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' SUPPLEMENTAL BRIEF IN OPPOSITION TO REHEARING EN BANC

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Pursuant to this Court's October 29, 2016 Order (Doc. 56), Defendants/Appellees the Arizona Secretary of State's Office, Secretary of State Michele Reagan, and Attorney General Mark Brnovich (collectively, the "State Defendants") submit this Supplemental Brief in Opposition to Rehearing En Banc. For the reasons below, this Court should decline to rehear this case en banc.

INTRODUCTION

The district court's and the panel's decisions were wholly consistent with this Court's opinions, including *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc), which involved similar challenges to Arizona election laws under § 2 of the Voting Rights Act. Moreover, the panel opinion applied the correct legal standard to Plaintiffs' Fourteenth Amendment claims, as recently clarified in *Public Integrity Alliance, Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366 (9th Cir. Sept. 2, 2016) (en banc). Therefore, rehearing en banc is not necessary to secure or maintain uniformity of the Court's decisions; nor does this proceeding involve a question of exceptional importance. Fed. R. App. P. 35(a).

The panel also correctly determined that: (1) review of a district court's denial of a preliminary injunction is "limited and deferential" and must be affirmed unless the district court abused its discretion, and (2) "considerations specific to election cases . . . counsel restraint" when an election is imminent. (Maj. Op. at 11, 13) (quoting *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003); *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1139 (9th Cir. 2005); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). That restraint is particularly important here, where the challenged law prohibits third parties from collecting

early ballots, and the twenty-seven-day early voting period has been underway for nineteen days. With three-quarters of the early voting period past, and a week to go before Election Day, rehearing en banc is not appropriate.

FACTUAL AND PROCEDURAL BACKROUND

On June 10, 2016, the Democratic National Committee, the Democratic Senatorial Campaign Committee, the Arizona Democratic Party ("ADP"), Hillary for America, Kirkpatrick for U.S. Senate, several Arizona voters, and Bernie 2016, Inc. (collectively, "Plaintiffs") moved for a preliminary injunction of various Arizona election laws and practices.[1] This appeal arises from Plaintiffs' challenge to a new law, enacted as H.B. 2023 in the 2016 legislative session. (ER2946). H.B. 2023 is designed to prevent fraud or abuse in the early voting process and to ensure that a voter's ballot is received by elections officials in the same condition it left the voter's hands, by limiting who may deliver it. (*Id.*) At the same time, H.B. 2023 recognizes that a voter should be able to rely on family members, household members, or caregivers to deliver the voter's ballot, and thus permits those people to possess a voter's early ballot and return it to elections officials by mail or in person. (*Id.*)

For many years, Arizona has been a leader among the states in increasing both the opportunity to vote and the convenience of voting for all registered voters. (ER2883-85, ¶¶ 4-19; ER2888-91). In addition to voting at polling places on

[1] In addition to the State Defendants, Plaintiffs also sued various Maricopa County officials, who have not taken a position on the claims related to H.B. 2023. The Arizona Republican Party and several Republican office holders or candidates intervened as defendants.

Election Day, the State has a twenty-seven-day early voting period before Election Day. A.R.S. § 16-542(C); (ER2883, ¶ 8; ER2894-95, ¶¶ 7-8, 10-11). Early voting may be done in person or by mail. (ER2883, ¶ 5; ER2885, ¶ 15). The county recorders accept early ballots delivered up until 7:00 pm on Election Day. A.R.S. § 16-548(A); (ER2895, ¶ 11). Early voting for the November 2016 General Election began on October 12, 2016.

For voters who prefer to vote in person, many counties operate multiple in-person early voting sites, some of which are open on Saturdays. (ER2885, ¶ 15; ER2895, ¶ 10; ER2902-14). If a voter received an early ballot by mail, but did not mail the ballot back to the county recorder in time to be received by 7:00 pm on Election Day, the voter may drop the sealed ballot at any polling place or the county recorder's office while the polls are open. A.R.S. § 16-548(A); (ER2885, ¶ 16; ER2895, ¶ 11).

