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U.S. COURT OF APPEALS

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; THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEMOCRATIC PARTY; KIRKPATRICK FOR U.S. SENATE; HILLARY FOR AMERICA,

Plaintiffs-Appellants,

BERNIE 2016, INC.,

Intervenor-Plaintiff-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; STEVE CHUCRI; ANDY KUNASEK; CLINT HICKMAN; STEVE GALLARDO, member of the Maricopa County Board of Supervisors, in their official capacities; MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT; HELEN

No. 16-16698

D.C. No. 2:16-cv-01065-DLR
District of Arizona,
Phoenix

ORDER

PURCELL, in her official capacity as Maricopa County Recorder; KAREN OSBORNE, in her official capacity as Maricopa County Elections Director; MARK BRNOVICH, in his official capacity as Arizona Attorney General,

Defendants-Appellees,

THE ARIZONA REPUBLICAN PARTY,

Intervenor-Defendant-Appellee.

BEFORE: THOMAS, Chief Judge and O'SCANNLAIN, W. FLETCHER, RAWLINSON, CLIFTON, BYBEE, CALLAHAN, N. R. SMITH, MURGUIA, WATFORD, and OWENS, Circuit Judges.

THOMAS, Chief Judge:

We granted, in a prior order, rehearing *en banc* in this appeal. In a separate order, filed concurrently with this opinion, we scheduled *en banc* oral argument for the week of January 17, 2017, in San Francisco, California. The question, then, is whether to grant plaintiffs' motion for an injunction pending appeal. A motions panel denied the motion in the first instance, but we may reconsider that decision as an *en banc* court. For the reasons stated herein, we grant the motion.

The standard for evaluating a stay pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction. *Lopez v.*

Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); *see also Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006) (order) (discussing injunctions pending appeal). Therefore, we grant the motion for a preliminary injunction pending appeal essentially for the reasons provided in the dissent in *Feldman v. Arizona Sec'y of State*, __ F.3d __, 2016 WL 6427146, at *21–31 (9th Cir. 2016), a copy of which is attached (along with a copy of the majority opinion).

However, there are additional considerations when we consider granting an injunction pending appeal in an election case. When faced with an appeal in cases in which an election is pending, federal courts are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). And we do not "lightly interfere with . . . a state election." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

At the outset, it is important to remember that the Supreme Court in *Purcell* did not set forth a *per se* prohibition against enjoining voting laws on the eve of an election. 549 U.S. at 4; *see also Veasey v. Perry*, 135 S. Ct. 9, 10 (2014) (Ginsburg, J., dissenting) ("*Purcell* held only that courts must take careful account

of considerations specific to election cases, not that election cases are exempt from traditional stay standards."). Rather, courts must assess the particular circumstances of each case in light of the concerns expressed by the *Purcell* court to determine whether an injunction is proper.

In this case, the factors that animated the Supreme Court's concern in *Purcell* are not present. First, the injunction does not affect the state's election processes or machinery. The injunction pending appeal sought by plaintiffs would not change the electoral process, it simply would enjoin enforcement of a legislative act that would criminalize the collection, by persons other than the voter, of legitimately cast ballots.

H.B. 2023 amended Arizona's election statutes to provide that "A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony." Ariz. Rev. Stat. § 16-1005(H). Enjoining enforcement of H.B. 2023 will not have any effect on voters themselves, on the conduct of election officials at the polls, or on the counting of ballots. Under H.B. 2023, as the State agrees, legitimate ballots collected by third parties are accepted and counted, and there are no criminal penalties to the voter. So, under H.B. 2023, if a ballot collector were to bring legitimate ballots to a voting center, the votes would be counted, but the collector would be charged with a felony. Thus, the only effect

of H.B. 2023, although it is serious, is to make the collection of legitimate ballots by third parties a felony. So, unlike the circumstances involved in *Purcell* or *Southwest Voter*, the injunction at issue here does not involve any change at all to the actual election process. That process will continue unaltered, regardless of the outcome of this litigation. The only effect is on third party ballot collectors, whose efforts to collect legitimate ballots will not be criminalized, pending our review. No one else in the electoral process is affected. And no electoral process is affected.

