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

STATE DEFENDANTS/APPELLEES' AND DEFENDANT-INTERVENORS/APPELLEES' RESPONSE IN OPPOSITION TO THE EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

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I. BACKGROUND

Plaintiffs and Plaintiff-Intervenor ("Plaintiffs") ask the judiciary here to micro-manage the electoral process and eliminate well-reasoned safeguards to a fair and transparent election. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *1 (6th Cir. Aug. 23, 2016) (noting "yet another appeal . . . asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes"). In this Circuit, Plaintiffs have rested too long on their laurels and now make that untenable ask. By their own calculations in their Circuit Rule 27-3 Certificate, there were nearly three weeks until early ballots would be sent to Arizona voters when they filed their Notice of Appeal. (Doc. 16 at ix) (noting that on October 4 "eight days remain[ed] before early ballots [we]re sent"). Yet Plaintiffs inexplicably delayed *eleven days* in filing their Motion for Expedited Appeal.

The State Defendants and Defendant-Intervenors[1] ("Defendants") acknowledge that Plaintiffs were first required to move the district court for a stay of its order and request it enjoin enforcement of H.B. 2023 before bringing their

[1] Defendant-Intervenor Arizona Republican Party understands the district court order stated that individual Defendant-Intervenors Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero did not participate in the instant motion (ER0002) but it cited the County Defendants' Notice of Non-Participation (*see* ER2850). The individual Defendant-Intervenors were represented in briefing and argument below (*see* description of Doc. 152, at ER2851), and also jointly file this Response with Defendant-Intervenor Arizona Republican Party, which respectfully requests that they be added as parties.

Emergency Motion Under Circuit Rule 27-3 for Injunction Pending Appeal and for Expedited Appeal ("Motion"). Fed. R. App. P. 8(a)(1). However Plaintiffs did not seek this relief from the district court until five days after the lower court entered its Order denying Plaintiffs' Motion for Preliminary Injunction of H.B. 2023. ER1-27; 2640.

H.B. 2023's sensible restrictions were in effect for all but the first three days of early voting for Arizona's most recent Primary Election—meaning, with regard to early voting, "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* A.R.S. § 16-1005(H), (I). At no time did Plaintiffs request emergency relief or an expedited ruling from the Court based on irreparable harm occurring during the early voting period.

Instead of providing actual evidence, Plaintiffs attempt to discount it, including by characterizing the sworn testimony and admissions of the Executive Director of the Arizona Democratic Party (the "ADP"), the one Plaintiff that the Court found had standing to challenge the validity of H.B. 2023, as something on which the lower court "misplaced" its reliance. ER2651.

Perhaps as a diversion, in their Certificate and throughout their Motion, Plaintiffs selectively quote from a *Yuma Sun* article that was in the record before the district court nearly a month before it issued its ruling. *See* ER2611-19.

Plaintiffs blatantly misrepresent the contents of the article by citing it as evidence that Intervenor-Defendant "Arizona Republican Party has publicly announced its intention to use HB2023 as an excuse to . . . harass voters[.]" (Doc. 16, at vi, 19). In fact, the article reports the exact opposite, quoting Arizona Republican Party spokesman Tim Sifert: "We certainly don't recommend harassing anybody," Sifert said, calling the plans "part of documenting something that looks like it could very easily be illegal." ER2618.[2] Neither Plaintiffs' request for emergency relief nor their statements that the balance of hardships tips sharply in their favor should be given much weight when they are based on such selective misrepresentations.

Regardless of the misdirection and conscious delay by the Plaintiffs, the district court's multiple denials of Plaintiffs' preliminary injunction requests are founded upon well-reasoned evaluation of the law and facts. Simply, Plaintiffs have not and cannot meet their burden to overcome the important regulatory interests of protecting voters and ensuring an orderly and fair election process.

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[2] In any event, Plaintiffs noticed and took a 30(b)(6) deposition of the Arizona Republican Party. ER3130-31; *see also* ER3157-59 (Decl. of E. Spencer, attached as Ex. C) (Defendants have continued Plaintiffs' numbering of the ER in Exhibits A (Doc. 153), B (Tr. of Proceedings dated 7/18/16), and C, attached). Mr. Sifert was the 30(b)(6) designee, and Plaintiffs had ample time to discern whether the Party had anything other than appropriate plans regarding the new state law—indeed that was their claimed focus of the deposition. ER3131. Any inappropriate plans would be specifically against the law. *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).