In 2016, Arizona enacted H.B. 2023 to regulate the collection of early ballots. Numerous times throughout the debates on H.B. 2023, legislators stated that the bill was directed to the integrity of the elections process. (ER2921-22, ER2925-26, ER2928-32, ER2939-43). The law went into effect on August 6, 2016, just three days into the early voting period for the August 30, 2016 Primary Election.

H.B. 2023 does not limit any of the many means of voting that Arizona law provides. It only limits who may return a ballot. H.B. 2023 allows any member of a voter's family or household to mail or return an early ballot for the voter. (ER2946). In addition, voters may give their ballots to their caregiver, an election

worker performing official duties, or a postal worker. *Id.* If the voter cannot go to the polls because of an illness or disability, the voter can request a special election board to facilitate voting. A.R.S. § 16-549; (ER2885, ¶ 18; ER2895, ¶ 12).

The dissent paints a grim picture of Arizona elections, but that picture is not supported by the district court record. Indeed, the facts cited in the dissent concerning long waits and lack of access to polling places related to the March 2016 Presidential Preference Election (the "PPE") in Maricopa County. (Dis. Op. at 1, 7). In the PPE, Maricopa County used a vote-center model, and the County had sixty vote centers at which any voter could cast a ballot. (*See* ER0054, ¶ 61). In contrast, for the November 8, 2016 General Election, Maricopa County will use a precinct-based model, and will have polling places for each of its 724 precincts.[2] (*See* No. 16-16865, ER2201, ¶ 6; ER2208, ¶ 25).[3] Most of these polling places will be the same ones used in the 2012 General Election, which were precleared by the Department of Justice. (No. 16-16865, ER2209, ¶ 26). Voters (or their family members, household members, or caregivers) with early ballots to deliver on Election Day may drop them off at any polling place in their county. (ER2885, ¶ 16). In the unlikely event that there is a line at that polling place, the voter need not wait in that line to drop the early ballot. (*Id.*)

On September 23, 2016, the district court denied Plaintiffs' request to enjoin

[2] Indeed, Plaintiffs have agreed to dismiss their claims against the County Defendants regarding the number and location of polling places. (No. 16-16865, ER4068-69, 4072-73).

[3] Case No. 16-16865 is Plaintiffs' appeal of the district court's decision denying their Motion for Preliminary Injunction regarding out-of-precinct voting. That appeal was heard by the same panel as this case. (*See* Maj. Op. at 10 n.5).

enforcement of H.B. 2023 because they did not show that they have a likelihood of success on their claims that H.B. 2023 violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301, or the First and Fourteenth Amendments. (ER0014, 21, 23, 25). On October 28, 2016, a panel of this Court affirmed. (Maj. Op. at 3, 58).

ARGUMENT

I. This Case Does Not Warrant En Banc Review Under Fed. R. App. P. 35 and Ninth Circuit Practices.

The Federal Rules of Appellate Procedure state that "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Indeed, en banc review in the Ninth Circuit is markedly more limited than review allowed under Rule 35 because the Ninth Circuit Rules require that the panel decision "directly conflicts with an existing opinion by another court of appeals *and* substantially affects a rule of national application in which there is an overriding need for national uniformity." 9th Cir. R. 35-1 (emphasis added). In other words, the Ninth Circuit will only consider exercising its discretion to rehear a case en banc if the decision both creates an intra-or inter-circuit split and raises a pressing national issue.

It is inappropriate to grant en banc review based on a disagreement with the panel or the trial court. *Mitts v. Bagley*, 626 F.d3d 366, 370 (6th Cir. 2010) ("The decision to grant *en banc* consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the

effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances."); *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) ("The function of en banc hearings is not to review alleged errors for the benefit of losing litigants.").

The panel's decision in the instant case was consistent with case law from this and other circuits; therefore, en banc review is not necessary to "secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). The panel affirmed the district court's holdings that: (1) Plaintiffs did not provide sufficient evidence of a "cognizable disparity between minority and non-minority voters" to support the allegations that Arizona violated the Voting Rights Act ("VRA"); (2) H.B. 2023 was unlikely to violate the Fourteenth Amendment because the "burden on voting was minimal and justified by the State's interests . . ."; (3) ballot collecting is not an expressive activity, so the law does not impinge on Plaintiffs' First Amendment rights; and (4) Plaintiffs' partisan fencing claim was unlikely to succeed. (Maj. Op. at 9).