In contrast, the voter-ID law at issue in *Purcell* changed who was eligible to vote and directly told election officials to turn people away if they lacked the proper proof of citizenship. That circumstance is far different from the case at bar where, as the district court pointed out, the law "does not eliminate or restrict any method of voting, it merely limits who may possess, and therefore return, a voter's early ballot." *Feldman v. Arizona Sec'y of State*, __ F. Supp. 3d __, 2016 WL 5441180 at *9 (D. Ariz. 2016). Thus, in our case, in contrast to *Purcell*, an injunction will not confuse election officials or deter people from going to the polls for fear that they lack the requisite documentation. The election process is unaffected.

Second, none of the cases that caution against federal court involvement in elections involved a statute that newly criminalizes activity associated with voting. This law is unique in that regard.

Third, the concern in *Purcell* and *Southwest Voter* was that a federal court injunction would disrupt long standing state procedures. Here, the injunction preserves the *status quo* prior to the recent legislative action in H.B. 2023. Every other election cycle in Arizona has permitted the collection of legitimate ballots by third parties to election officials. So, the injunction in this case does not involve any disruption to Arizona's long standing election procedures. To the contrary, it restores the *status quo ante* to the disruption created by the Arizona legislature that is affecting this election cycle for the first time.

Fourth, unlike the circumstances in *Purcell* and other cases, plaintiffs did not delay in bringing this action. This action was filed less than six weeks after the passage of the legislation, and plaintiffs have pursued expedited consideration of their claims at every stage of the litigation, both before the district court and ours. Indeed, it was the State that opposed an expedited hearing and briefing schedule at every turn, not the plaintiffs.

Fifth, *Purcell* was decided prior to the Supreme Court's opinion in *Shelby Cty. Ala. v. Holder*, __ U.S. __, 133 S. Ct. 2612 (2013), which declared

unconstitutional the Voting Rights Act's coverage formula, and effectively invalidated preclearance requirements under § 5 of the Act. In short, *Purcell* was decided when the preclearance regime under § 5 of the Voting Rights Act was still intact, and Arizona was a covered jurisdiction. The Court in *Purcell* emphasized that the challenged law had already passed the then-effective § 5 preclearance requirements of the United States Department of Justice. As a result, there was a prima facie reason to believe that the challenged statute was not discriminatory, alleviating the concern that the law violated voting rights. *Purcell*, 549 U.S. at 3. That same reassurance is absent here.

Indeed, this case presents precisely the opposite concern. In 2012, Arizona submitted a previous iteration of H.B. 2023 for preclearance. The Department of Justice expressed concern and refused to preclear the bill, S.B. 1412, without more information about its impact on minority voters. Rather than address this concern, Arizona withdrew S.B. 1412 from preclearance and repealed it the following session. Now, unhindered by the obstacle of preclearance, Arizona has again enacted this law—a mere seven months before the general election—with nothing standing in its way except this court. Thus, not only are the preclearance protections considered important in *Purcell* absent in this case, but it is quite

doubtful that the Justice Department would have granted preclearance. In the wake of *Shelby County*, the judiciary provides the only meaningful review of legislation that may violate the Voting Rights Act.[1]

Sixth, unlike the situation in *Purcell*, we have, as a court, given careful and thorough consideration to these issues. *Purcell* involved a barebones order issued by a two judge motion panel, which did not contain a reasoned decision. As the Court described in *Purcell*, "[t]here has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect." 549 U.S. at 5. Here, a three judge merits panel has held oral argument and issued a detailed, reasoned decision and dissent. Our *en banc* court has also considered these issues and reached a decision essentially for the reasons set forth in the dissent. This is not a case in which our court has issued a stay without a detailed consideration and resolution of the issues.