II. LEGAL STANDARD FOR RELIEF SOUGHT

Plaintiffs have not demonstrated that they are entitled to an injunction pending appeal, especially because early voting for the General Election begins on October 12, 2016. Plaintiffs must make the same showing for an injunction pending an appeal as for a preliminary injunction. As the district court found, they have not made it, and the district court's conclusion is entitled to deference. *Sw. Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)

Moreover, Plaintiffs cite three cases in support of their assertion that this Court "has granted interim relief where constitutional issues are raised shortly before an election." (Doc. 16, at 7). None of those cases supports granting interim relief here. In *Southwest Voter Registration*, 344 F.3d at 917, 919, this Court, sitting en banc, dissolved an injunction pending appeal and affirmed the district court's judgment denying an injunction. In *Daily Herald Co. v. Munro*, 758 F.2d 350, 351 (9th Cir. 1984), the Court expedited the appeal, but did not provide interim relief. And in *Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990), the Court ordered interim relief postponing an election for county board of supervisors that did not involve other jurisdictions, unlike the combined federal, state, and local election occurring on November 8, 2016, in Arizona.

In addition, the foregoing cases were all decided before *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006), in which the Supreme Court vacated interim relief ordered

by a Ninth Circuit motions panel and allowed the election to go forward with the challenged law in effect. *Id.* at 4-5 (stating that "[c]ourt 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 "will enhance the likelihood that [the constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation").[3]

III. NEITHER INTERIM RELIEF NOR EXPEDITED REVIEW IS APPROPRIATE.

a. The District Court Properly Found that H.B. 2023 Does Not Violate Section 2.

For their § 2 claim, Plaintiffs had to establish a likelihood of success on their contentions that (1) that H.B. 2023 imposes a discriminatory burden on a minority

[3] This case is presently in a procedural posture nearly identical to *Purcell v. Gonzalez*. In that case, the plaintiffs sought to enjoin enforcement of Arizona's 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 will start to receive on October 12, 2016.

group (2) as it interacts with social and historical conditions that have produced discrimination. *See Ohio Democratic Party v. Husted*, 2016 WL 4437605, at *13; *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc); 52 U.S.C. § 10301; ER7-8. They failed at both steps.

1. Plaintiffs' Admitted Failure to Provide Any Quantitative Evidence Precluded a Finding of a Likely Disparate Impact.

Plaintiffs do not challenge the district court's finding that they "provide[d] no quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." ER8. The district court thus correctly determined that "Plaintiffs are not likely to succeed on their § 2 claim because there is insufficient evidence of a statistically relevant disparity between minority as compared to white voters" caused by H.B. 2023. *Id.*[4]

This Court applied § 2 in a similar manner in *Gonzalez*. There, this Court explained that § 2 requires evidence of a "causal connection" between the challenged law and "some relevant statistical disparity between minorities and whites." *Gonzalez*, 677 F.3d at 405 (internal quotations and citation omitted). Accordingly, the presence of some "Senate Factors" could not save a § 2 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.

[4] Plaintiffs' assertions that the district court applied an incorrect evidentiary standard have no merit. Plaintiffs had the burden to show a likelihood of success on the merits, which they failed to do. *See* ER8, 14, 21-22.

Here, Plaintiffs contend the district court "invented a new test" by requiring quantitative evidence of disparate impact. To the contrary, several courts have emphasized the importance of quantitative evidence in § 2 vote-denial claims. *See One Wisc. Inst., Inc. v. Thomsen*, 15-cv-324-jdp, 2016 WL 4059222, at **47, 49 (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."); *Veasey v. Abbott*, No. 14-41127, 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.").[5]

Additionally, the district court correctly observed that quantitative evidence is required to prove disparate impact in other contexts, such as claims arising under the Fair Housing Act, Age Discrimination in Employment Act, Equal Pay Act, Title VII, or 42 U.S.C. § 1983. ER9 (citing numerous cases). Plaintiffs do not address *any* of these authorities, much less explain why their rationale should not apply to VRA cases. Nor do Plaintiffs cite *any* case in which a disparate impact was proven, in the § 2 context or otherwise, without any quantitative evidence.

