No. 16-16698

In the United States Court of Appeals
for the Ninth Circuit

LESLIE FELDMAN; LUZ MAGALLANES; MERCEDEZ HYMES; JULIO MORERA; CLEO OVALLE; PETERSON ZAH, *Former Chairman and First President of the Navajo Nation*; DEMOCRATIC NATIONAL COMMITTEE; DSCC *a/k/a Democratic Senatorial Campaign Committee*; ARIZONA DEMOCRATIC PARTY; KIRKPATRICK FOR U.S. SENATE; HILLARY FOR AMERICA,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE; MICHELE REAGAN, *in her official capacity as Secretary of State of Arizona*; MARICOPA COUNTY BOARD OF SUPERVISORS; DENNY BARNEY, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE CHUCRI, *in his official capacity as member of the Maricopa Board of Supervisors*; ANDY KUNASEK, *in his official capacity as member of the Maricopa Board of Supervisors*; CLINT HICKMAN, *in his official capacity as member of the Maricopa Board of Supervisors*; STEVE GALLARDO, *in his official capacity as member of the Maricopa Board of Supervisors*; MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT; HELEN PURCELL, *in her official capacity as Maricopa County Recorder*; KAREN OSBORNE, *in her official capacity as Maricopa County Elections Director*; and MARK BRNOVICH, *in his official capacity as Arizona Attorney General*,

Defendants/Appellees,

ARIZONA REPUBLICAN PARTY; BILL GATES, *Councilman*; SUZANNE KLAPP, *Councilwoman*; SENATOR DEBBIE LESKO; and REPRESENTATIVE TONY RIVERO,

Defendant-Intervenors/Appellees.

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

PLAINTIFF-APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

Attorneys for Plaintiffs-Appellants Leslie Feldman, Luz Magallanes, Mercedez Hymes, Julio Morera, Cleo Ovalle, Former Chairman and First President of the Navajo Nation Peterson Zah, the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America:

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

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

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Amanda R. Callais
PERKINS COIE LLP
700 Thirteenth Street N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211
MElias@perkinscoie.com
BSpiva@perkinscoie.com
EFrost@perkinscoie.com
ACallais@perkinscoie.com

Attorneys for Intervenor-Plaintiff/Appellant Bernie 2016, Inc.:

Roopali H. Desai
Andrew S. Gordon
D. Andrew Gaona
COPPERSMITH BROCKELMAN PLC
2800 North Central Avenue, Suite 1200
Phoenix, Arizona 85004
Telephone: (602) 381-5478
RDesai@cblawyers.com
AGordon@cblawyers.com
AGaona@cblawyers.com

Malcolm Seymour
GARVEY SCHUBERT BAKER
100 Wall Street, 20th Floor
New York, New York 10005-3708
Telephone: (212) 965-4533
MSeymour@gsblaw.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF CONTENTS
(continued)

Page

I. INTRODUCTION

HB2023 is a partisan effort meant to make it more difficult for voters who are unlikely to support the Republican Party—including, in particular, minority voters—to participate in elections in Arizona. Indeed, the State Appellees (including Arizona's top election official, the Secretary of State) and the Arizona Republican Party, write ***jointly*** in opposition in a brief signed and filed by the attorney for the Arizona Republican Party. Their brief and the District Court's opinion necessarily rely heavily on an opinion from a divided Sixth Circuit panel that rested on the assumption that careful scrutiny of state laws burdening voting rights is "an improper intrusion of the federal courts"; but, as the dissent to that decision explains, that "see-no-evil" approach has long been recognized as untenable in the world's greatest democracy, and has been rejected by Congress in enacting the Voting Rights Act ("VRA") and countless Supreme Court and federal court cases that have followed. *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *15-17 (6th Cir. Aug. 23, 2016) (Stranch, J., dissenting). "Our recent jurisprudence does not shy away from the scrutiny that is essential to protection of the fundamental right to vote." *Id*. at *17. Indeed, in just the last few months, this Court and the Supreme Court have reaffirmed that federal courts must be vigilant when constitutional rights are at stake. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016), *as revised* (June 27, 2016); *Pub. Integrity All., Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366 (9th Cir. Sept. 2, 2016) (en banc). Evaluated under the appropriate standards, HB2023 cannot survive.

II. ARGUMENT

A. Appellants Did Not Delay In Seeking Relief

Appellants filed this action less than six weeks after HB2023 was enacted. Appellants' Br. vii-viii. They requested an expedited schedule, but Appellees objected, asserting no decision was needed until "late in the game" because the injunction "would be essentially just saying not to enforce a new law." ER96-97. Based on these representations (and over Appellants' objections) the District Court set argument on August 3, just three days before HB2023 became effective, but did not issue a decision until Friday, September 23. Appellants filed a notice of appeal within hours, ER2856, and a motion for injunction pending appeal five days later. ER2857. That motion was not a canned recitation of prior briefing, but a good faith effort to address the District Court's errors. ER2640. Had it corrected them, Appellants would not have required emergency relief from this Court, which they sought just two hours after the District Court denied the motion. ER2818; Doc. 16. Finally, Appellees cannot demonstrate prejudice, particularly in light of their own requests to delay proceedings in the first instance.