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[1] Meaningful review of H.B. 2023 is especially important because, as I observed in my dissent, the sponsors of H.B. 2023 could not identify a single example of voter fraud in Arizona caused by ballot collection, nor is there one to be found anywhere in the voluminous record before us. Judge Bybee cites to a 2005 report from the bi-partisan Commission on Federal Election Reform, which recommends that states should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations from handling absentee ballots. Dissent at 2. However, the Commission's recommendation was issued before the Supreme Court invalidated the § 5 preclearance requirement; since that time, the voting rights landscape has changed considerably, requiring courts to exercise more vigilance as the primary bulwarks against voter suppression.

In short, the injunction applies to the operation of a statute that would impose felony sanctions on third parties for previously legal action in connection with elections when, as everyone concedes, the statute has no impact on the election process itself. We are preserving the *status quo* for this election, and we will consider the challenge to the new legislation at our *en banc* hearing in the next few months.

IT IS SO ORDERED.

Feldman v. Arizona Sec'y of State, No. 16-16698

O'SCANNLAIN, Circuit Judge, with whom CLIFTON, BYBEE, and CALLAHAN, Circuit Judges, join, and with whom N.R. SMITH, Circuit Judge, joins as to Parts I, II, and III, dissenting from the order enjoining the State of Arizona:

The court misinterprets (and ultimately sidesteps) *Purcell v. Gonzalez*, 549 U.S. 1 (2006), to interfere with a duly established election procedure *while voting is currently taking place*, contrary to the Supreme Court's command not to do so. I thus respectfully dissent from this order enjoining the state of Arizona from continuing to follow its own laws during an ongoing election. And let there be no mistake: despite the majority's pretenses to the contrary, the order granting the injunction *is* a ruling on the merits, and one based on an unnecessarily hasty review and an unsubstantiated statutory and constitutional analysis.[1]

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[1] The order alternately discusses whether to grant an "injunction" pending appeal, Order at 2, and a "stay" pending appeal, *id.* at 2, 8. Stays and injunctions are two different things: a stay postpones the judgment or order of a court; an injunction, of course, commands or prohibits action by a third party. *See, e.g.*, Fed. R. App. P. 8 (Stay or Injunction Pending Appeal); "Injunction," Black's Law Dictionary (10th ed. 2014); "Stay," Black's Law Dictionary (10th ed. 2014). Because before today no court has ordered Arizona not to enforce H.B. 2023, the majority presumably means that today it issues an injunction against the State from

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I

Some background: On September 23, 2016, the district court denied plaintiffs' motion for a preliminary injunction blocking Arizona from implementing certain provisions in Arizona House Bill 2023 (H.B. 2023). These provisions limit the collection of voters' early ballots to family members, household members, certain government officials, and caregivers. Plaintiffs appealed. A Ninth Circuit motions panel *unanimously denied* plaintiffs' emergency motion for an injunction pending appeal on October 11. That same panel *sua sponte* amended its October 11 ruling to expedite the appeal on October 14. A merits panel received briefing, heard oral argument, and issued an opinion on October 28, affirming the district court and denying the request for a preliminary injunction by a two-to-one majority. The case was called en banc the same day the opinion was issued. Eschewing our normal en banc schedule, memo exchange was compressed into five days, as opposed to our customary thirty-five. Now, just two days after the en banc call succeeded, and just four days before Election Day, the majority overturns the district court, a motions panel, and a separate merits panel to reach its desired result.

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[1](...continued)
enforcing a particular statute.