Plaintiffs instead argue that in § 2 *vote-dilution* cases, some courts have not required quantitative evidence. None of those vote-dilution cases are relevant to a disparate impact analysis. *See Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*,

[5] Although the plaintiffs in *Veasey* did not provide voter turnout data, they did provide other quantitative evidence. *See Veasey*, 2016 WL 3923868 at **21-22.

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 voting).[6]

Plaintiffs also assert (at 8-9) that the district court's analysis "flies in the face" of the VRA's "broad remedial purpose." (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).) The *Chisom* Court talked about this purpose, however, in holding that § 2 applied to a vote-dilution claim relating to state judicial elections. *See Chisom*, 501 U.S. at 403-04. The remedial purpose of § 2 cannot nullify the claim's essential elements, the first of which "necessarily" requires "a comparative exercise" of the quantitative impact on minority and white voters. ER9.

Plaintiffs further argue they should be excused from producing quantitative evidence because the State does 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' § 2 claim, specifically when there is no law that requires them to do so. ER10 n.3. Moreover, Plaintiffs had several options to

[6] Plaintiffs contend that when § 5 preclearance requirements were used, the Department of Justice ("DOJ") did not require covered jurisdictions to provide quantitative evidence. ER2654. 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 here given the tens of thousands of preclearance submissions that DOJ previously received under this scheme.

procure quantitative evidence on H.B. 2023's impact in the absence of state-provided data. The ADP has asserted that it has long been involved in collecting early ballots, ER299-300, yet provides no reason why it did not track data on these collection efforts over the many years that bills with ballot collection provisions were before the Legislature. A failure to require any data would open a Pandora's Box of unsubstantiated legal theories tactically raised immediately before future elections. The district court correctly determined there must be some data to support a claim. None exists here.

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

The district court's conclusion that Plaintiffs failed to show a likelihood of a disparate impact from H.B. 2023 did not rely solely on Plaintiffs' admitted failure to provide *any* quantitative evidence. The district court also correctly held that "[a]ssuming, *arguendo*, that a § 2 violation could be proved using non-quantitative evidence, Plaintiffs' evidence is not compelling." ER10.

Plaintiffs do not challenge (or even address) the many findings by the district court supporting its alternative analysis. For example, the district court concluded 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 only provided an incomplete picture of ballot collection, which is used by "groups from all ideological

backgrounds." ER10, 10 n.4 (internal quotations and citation omitted). In response to Plaintiffs' argument that H.B. 2023 will harm voters in Arizona's rural communities, the district court explained that Plaintiffs failed to rebut the evidence showing that many of these communities are actually predominantly white. ER11. The district court further concluded that Plaintiffs' selective use of H.B. 2023's legislative history and a DOJ preclearance file was "largely duplicative" of their insufficient declarations, did not provide any statewide information on ballot collection, and had been taken out of context. ER11-14.

Plaintiffs also suggest that the district court should have considered socioeconomic inequalities between minority and white voters in its disparate impact analysis. 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.

3. Plaintiffs Have Also Failed to Establish a Likelihood of Success on the Second Element of a § 2 Claim.

Because Plaintiffs failed to show a likelihood of success on the first step of a § 2 claim (disparate impact), the district court had no need to reach the second step. ER14. Had it done so, Plaintiffs would have failed at that stage too.

Plaintiffs argue that they view various Senate Factors as present, but that is not enough to establish a likelihood of a § 2 violation. *Gonzalez*, 677 F.3d at 407 (rejecting § 2 claim despite presence of some of the same Senate Factors in

Arizona). Plaintiffs had to show they are likely to succeed in proving that H.B. 2023 *interacts* with Senate Factors to impose a discriminatory impact on minorities, which they failed to do. *See Husted*, 2016 WL 4437605, at *14.