The panel's review of Plaintiffs' § 2 claims was consistent with *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir.2012) (en banc), *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997), and *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014), among others. The remaining claims are analyzed under the *Anderson/Burdick* test (derived from *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992)), which has been so widely and uniformly adopted that it is now hornbook law. *See,*

e.g., *Gov't Discrim.: Equal Protection Law & Lit.* 6:3 (explaining that courts use the *Anderson/Burdick* balancing test to determine if a state election procedure violates the First and Fourteenth Amendments). Because the district court's and the panel's decisions were consistent with established law, rehearing en banc is not necessary.

This interlocutory appeal also does not meet the strict requirements to satisfy the "exceptional importance" prong of en banc review because the panel and the district court applied the correct legal standards. At best, the dissent disagrees with the district court's application of the law to the record. (Dis. Op. at 5 ("the district court misapplied the analysis required by" the *Anderson/Burdick* balancing test), at 20 (criticizing the district court's assessment of Plaintiffs' evidence concerning discriminatory impact under § 2)). Any purported error in the application of the law to the record would not affect a rule of national application. *See* 9th Cir. R. 35-1.

The Court may also consider the procedural posture, subject matter, potential recurrence, and current attitudes toward the issues involved. *See Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974). Novel applications of the law with the potential for nation-wide harm may also qualify as a case of "exceptional importance." *See, e.g.*, *Ricci v. Destefano*, 530 F.3d 88, 101 (2d Cir. 2008) (approving en banc review when the district court's novel approach would enable any employer in the nation to use race-based hiring processes to avoid a hypothetical lawsuit). Plaintiffs' Fourteenth Amendment and § 2 claims are not novel.

Even if conflicts on issues of nation-wide importance exist, however, en banc review is still rare and never automatic. *E.g.*, *Gutierrez v. Municipal Ct. of S.E. Judicial District, Cty. of Los Angeles*, 861 F.2d 1187 (9th Cir. 1988) (denying rehearing en banc despite the fact that the trial court ruling created direct conflict with *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), and even though the panel decision imperiled uniform determination of disparate impact under the Civil Rights Act of 1964). The fact that this case does not present a direct conflict with existing law or involve a national rule of extraordinary importance should counsel this Court to let the panel decision stand and deny rehearing en banc.

II. The Panel Correctly Conducted Limited and Deferential Review of the District Court's Order Denying a Preliminary Injunction.

A. The Panel's Decision Is Consistent with Ninth Circuit Authority on Voting Rights Act § 2 Claims.

To show a likelihood of success on their claim under VRA § 2, Plaintiffs were required to provide evidence that H.B. 2023 would disparately impact minority voters, such that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Whether such a disparate impact exists is a question of fact, for which the panel deferred to "the district court's superior fact-finding capabilities." (Maj. Op. at 28 (quoting *Salt River*, 109 F.3d at 591)).

Plaintiffs did not present any statistical or quantitative evidence of H.B. 2023's allegedly disparate impact. The district court thus correctly determined that "Plaintiffs are not likely to succeed on their § 2 claim because there is insufficient evidence [that H.B. 2023 causes] a statistically relevant disparity between minority

as compared to white voters." *Id.* 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). 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.

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." (ER0010). The panel reviewed all of the evidence that the district court determined was not compelling and properly concluded that those factual findings were not clearly erroneous. (Maj. Op. at 31).

The panel further considered Plaintiffs' argument that the district court should have considered socioeconomic inequalities between minority and white voters in its disparate impact analysis and rejected Plaintiffs' argument because the Court had "rejected a similar argument in *Gonzalez*." (*Id.* at 34). The panel further explained that in *Gonzalez*, the plaintiffs had presented evidence of a general history of discrimination in Arizona and the existence of racially polarized voting, but that evidence was insufficient "because the plaintiff was unable to produce evidence that the photo identification law caused minorities to have less

opportunity to participate in the political process." (*Id.* (citing *Gonzalez*, 677 F.3d at 407)). The panel concluded that because Plaintiffs had not shown a disparate impact, "as in *Gonzalez*, the district court had no obligation . . . to consider whether H.B. 2023 interacted with racial discrimination to cause a discriminatory result." (*Id.* at 35). In short, the district court and the panel decided this case in precisely the same way that the Court decided *Gonzalez*.