B. *Purcell* Does Not Bar the Requested Relief

Appellees repeatedly assured the District Court that the extended schedule *they requested* would not put the case "into the danger zone" sometimes posed by *Purcell v. Gonzalez*, 549 U.S. 1 (2006). ER94-96, 100, 119-20, 122-23. They now argue otherwise.

Purcell did not hold that a court cannot act to protect voters as an election nears. The Supreme Court recently illustrated this in denying a stay in *N.C. v. N.C.*

State Conference of the N.A.A.C.P., No. 16A168 (U.S. Aug. 31, 2016), where early vote plans had to be revised, and a voter ID law for which there had been training and public education (and that had been applied in the primary) was enjoined. N.C. Em. App. to Recall & Stay Mandate 2, 29-30, No. 16A168 (Sup. Ct.). In contrast to *Purcell* (and *North Carolina*) elections officials have made *no* preparations related to HB2023's implementation or enforcement. ER870, 2618. And *Purcell* did not involve a law *criminalizing* a means by which thousands cast their ballots. Far from creating "voter confusion and consequent incentive" not to participate in the election, an injunction here will avoid irreparable injury to voters' fundamental rights, prevent intimidation or harassment as a result of vigilante attempts to enforce HB2023, and no one will be subject to criminal penalties for doing nothing more nefarious than helping their neighbors vote. *See* ER258, 268, 270-71, 279-81, 514-15, 607-08.

C. Appellants Are Highly Likely to Succeed Under the VRA

Appellees fail to cite a single case holding that a § 2 plaintiff may *only* show disparate burden by "quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on [the means of participating in the electoral process impacted by a challenged provision]." ER8. No such case exists.[1]

[1] In considering whether Appellants are likely to succeed on the merits, the Court will take into account that this appeal will be reviewed for abuse of discretion, but this is not the same as deferring to the rejection of the motion for an injunction pending appeal below, as Appellees argue. *See* Opp. Br. 4. A court abuses its discretion when its decision is based on an erroneous legal standard or clearly erroneous factual findings. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). Here, the District Court did both.

The cases they do cite prove that Appellants presented more than sufficient evidence of disparate impact. In *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222 (W.D. Wis. July 29, 2016), the court found a disparate burden based on precisely the type of evidence presented here: "[P]laintiffs … indirectly prov[ed] the nature and severity of the burden[]" through evidence that "Wisconsin's minority populations are much more transient than its white population" and "more likely to lack access to transportation and to have less flexible work schedules." *Id*. at *36, 48. Based on these disparities, the court found "that the durational residency requirement will impose considerable burdens on [African American and Latino voters, who as a class] will have difficulty complying with the requirement." *Id*. at *36.[2] In other words, the court carefully considered the "totality of circumstances" surrounding the challenged provisions, and determined whether there was sufficient evidence to support a finding that any imposed a disparate impact on minority voters. *See also Veasey*, 830 F.3d at 248; *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 245 (4th Cir. 2014) ("*LOWV*"), *cert. denied*, 135 S. Ct. 1735 (2015); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998).

The District Court had the same type of ***unrefuted*** evidence that HB2023 will disparately impact minority voters.[3] But it erroneously concluded it need not

[2] Appellees' reliance on a generalized statement in *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016), ignores the plaintiffs proved disparate impact based on data maintained by Texas, *id*. at 250-51, and that the court recognized that § 2 must apply even when data is unavailable, *id*. at 259-60.

[3] *See* ER961-1015, 2258-67; *see also* ER 231-33, 238-40, 245, 247-49, 254, 257-58, 270-72, 281-82, 286, 298-301, 319-342, 928-30, 2244-2312.

consider it. ER14. Further, it presumed *without any evidence* that HB2023's burdens would fall "equally to minority and white voters," because "both … live in rural areas." ER11. But even if there was evidence that white voters were just as likely to live in areas *lacking mail delivery* (and there was none, *see id*.), the demonstrated racial socioeconomic disparities—e.g., in transportation access, ER1002—demonstrate that HB2023's burdens will fall disparately on minority voters. The District Court also failed to separately consider the burdens on Native Americans, including in the Tohono O'odham Nation, where 1,900 members lack home mail delivery, and must travel up to 40 miles to the nearest post office. ER247-49, 511-13, 980-81. As a result, many rely on neighbors to communally collect and deliver mail. ER247-49, 511-13, 980-81, 2228, 2342. HB2023 makes this a *felony*. If a law makes voting disproportionately more burdensome on any minority community—indeed, a single minority *voter*—that is sufficient to establish a § 2 violation. *See, e.g.*, *LOWV*, 769 F.3d at 244 (quoting 52 U.S.C. § 10301(a)); *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016). The District Court read a strict evidentiary requirement into the VRA that is not there, creating a means for a state to engage in precisely the type of subtle voting discrimination Congress meant to prohibit. Appellants' Br. 9-10.[4] *See also Chisom v. Roemer*, 501