Plaintiffs' evidence on the Senate Factors suffers serious defects. *See* ER1048-49, 1390-1409, 1985-2032, 2684-67. Rather than consider the totality of the circumstances, Plaintiffs ignore any evidence that undermines the claimed existence of the 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 consideration of minority concerns by the Arizona Independent Redistricting Commission ("AIRC"), (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, ER1996-97, 2009-11, 2028. On racially polarized voting (Factor 2), Plaintiffs rely on a *draft* AIRC report that did not assess *statewide* results or any election not involving a Hispanic candidate. *See* ER1395-99, 3017-24; *see also Johnson v. Mortham*, 926 F. Supp. 1460, 1474-75 (N.D. Fla. 1996) (rejecting polarization analysis with similar defects). In assessing the number of elected minorities (Factor 7), Plaintiffs ignore county and municipal elections where minority candidates have been highly successful. *See* ER1972-75.

Also, the district court properly recognized that H.B. 2023 furthers the legitimate and non-tenuous goals (Factor 9) of preventing fraud and promoting public confidence in election integrity. *See* ER19-21. The district court did not "blindly credit[]" these interests, as Plaintiffs argue, but instead explained that "absentee voting presents a greater opportunity for fraud." ER20 (citing numerous cases); *see also* ER2167 (criminal indictment describing tampering with voted absentee ballots by New Jersey ballot collectors). Plaintiffs do not dispute this conclusion. Given the greater potential for early voting fraud, "[o]utlawing criminal activity before it occurs is not only a wise deterrent, but also sound public policy." ER21 (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)).

b. The District Court Properly Found that H.B. 2023 Violates Neither the Fourteenth Nor the First Amendment.

The constitutional standard is not one of convenience—the law must actually burden the right to vote to violate the Fourteenth Amendment. *See Ohio Democratic Party*, 2016 WL 4437605, at *6 (concluding that "a withdrawal or contraction of just one of many conveniences that have generously facilitated voting participation" is not a "true burden" on the right to vote). Nor does elimination of this convenience prevent Plaintiffs from engaging in all of the expressive and associational activities that they conducted before H.B. 2023. The evidence that Plaintiffs presented below—the same evidence on which they rely

here—simply does not support a finding that H.B. 2023 meaningfully burdens the right to vote. The district court properly concluded that Plaintiffs were unlikely to succeed on the merits of their First and Fourteenth Amendment claims. ER0021, 23. Nothing that they have argued here demonstrates a need for the extraordinary relief of an injunction pending appeal—which, because early voting commences in less than a week, would have precisely the same effect as the preliminary injunction that the district court denied.

1. Plaintiffs Offer No Evidence that H.B. 2023 Burdens Voters; the State's Important Regulatory Interests Support Its Constitutionality.

As the district court recognized—to decide Plaintiffs' claim that H.B. 2023 burdens the Fourteenth Amendment right to equal protection—the Court must "weigh the nature and magnitude of the burden imposed by the law against the state's interests in and justifications for it." ER0015 (citing *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008) (describing the *Anderson-Burdick* test)). The extent of the burden on the asserted rights determines the level of scrutiny. Where the burden is not severe, courts "apply less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (internal quotation marks omitted).

Plaintiffs have not shown that H.B. 2023 severely burdens the right to vote. *See Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1199 (Ill. App. 2005) (holding that the burden from a law limiting return of absentee ballots "is slight and is nondiscriminatory"). Indeed, even after the Primary Election and as the district court noted, Plaintiffs have not identified a single voter whose ability to vote was burdened by H.B. 2023. ER2819. In fact, their witnesses testified that they did not know of anyone who would not be able to return an early ballot.[7]

Moreover, Plaintiffs have not shown that H.B. 2023 burdens voters' ability to vote in person on Election Day or at an early voting site, to vote by mail, to vote by a special election board, or by giving their ballot to a family member, household member, caregiver, or election worker. Plaintiffs argue that these alternatives to ballot collection are more burdensome and that learning about these alternatives shortly before an election is itself a burden. (Doc. 16, at 14). Surely, voters do not need to learn that they can vote at a polling place near their home on Election Day, and Plaintiffs are well-positioned to inform voters of the other methods of voting.