II

The Supreme Court counseled against just this type of last-minute interference in *Purcell*. That case also involved our court's issuing a last-minute injunction against the enforcement of a contested Arizona election law. 549 U.S. at 2–4. The Supreme Court, on October 20, 2006, vacated that injunction, which had been implemented by a Ninth Circuit motions panel on October 5—more than four weeks before the election. *Id.* at 2–3. In doing so, the Court stressed the "imminence of the election" and the need to give the case adequate time to resolve factual disputes. *Id.* at 5–6. Despite *Purcell*'s direct impact on this case, the majority confines that decision much too narrowly, and in its strained attempt to distinguish *Purcell*, disregards how this eleventh-hour injunction will impact the current election and many elections to come.

At first, it seemed that we might respect Supreme Court precedent this time around, when first the motions panel, and later the three-judge merits panel, wisely determined that no injunction should issue at this stage. Yet, after a third bite at the apple, here we are again—voiding Arizona election law, this time *while voting is*

already underway[2] and only *four days* before Election Day. In doing so we depart from our own precedent, *see, e.g.*, *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (staying a district court's injunction "given the imminent nature of the election"), and myriad decisions of our sister circuits, *see, e.g.*, *Crookston v. Johnson*, No. 16-2490, 2016 WL 6311623, at *2 (6th Cir. Oct. 28, 2016) ("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 . . . ."); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (staying an injunction "in light of the importance of maintaining the status quo on the eve of an election"); *Colon-Marrero v. Conty-Perez*, 703 F.3d 134, 139 n.9 (1st Cir. 2012) (noting that "even where plaintiff has demonstrated a likelihood of success, issuing an injunction on the eve of an election is an extraordinary remedy with risks of its own"). We also disregard not only *Purcell*, but other Supreme Court authority disfavoring last-minute changes to election rules. *See*, *e.g.*, *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (granting stay to prevent interference with election procedures roughly one month before election).[3] In all these cases, "the

[2] Early voting in Arizona began more than three weeks ago, on October 12.

[3] Likewise, the Court stayed a permanent injunction imposed by a district court and affirmed by the Sixth Circuit on September 24, 2014, which would have

(continued...)

common thread [was] clearly that the decision of the Court of Appeals would change the rules of the election too soon before the election date." *Veasey*, 769 F.3d at 895.

The majority recognizes the need to address *Purcell* and its progeny. But the majority's strained attempt to distinguish those cases is unconvincing—its reasoning either misrepresents *Purcell* or is irrelevant to the issues at hand. And it misses the main point of *Purcell*: the closer to an election we get, the more unwarranted is court intrusion into the status quo of election law.

A

First, the majority makes the incomprehensible argument that its injunction "does not affect the state's election processes or machinery." Order at 3. The majority cites no law, fact, or source of any kind in support of this argument, and it is dubious on its face. Of course, H.B. 2023 directly regulates the state's election processes or machinery: it governs the collection of ballots, which obviously is

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[3](...continued)
required Ohio to add early in-person voting hours. *See Husted v. Ohio State Conference of N.A.A.C.P.*, 135 S. Ct. 42 (2014), *rev'g sub nom. Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014). And, in *Frank v. Walker*, the Court vacated the Seventh Circuit's September 26, 2014 stay of a preliminary injunction enjoining application of Wisconsin's voter ID law, which had been put in place by the district court in April 2014. *See* 135 S. Ct. 7 (2014), *rev'g in part*, *Frank v. Walker*, 769 F.3d 494 (7th Cir. 2014), *rev'g*, 768 F.3d 744 (E.D. Wis.).

integral to how an election is conducted. But under the majority's Orwellian logic, regulations affecting get-out-the-vote operations are somehow not regulations of the "electoral process." (What are they, then, one might ask? The majority does not tell.) Apparently, the majority believes that only measures that affect the validity of a vote itself (or a voter herself) affect such process. Other courts, in ruling on similar regulations, have rejected the majority's view, and widely held that regulations of many aspects of an election beyond the validity of a vote affect the election process. *See, e.g.*, *Lair*, 697 F.3d at 1214 (staying injunction of certain campaign finance laws); *see also Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984) (observing that even the racial composition of polling officials could affect the election process).