Instead of showing that the panel or district court did not follow *Gonzalez*, the dissent primarily excuses the Plaintiffs for failing to provide sufficient evidence of a disparate impact (Dis. Op. at 16-17) and criticizes the district court for its assessment of the evidence (*id.* at 17-19). The dissent's disagreement with the district court's evaluation of the evidence does not warrant en banc review.

B. The Panel Properly Analyzed Plaintiffs' Fourteenth Amendment Claims Under the *Anderson/Burdick* Test.

As the panel and the district court recognized—to decide Plaintiffs' claim that H.B. 2023 burdens the Fourteenth Amendment right to equal protection—the Court must "weigh [1] '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 [2] 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration [3] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (Maj. Op. at 39 (quoting *Burdick*, 504 U.S. at 434); ER0015 (citing *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008)). The extent of the burden on the asserted rights determines the level of scrutiny. "[W]hen a state election law provision imposes

only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Public Integrity Alliance*, 2016 WL 4578366, at *3 (quoting *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 788).

As the panel noted, "[t]he severity of the burden that an election law imposes 'is a factual question on which the plaintiff bears the burden of proof.'" (Maj. Op. at 39-40 (quoting *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122-24 (9th Cir. 2016))). The district court found that Plaintiffs did not show that H.B. 2023 severely burdens the right to vote. (ER0019). Indeed, as the district court noted, even after the Primary Election Plaintiffs have not identified a single voter whose ability to vote was burdened by H.B. 2023. (*Id.*). In fact, Plaintiffs' witnesses testified that they did not know of anyone who would not be able to return an early ballot.[4] Based on the lack of evidence in the record that voters are burdened by H.B. 2023, the panel correctly did not disturb the district court's factual finding. (*See* Maj. Op. at 46-47).

In sum, H.B. 2023 removes one convenience from voters who had previously been targeted by ballot collectors. *See Ohio Democratic Party v.*

[4] *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.

Husted, 834 F.3d 620, at *6 (6th Cir. 2016). 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 identification card, including travel to a government office, "surely do[ ] not qualify as a substantial burden on the right to vote").

The dissent asserts that the district court incorrectly applied rational basis review to Plaintiffs' Fourteenth Amendment claim. (Dis. Op. at 4). 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). In short, both the panel and the district court applied the correct legal standard, as set

forth in this Court's recent en banc opinion in *Pubic Integrity Alliance*, 2016 WL 4578366, at *3.

III. *Purcell* Warns Against Changing Election Rules on the Eve of an Election.

"Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. This is especially true of "conflicting court orders," which could result here if the Court rehears this case en banc. *Id.* For this reason, "last-minute injunctions changing election procedures are strongly disfavored." *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012) ("*SEIU*"). H.B. 2023 prohibits collection of early ballots during the twenty-seven-day early voting period up through Election Day. As such, ballot collection has been prohibited for at least the first nineteen days of early voting. Changing the rules now, in the middle of early voting, will surely lead to voter confusion.

In *Purcell*, the district court denied a preliminary injunction regarding two new Arizona voting laws—one requiring documentary evidence of citizenship to register to vote and one requiring presentation of identification to vote in person on Election Day. 549 U.S. at 3. More than a month before the election, this Court stayed the district court order and enjoined the challenged laws pending appeal. *Id.* The State and counties petitioned the Supreme Court for relief, which it granted, instructing courts to avoid granting injunctions that would alter election procedures on the eve of elections. *Id.* at 5-6. "Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent

elections absent a powerful reason for doing so." *Crookston v. Johnson*, No. 16-2490, 2016 WL 6311623, at *2 (6th Cir. Oct. 28, 2016).

Indeed, "[t]iming is everything." *Id*. at *1. In *Crookston*, the Sixth Circuit considered a challenge to Michigan's "ballot selfie law." The plaintiff asserted a constitutional right to take a "selfie" in the voting booth and post it to social media. *Id*. The district court preliminarily enjoined the law. *Id*. But the Sixth Circuit stayed the injunction, in large part because the election was imminent and the injunction would come too close to the election. *Id*. The Sixth Circuit explained that the plaintiff raised interesting constitutional issues, which he should have the opportunity to litigate—*after* the election. *Id*. at *3; *see also Purcell*, 549 U.S. at 6 (Stevens, J., concurring) (acknowledging that allowing the election to proceed with the challenged laws in place "will provide the courts with a better record on which to judge their constitutionality").