[4] Rather than address this head on, Appellees argue that the District Court properly relied on cases applying the Fair Housing Act, Age Discrimination in Employment Act, Equal Pay Act, and Title VII, while inexplicably dismissing cases applying § 2 of the VRA—*the very statute at issue*—as not "relevant." Opp. Br. 7-8. In fact, § 2 vote dilution and vote denial cases are creatures of the exact same statutory language. *See* 52 U.S.C. § 10301(b); *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003).

U.S. 380, 406 (1991) (§ 2 "provide[s] a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination") (Scalia, J., dissenting).

As for part two of the test, "not every Senate factor, or even a majority," must weigh in favor of finding a § 2 violation. *United States v. Blaine Cty., Mont.*, 363 F.3d 897, 914 n.26 (9th Cir. 2004) (citing *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)). Indeed, courts have found § 2 cases likely to succeed on far less evidence than present here. *See, e.g.*, *LOWV*, 769 F.3d at 245-47; *Mich. State A. Philip Randolph Inst. v. Johnson*, No. 160cv011844, -- F.Supp.3d --, 2016 WL 3922355, at *11-13 (E.D. Mich. July 21, 2016), *as amended* (July 22, 2016). Moreover, "courts must be careful not to become preoccupied with the trees and thereby lose sight of the forest"; it is the "landscape as a whole" that is important. *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 303-04 (D. Mass. 2004); *N.C. State Conf. of N.A.A.C.P. v. McCrory*, 831 F.3d 204, 204 (4th Cir. 2016). But Appellees invite the Court to do just that. They nitpick at Appellants' evidence regarding a few Senate factors, while ignoring Arizona's lengthy and continuing history of discrimination, including specifically in voting; the stark socioeconomic disparities that minority communities still suffer; the Legislature's lack of concern for minority voters as evidenced by their dismissal of testimony of HB2023's burdens on those voters; a history of racially polarized voting previously recognized by this Court, *Gonzalez v. Arizona* , 677 F.3d 383, 406-07 (9th Cir. 2012); and the demeaning, disturbing racial appeals that continue to appear in

Arizona's elections and recently seem to have reached a fever pitch. ER2657 n.4; *see also* Appellants' Br. 1-2, 11-13.

Appellees' attempt to justify HB2023 because "absentee voting presents a greater opportunity for fraud," Opp. Br. 12, is a distraction. HB2023 did not outlaw absentee voting—it made it harder for voters without reliable or secure mail service, or reliable transportation, to use it. "[T]ampering with voted absentee ballots," *id.*, as well as every other type of conceivable fraud related to ballot collection, was already a crime. *See* A.R.S. §§ 16-1005(A)-(F); *see also* A.R.S. § 16-545. The Legislature rejected amendments that would have addressed these concerns without making it more difficult to vote. *See* Appellants' Br. 6, 13.

D. Appellants Are Highly Likely to Succeed Under the 14th Amendment

Appellees also ignore one of the most serious errors in the District Court's *Anderson-Burdick* analysis: its failure to consider the burdens imposed on the specific groups of voters for whom it is likely to pose the most serious challenges. This Court made clear this analysis is required in *Public Integrity Alliance*—a case *Appellees* filed as supplemental authority below, but omit from their brief here. ER2620-22, 2631-33; *see also One Wis.*, 2016 WL 4059222, at *35 ("[T]he court must evaluate the burdens … on voters who cannot comply with" the law).

The burdens on impacted voters here are severe. They cannot cast an early ballot (a right conferred by A.R.S. § 16-541) unless they incur the burdens (which their socioeconomic circumstances make more difficult to bear or even achieve) of traveling many miles to mail their ballot, drop it off, or vote in person. "These options reduce the burden that the law imposes, but they do not negate it entirely."

One Wis., 2016 WL 4059222, at *35. This is particularly so in Arizona: voting in person has repeatedly proved difficult because of serious errors by election administrators, particularly with Spanish-language materials. ER257-59, 273, 290, 340, 818-20, 824-25, 2699-2703. Voters in the 2016 presidential primary waited for as long as six hours to cast their ballots in Maricopa County. *See* ER264-66, 287, 296-97. And Arizona rejects the highest number of provisional ballots nationwide, ER2695, at least partly due to Maricopa County's practice of disenfranchising voters through an official policy of misleading voters "to believe that their vote would count" even where it would not. Under Advisement Ruling 5, *Jones v. Reagan*, CV 2016-014708 (Ariz. Super. Ct. Sept. 9, 2016).