Tellingly, the majority barely addresses whether enjoining H.B. 2023 will create confusion and disruption in the final days of the election—a key factor in the *Purcell* decision. 549 U.S. 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."). And, based on this record, how could it? Factual development in the record is sparse. The majority says its injunction will be less disruptive than the *Purcell* injunction, but offers not a shred of empirical proof for this proposition. Order at 3–5. At this point, it appears that no

one knows just how much confusion this court risks by issuing this injunction, after weeks of procedures suggested it would not.[4] What we do know is that the State has approximately four days to figure out and to implement whatever response is necessary to accommodate our latest view of the case. If requiring such action is inappropriate four weeks prior to Election Day, *see Purcell*, 549 U.S. at 3–4, it surely is in the waning days of voting. The Supreme Court could not have been clearer: "[a]s an election draws closer, that risk [of disruption] will increase." *Id.* at 5.

B

The majority's second argument—that this case is different because it involves a law that imposes criminal penalties—manages to be both irrelevant and incorrect. It is irrelevant because *Purcell* never says, or even indicates, that whether a law imposes criminal penalties affects whether the status quo should be upset right before an election. It is incorrect because our own circuit applied *Purcell* in a case involving a law that affected the electoral process and imposed criminal

[4] This lack of factual support is a recurring theme, and another reason this court should wait until after the election to act. *See Purcell*, 549 U.S. at 6 (Stevens, J., concurring) ("Allowing 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."). This court should "take[] action[s] that will enhance the likelihood that [important factual issues] will be resolved correctly on the basis of historical facts rather than speculation." *Id.*

penalties. *See Lair*, 697 F.3d at 1214 (staying an injunction that applied to Montana campaign finance law enforced by criminal penalties).

C

Third, the majority misreads *Purcell* by inventing a supposed *Purcell* Court concern that the federal judiciary was "disrupt[ing] long standing state procedures" and then equating it with the majority's desire to preserve the pre-H.B. 2023 status quo. Order at 5. Nowhere in *Purcell* does the Court mention "long standing state procedures." Proposition 200, the voter identification law at issue in *Purcell*, had been approved by Arizona voters in 2004 and was not precleared until May of 2005. 549 U.S. at 2. The 2006 election was the first federal election at which it would go into effect. The voter identification law was relatively new, but, "[g]iven the imminence of the election," the Court overturned our injunction which would have returned Arizona to a pre-Proposition 200 world, the majority's so-called "status quo." *Id.* at 5. Obviously, *Purcell* was actually concerned with changes to the status quo that had occurred within weeks of an election.

And that status quo can be a law or an injunction that has been in place for just a few months. *See Frank*, 135 S. Ct. at 7. In *Frank*, the Supreme Court vacated the Seventh Circuit's September 26, 2014 stay of a preliminary injunction enjoining application of Wisconsin's voter ID law, which had been put in place by

the district court in April 2014. By the time the Seventh Circuit issued its decision, the injunction had become the new "status quo," even the dissent had to concede the "colorable basis for the Court's decision." *Id.* at 7 (Alito, J., dissenting). The dissent noted that given the "proximity of the election," it was "particularly troubling that absentee ballots [relying on the injunction] ha[d] been sent out without any notation that proof of photo identification must be submitted." *Id.*

D

Fourth, the argument that "unlike the circumstances in *Purcell* and other cases, plaintiffs did not delay in bringing this action" continues the majority's pattern of inventing facts. Order at 5. Nowhere in *Purcell* does the Supreme Court discuss the timing of the plaintiffs' filing. Nowhere does it say that the plaintiffs affected their chances of success by delaying their filing. Nowhere does it use this factor in its analysis. Indeed, as recounted above, the Supreme Court is far more focused on the date of court orders that upset the status quo in relation to the date of the election. *See*, *e.g.*, *League of Women Voters*, 135 S. Ct. at 6 (staying an injunction ordered by the Fourth Circuit a month before the election despite the fact that plaintiffs challenged the statute at issue a year prior to the election).