Here, early voting has been underway for nineteen days, and the General Election is only eight days away. Arizona media outlets have already advised voters that this Court declined to enjoin the ballot collection law. *See, e.g.*, "Appeals court upholds Arizona 'ballot harvesting' ban," *AZCentral.com* (Oct. 29, 2016)[5]; Bob Christie, "Appeals court won't block Arizona ballot-collection law," *HavasuNews.com* (Oct. 28, 2016).[6] A contrary en banc decision, so close to the

[5] *Available at*: http://www.azcentral.com/story/news/politics/elections/2016/10/29/appeals-court-upholds-arizona-ballot-harvesting-ban/92784864/ (last visited Oct. 31, 2016).

[6] *Available at*: http://www.havasunews.com/news/arizona/appeals-court-won-t-block-arizona-ballot-collection-law/article_47dd84ba-8de7-5a65-8024-d7274e68e9e1.html (last visited Oct. 31, 2016).

election, would create the potential for great voter confusion—the very harm that the Supreme Court sought to prevent in *Purcell*. 549 U.S. at 4-5 (noting the harmful potential for "voter confusion" that arises when courts enjoin election procedures on the eve of elections, and that "[a]s an election draws closer, that risk will increase.").

Many courts, including this Court, have relied on *Purcell* when declining to enjoin election laws on the eve of elections. *See, e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (relying on *Purcell* and explaining that "given the imminent nature of the election, we find it important not to disturb long-established expectations that might have unintended consequences"); *Veasey*, 769 F.3d at 893-94 (relying on *Purcell* in granting stay of injunction against Texas voter identification law); *SEIU*, 698 F.3d at 345 (relying on *Purcell* and granting stay of injunction of Ohio law regarding out-of-precinct voting).

Even when a plaintiff is likely to prevail on the merits and the challenged law is likely to ultimately be enjoined, *Purcell* warrants maintaining the status quo for an imminent election. In *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 135 (1st Cir. 2012), the First Circuit considered a challenge by a qualified voter who had been removed from the voting rolls because she did not vote in the 2008 general election. On October 18, 2012, the First Circuit "concluded that plaintiff had shown a likelihood of success on the merits of her claim." *Id*. But the court relied on *Purcell* to conclude that October 18 was so near the election, that the grant of injunctive relief "would be improvident[.]" *Id*. at 139 & n.9. Enjoining the law would "create risks of its own" because of the potential for voter

confusion. *Id*. at 139 n.9. As a result, the First Circuit declined to enjoin the law, even though it believed plaintiff would likely prevail on the merits.

Indeed, before *Purcell,* courts refused to stay election laws on the eve of elections, even though the laws were likely unconstitutional. This Court noted that fact in *Southwest Voter Registration,* explaining that "[t]he decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." 344 F.3d at 918 (*citing Ely v. Klahr*, 403 U.S. 108, 113, 115 (1971); *Whitcomb v. Chavis*, 396 U.S. 1055 and 396 U.S. 1064 (1970); *Kilgarlin v. Hill*, 386 U.S. 120 (1967)).

In this case, it is unlikely that Plaintiffs will ultimately succeed on their challenges to H.B. 2023 when the merits are fully litigated. The district court concluded that Plaintiffs were unlikely to prevail on the merits of their challenge. (ER0014, ER0021, ER0025). A panel of this Court affirmed that decision. (Maj. Op. at 58). This Court should not disturb those rulings, when doing so may well result in voter confusion three-quarters of the way through the early voting period and within a week of the General Election.

CONCLUSION

For the foregoing reasons, this Court should decline to rehear this case en banc.

RESPECTFULLY SUBMITTED this 31st day of October, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by this Court's October 29, 2016 Order (Doc. 56). The Brief contains 4,470 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The Brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Karen J. Hartman-Tellez

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 31, 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.

s/ Phylis Durbin