[7] *See* ER2811-12, at 40:25-41:3 ("I have no way of knowing if and how many voters could be impacted by [the ADP's] inability to mail their ballot for them."); ER3097, at 92:5. Despite Plaintiffs' counsel's statement during ADP Executive Director Healy's deposition that she was testifying in her personal capacity, Healy submitted a declaration in her official capacity as ADP Executive Director that described at length the ADP's activities and knowledge, and her response noted above was a response to questions about the activities described in her declaration. *See* ER0293-304, at ¶¶ 2, 20; ER2811-12, at 40:23-41:2; *see also* ER2808-11, at 37:19-40:22.

Indeed, Plaintiffs' claims about these harms are purely speculative, as they have not identified a single voter who will incur a substantial obstacle to voting in November due to H.B. 2023. In addition, counties may still count a ballot even if it is returned in violation of H.B. 2023. *Compare* Cal. Elec. Code § 3017(d) (mandating that ballots returned by an unauthorized person not be counted).[8]

In sum, H.B. 2023 removes one convenience from voters who had previously been targeted by ballot collectors.[9] *See Ohio Democratic Party*, 2016 WL 4437605, at *6. In contrast, courts have considered far more extensive restrictions to be only minimal burdens. For example, this Court concluded that Arizona's requirement of documentary evidence of citizenship in order to register to vote is not a severe burden, even though a person without such evidence cannot register to vote in state elections. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007). The Supreme Court has held that voter ID requirements impose only a minimal burden, even when they require gathering records and traveling to government offices to obtain identification. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (stating that the steps necessary to obtain a photo

[8] Nevada and California have similar ballot collection prohibitions to H.B. 2023. Nev. Rev. Stat. §§ 293.330, 293.316; Calif. Elec. Code §§ 3017, 3021, and 18403. This Court should maintain the existing briefing schedule to give the other states in the Circuit with similar laws the opportunity to provide their perspectives.

[9] Notably, the "burden" imposed by H.B. 2023 is only new for those who were targeted by ballot collectors in the past. Most Arizonans who vote early have delivered their ballots to elections officials without ballot collection for years.

identification card, including travel to a government office, "surely do[ ] not qualify as a substantial burden on the right to vote").

Plaintiffs complain that the district court incorrectly applied rational basis review to their Fourteenth Amendment claim. (Doc. 16, at 17). But the district court specifically determined that "[b]ecause H.B. 2023 imposes only minimal burdens, Arizona must show only that it serves important regulatory interests." ER0019 (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008)). Thus, the district court did not shift the burden to the Plaintiffs to demonstrate that there was no rational basis for H.B. 2023. And it relied on state interests that the Supreme Court has repeatedly recognized as the type of important regulatory interests that justify the minimal burden that H.B. 2023 may impose on voters. *See Crawford*, 553 U.S. at 195 (combating election fraud); *Purcell*, 549 U.S. at 4 (preserving public confidence in the electoral process).

2. Ballot Collection Is Not Expressive Activity.

With no new evidence, Plaintiffs reiterate their argument that H.B. 2023 burdens their associational rights. (Doc. 16, at 15). The *Anderson-Burdick* test applies to this claim as well. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Plaintiffs assert that the district court "undervalu[ed] the expressive significance of participation in, and the assistance of others in participating in, the political process." (Doc. 16, at 15). In fact, the district court

properly disentangled Plaintiffs' expressive and associational conduct from the ministerial act of delivering ballots. ER0022 (citing *Voting for Am. v. Steen*, 732 F.3d 382, 389, 392 (5th Cir. 2013)). As Plaintiffs' witnesses acknowledged, H.B. 2023 does not limit their expressive activity. ER2813-17, at 99:19-103:13; ER3098-102, at 123:14-127:12. It will not prevent them from engaging with voters to discuss candidates and issues, to inform them about the process of voting early or on election day, and to encourage them to vote. *Id*. The only thing that H.B. 2023 will prevent Plaintiffs from doing is collecting voters' voted ballots. Like the voter registration laws at issue in *Voting for America,* H.B. 2023 "do[es] not in any way restrict or regulate any communicative conduct. [It] merely regulate[s] the receipt and delivery of completed [ballots], two non-expressive activities." 732 F.3d at 391 (footnotes omitted).[10]

