was, It Does Not Arise Here.

The district court properly treated Plaintiffs' claim that H.B. 2023 was enacted with the intent to discriminate against Democrat voters with skepticism. ER0024. Recent court cases have found that "the term 'partisan fencing' *does not* create an independent cause of action . . . ." *Lee I*, 155 F. Supp. 3d at 584 (emphasis added). Rather, it provides a "different theory" for proving that an election regulation imposes a severe and unjustified burden on voting or associational rights, which should be assessed under the *Anderson-Burdick* framework. *Id.*; *see also Lee II,* 2016 WL 2946181, at *26 (partisan fencing "is somewhat of an aberration;" "Even if the evidence had revealed that partisan advantage was a latent motive in enacting [election regulation], it

would not offend the First or Fourteenth Amendment."); *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (political gerrymandering claims are nonjusticiable political questions). The district court properly followed this authority. ER0024-25.

Even if "partisan fencing" could stand alone as an independent claim—and it cannot—there is no actual evidence that the motive behind H.B. 2023 was to disenfranchise Democrats. ER0025 at n.10. For this claim, Plaintiffs primarily relied on their expert Dr. Lichtman, a historian who opines on the intent behind H.B. 2023 based on a selective review of legislative history and without interviewing any legislator whose comments were recorded in that history. ER1959-67, at 118:6-122:6, 134:14-137:18.

Plaintiffs' expert's opinions were undermined below by: (1) the legislative history discussing abuse of the ballot collection system in Arizona, ER1204-05, 1207-1208, ¶¶ 7-9, 18-19; ER1385-87 ¶¶ 71-76, and (2) previous incidents in other states involving tampering with early ballots, which Dr. Lichtman admitted he did not consider. ER1077, ¶¶ 46-47; ER1979, at 258:6-13; ER2167. Even had there been no confirmed incidents of fraud in Arizona (and the record shows at

least one, ER1322-23, ¶¶18-21), the Legislature had a legitimate and non-partisan interest in preventing fraud before it occurred and in response to public concern. *See Lee II*, 2016 WL 2946181, at *23, 26. As H.B. 2023's sponsor noted: "To be honest, it's important to anyone who cares about maintaining and protecting the integrity of their vote, honestly, *irrespective of their party affiliation*." ER1330-31, at 9:21-10:2 (emphasis added); ER1078, ¶ 48.

In sum, Plaintiffs' assertions were unsupported, and, as the district court properly found: "Plaintiffs have not provided evidence that H.B. 2023 will have a cognizable disparate impact on Democrats as compared to voters of other political affiliations." ER0025 n.10. To the extent that a "partisan fencing claim" even exists in law, it must fail.

D. The District Court Properly Found No Likelihood of Irreparable Harm Absent Relief.

The district court's decision rests on proper findings of fact and conclusions of law regarding *all* of the factors to be considered upon denial of a preliminary injunction. While the Party has the important interests in this matter discussed above, the State Defendants have the perspective most helpful to this Court on the remainder of the

injunction factors. The Party joins fully in the arguments made by the State Defendants as to why the balance of equities favors their interests and as to how H.B. 2023 promotes the public interest. And, there is certainly "no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008).

The Party would be remiss, however, in failing to respond to Plaintiffs' allegations of irreparable harm purported to arise from alleged conduct of the Party's members and volunteers, all of which would be non-state actors. To be categorically and unequivocally clear, the Party does not use, implement, or permit its members or volunteers to use or implement any harassment or "voter intimidation tactics," and it specifically disputes, as it has consistently, Plaintiffs' allegations that it does. ER2618. The very article Plaintiffs continue to cite for their specious allegations confirms this, *id.*, and Plaintiffs also noticed and took a 30(b)(6) deposition of the Arizona Republican Party in this matter, specifically related to H.B. 2023. ER3130-31. No harassment or voter intimidation tactics were revealed because (1) the Party does not engage in or condone such tactics, and (2) such tactics are specifically

against sensible election laws in Arizona, which the Party adheres to in all respects. *See, e.g.*, A.R.S. § 16-1013 (unlawful to intimidate or coerce an elector); A.R.S. § 16-1017 (illegal to interfere with, induce, or hinder a voter).

A Primary Election took place in Arizona with H.B. 2023 in effect as A.R.S. 16-1005(H), (I), and no incidents of harassment, intimidation—or even any similar impediment—to voters casting or returning ballots during the early voting period were reported to the Election Division of the Arizona Secretary of State's Office. ER3158. The call log for the 2016 Primary Election for that Office does not reflect any calls complaining about intimidation or harassment of a person delivering ballots to a polling place. ER3159. Neither did emails arrive referencing ballot-related harassment or intimidation, nor did Election Division staff at the Office receive any reports of voter harassment or intimidation when voters were delivering early ballots to a polling place. *Id.* If such conduct would have been reported, it would have been investigated. *Id.*

Indeed, as "evidence" that an injunction is needed at this late date, Plaintiffs have only cited statements of their declarants made well

before H.B. 2023 was in effect and statements of non-party lawmakers made during floor debates on the bill. (Dkt. 25, at 3 (citing ER258, 268, 270-71, 279-81, 514-15, 607-08.) This is incongruous with the requirement that Plaintiffs must demonstrate not only that irreparable harm caused by a state actor is "possible" without an injunction, but that it is "likely." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008)). This requires "an intensely factual inquiry requiring development of a full record" and *cannot* rely on "declarations from individuals who are not parties to the litigation" who purport to provide evidence the "law severely burdens anyone." *Gonzalez v. Ariz.*, 485 F.3d 1041, 1050 (9th Cir. 2007).

Plaintiffs have sought—for partisan reasons—to judicially strike down a law implementing reasonable security and integrity measures for Arizona elections. *See* ER2157, at 95:5-7 (Plaintiffs' expert admitted that primary drivers of concerns regarding H.B. 2023 are partisan issues); ER1199, 1201, at 32:4-13, 34:5-10 (admitting organization would not collect a ballot if a voter supported the opposing candidate and stating "[t]he extent to which those folks voted or not voted, if they

didn't support our candidate, that was on someone else's responsibility"); ER2117, ¶¶ 5, 8.[33] Partisan motives do not constitute irreparable harm, which is "the *sine qua non* for all injunctive relief." *See Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978).

VII. CONCLUSION

The district court did not abuse its discretion at any point in rendering its thoughtful and well-considered decision to deny Plaintiffs their requested preliminary injunction of H.B. 2023. Now that the law has taken effect, a Primary Election has occurred, and a General Election is imminent, there is no reason to enjoin it. If anything, the first couple months since its effective date have borne that out. Plaintiffs' failure to identify a scintilla of actual data to support their claims is devastating. By countenancing such tenuous claims, courts would be required to micro-manage all elections at every level of government. *See Husted*, 2016 WL 4437605, at *1. This is not appropriate. The district court was right, and this Court should decline to reverse its decision.

[33] *See also* ER245-46, 249, ¶¶ 10, 18 (implying that voters who allow her campaign to collect their early ballots and deposit them will vote for her).

VIII. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Intervenor states it is aware of Case No. 16-16865 pending before this Court, in which Plaintiffs appeal the district court's October 11, 2016, order denying them preliminary injunctive relief on their provisional ballot claims.

Dated: October 17, 2016

Respectfully submitted,

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IX. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,807 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century font size 14.

Dated: October 17, 2016

Respectfully submitted,

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By: *s/ Sara J. Agne*
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 October 17, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Sara J. Agne*
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