Appellees also do not address the District Court's failure to conduct the "means-end fit analysis" the law requires. Appellants' Br. 17. A state's interest in preventing voter fraud and promoting election integrity, "does not mean … that [it] can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters." *Ohio St. Conference of NAACP v.Husted*, 768 F.3d 524, 547 (6th Cir. 2014). It "must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, *meaning it actually addresses*, the interest put forth." *Id.* at 545 (emphasis added); *see also One Wis.*, 2016 WL 4059222, at *26. The State did not, and could not possibly, do so here.

E. The Balance of the Equities—Including the Irreparable Harm That Will Result—Tip Sharply In Favor of Issuing the Injunction

The District Court erroneously found Appellants could only show irreparable injury if they identified which or how many voters HB2023 will burden. *See* ER8, 2818. That is not required. *See LOWV*, 769 F.3d at 244; *Frank*, 819 F.3d at 386. Moreover, the record is brimming with the stories of voters who previously would have been severely burdened, and in many cases disenfranchised, but for ballot collection. *See, e.g.*, ER203-06, 210-11, 216, 219, 225-27, 231-33, 240, 246-49, 259, 267, 271-72, 281-82, 289, 294, 928-30. In each election, voter's circumstances will be different, but these examples demonstrate that HB2023 will irreparably harm voters within Appellants' constituency and membership. Relatedly, the single-minded focus on individual voters ignores the unrefuted evidence that HB2023 causes the organizational Appellants irreparable harm, because they must divert resources to ensure it does not prevent their supporters from voting. ER2222-24; *cf.* ER8 (ADP alleged a concrete and particularized injury resulting from HB2023). Appellees' focus on the August 2016 primary election—which took place after this matter was submitted and heard below—is misplaced. Only 29% of Arizona voters voted in that primary,[5] as compared to 52.6% in the 2012 general election. ER968. The Democratic races were mostly uncontested. And there is no evidence that the Republican Party had implemented the voter intimidation tactics that it intends to use in the general election.[6]

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[5] https://results.arizona.vote/elections/-103/0/2016-primary-election/featured-races

[6] Appellees balk at this being described as "harassment." Opp. Br. at 7-8. The dispute is semantic. Although it was part of the record below, the Republican

Finally, Appellees have not identified *any* countervailing harm remotely approaching the seriousness of the harms discussed above. Their claim that Arizona will be harmed if it cannot enforce HB2023, is contradicted by election administrators' indifference toward the law. *See* Appellants' Br. 19. Indeed, the State is so unconcerned by the evils that HB2023 purportedly was enacted to guard against, that Appellee Secretary of State Michele Reagan—who vocally advocated for HB2023—offered to collect ballots for her staffers just days after it was signed into law. ER975.

F. Expedition of the Appeal Is Warranted

Appellees' argument that the Court should decline to expedite this appeal so that California and Nevada may weigh in, Opp. Br. 15 n.8, should be rejected. California repealed its ballot collection law last week. *See* Calif. Assembly Bill 1921 (2016). And Nevada's law is not identical to HB2023, Nev. Rev. Stat. § 293.317, necessarily has a different history, and is not relevant to the harms that Appellants and thousands of Arizona's voters will suffer if HB2023 is not enjoined.

III. CONCLUSION

For the reasons set forth in Appellants' opening brief and herein, Appellants respectfully request that the Court enter an emergency injunction pending appeal or, in the alternative, expedite the appeal for review on the merits.

Party never disputed that it plans to do precisely what the article says it will. *See* ER2617-18.

RESPECTFULLY SUBMITTED this 10th day of October, 2016.

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

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

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

Attorneys for Plaintiffs Leslie Feldman, Luz Magallanes, Mercedez Hymes, Julio Morera, Cleo Ovalle, Former Chairman and First President of the Navajo Nation Peterson Zah, the Democratic National Committee, the DSCC, the Arizona Democratic Party, Kirkpatrick for U.S. Senate, and Hillary for America

s/ Roopali H. Desai (w/permission)
Roopali H. Desai (# 024295)
Andrew S. Gordon (# 003660)
D. Andrew Gaona (# 028414)
COPPERSMITH BROCKELMAN PLC
2800 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004

Malcolm Seymour
GARVEY SCHUBERT BAKER
100 Wall Street, 20th Floor
New York, New York 10005-3708
Telephone: (212) 965-4533
MSeymour@gsblaw.com

Attorneys for Intervenor-Plaintiff Bernie 2016, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 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/ Sarah R. Gonski

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length and type face limits permitted by Ninth Circuit Rule 32-2(b). The brief contains 2,774 words and 10 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Sarah R. Gonski