Even if the Court were to conclude that ballot collection is inextricably intertwined with Plaintiffs' associational and speech-related activities, H.B. 2023 does not severely burden those activities. Plaintiffs are not seriously limited in their ability to engage with voters and encourage them to vote for the candidates that

[10] Plaintiffs argued to the district court that cases analyzing restrictions on voter registration provided appropriate guidance. ER0186 (citing *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006)). But now they try to distinguish *Voting for America*, a voter registration case, because it involved a law that regulated more things than H.B. 2023 does. (*See* Doc. 16, at 15-16 n.10). The careful analysis of the First Amendment issues in *Voting for America* provides useful guidance, and it should not be ignored because it does not favor Plaintiffs.

Plaintiffs support. As the burden on Plaintiffs' First Amendment rights is not severe, the State's interests in deterring fraud related to early ballots are more than enough to justify H.B. 2023 and the district court properly concluded that Plaintiffs are not likely to succeed on their First Amendment claim. *See* ER0023.

c. No Irreparable Harm Will Arise Absent an Injunction.

Plaintiffs assert that H.B. 2023 will cause them and "thousands of other Arizona voters" to be irreparably harmed by restricting their "fundamental right to vote." (Doc. 16, at 1). Plaintiffs, however, have not identified a single Arizona voter facing a serious restriction on his or her right to vote due to H.B. 2023. Instead, Plaintiffs point to the thousands of ballots that they and other groups have collected in previous elections, and asserting that voters "rely" on ballot collection, thus H.B. 2023 "bans them from voting by their preferred method." (*Id.* at 2-3). Past use of a convenient method of delivering an early ballot to the county recorder, however, does not prove reliance, and as the district court correctly recognized, H.B. 2023 "does not eliminate or restrict any method of voting." ER0016.

Early voting for the August 30, 2016, Primary Election began on August 3, 2016, and H.B. 2023 became effective on August 6, 2016. Nearly a million Arizonans cast ballots in the Primary Election, yet Plaintiffs have not located a single person who was unable to vote or was severely burdened in his or her ability

to vote by H.B. 2023. Nor is there any evidence that H.B. 2023 was used to intimidate or harass voters. (Ex. C, ¶¶ 4-8, ER3157-59). If no irreparable harm existed in the Primary Election, it follows that continued enforcement of this voting regulation will not cause irreparable harm in the General Election.

d. The District Court Properly Found that Neither the Balance of Hardships Nor the Public Interest Favors Plaintiffs.

Plaintiffs assert that the district court erred when it did not consider whether they had raised "serious questions on the merits and [whether] the balance of hardships tips in their favor." (Doc. 16, at 18). Because Plaintiffs have presented no evidence of any voter who will be harmed by H.B. 2023, they have established neither a serious question about the merits nor that the balance of hardships tips sharply in their favor. Moreover, "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support issuance of a preliminary injunction, *so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest*." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (emphasis added) (describing the continued validity of the "serious questions" test after *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7 (2008)). Because Plaintiffs have failed to make a showing on any of the prongs of the *Winter* test, they are not entitled to an injunction pending appeal.

Plaintiffs seek an injunction against an election law, and the "State indisputably has a compelling interest in preserving the integrity of its election process." *See Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 203. The Ninth Circuit has therefore held that the "law recognizes that election cases are different form ordinary injunction cases," because "hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration*, 344 F.3d at 919. "Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the public interest." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Here, the public interest and balance of equities tip strongly in the State's favor. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")

IV. CONCLUSION

As the court below has twice now properly found, there is no reason to enjoin the effectiveness of the law embodied in H.B. 2023. And Plaintiffs' own delay evinces the lack of emergency—or even any urgency at all—here. Defendants respectfully request that Plaintiffs' Motion be denied in all respects.

RESPECTFULLY SUBMITTED this 7th day of October, 2016

SNELL & WILMER L.L.P.

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CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the length limits permitted by Ninth Circuit Rule 27(d)(2). The Response is 20 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and is filed by (1) separately represented parties. The Response's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Brett W. Johnson

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 7, 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/ Brett W. Johnson

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