E

Finally, perhaps betraying its real motivation, the majority bafflingly suggests that our last-minute intervention is required now that the Supreme Court struck down the federal preclearance mechanism in *Shelby County v. Holder*, 132 S. Ct. 2612, 2631 (2013). But, whatever the majority might think of that opinion, *Shelby County* has absolutely no relevance to the Court's decision in *Purcell*.

The majority is correct about one basic point: in discussing the procedural history in *Purcell*, the Supreme Court *mentioned* that the regulation at issue had been precleared. 549 U.S. at 2. But the Court did not suggest that preclearance was in any way relevant to its decision. Despite the majority's oblique citation to *Purcell*, one will not find any support in that decision for its statement that preclearance meant the law in *Purcell* was presumptively valid—or that any such presumption mattered at all to the question before the Court. Quite to the contrary, the Supreme Court explicitly cautioned that it was *not* addressing the merits of the claim in *Purcell*. *Id.* at 5 ("We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals [from the district court] . . . .").

Even if the majority believes that courts should engage in a heightened review of voting laws after *Shelby County*—and I stress the Supreme Court has

given us absolutely no reason to believe we should—that does not support the notion that such review matters at this stage of litigation. *Purcell* is plainly about the impact a court order will have on an upcoming (or in our case, ongoing) election, *not* the merits of the constitutional claim underlying that order. *Id.* Pre-clearance, *Shelby County*, and the merits of the challenge to H.B. 2023 are beside the point. Four days before an election is not an appropriate time for a federal court to tell a State how it must reconfigure its election process.

III

Unfortunately, though I believe the merits should not have been reached until a more thorough review of the case could have been conducted—and ideally more evidence could have been collected, including quantitative data—the majority's decision to consider and then to grant an injunction pending appeal forces the issue. In doing so, and given the current record, the majority, by adopting Chief Judge Thomas's dissent, makes various errors in both its constitutional and federal statutory analysis that further undermine its argument that an injunction is necessary. Order at 2 (adopting the reasoning of *Feldman v. Arizona Sec'y of State*, No. 16-16698, 2016 WL 6427146, at *21–31 (9th Cir. Oct. 28, 2016) (Thomas, C.J., dissenting)). This situation means we are forced to reach

the merits as well. *See* Order at 2 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)).

Unlike the majority, we are persuaded by the analysis of the vacated three-judge panel majority opinion and the district court opinion. *Feldman*, 2016 WL 6427146, at *1–21; *Feldman v. Arizona Sec'y of State*, No. CV-16-01065-PHX-DLR, 2016 WL 5341180 (D.C. Ariz. Sept. 23, 2016) [hereinafter *Feldman (D.C.)*]. A few key points, some contained in those opinions, are worth highlighting. One error in the majority's reasoning stands out the most—its failure even to pretend to give any deference to the district court's denial of exactly the same request. *See Purcell*, 549 U.S. at 5 (concluding that the failure of "the Court of Appeals to give deference to the discretion of the District Court . . . was error").

A

The majority's Fourteenth Amendment analysis falsely claims the district court improperly conducted a "rational basis" review. *Feldman*, 2016 WL 6427146, at *21 (Thomas, C.J., dissenting). Yet, the district court never used the phrase "rational basis," instead it explicitly stated that Arizona "must show [] that

it[s law] serves important regulatory interests," after it conducted the burden analysis.[5] *Feldman (D.C.)*, 2016 WL 5341180, at *11.

The majority argues that H.B. 2023 imposes a "substantial burden" on voting, but this cannot be reconciled with the fact six Justices in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), found that Indiana's voting ID law imposed either a "a limited burden," *id.* at 202 (Stevens., J., writing for three justices), or a "minimal" one, *id.* at 204 (Scalia, J., writing for three justices). The majority does not even try to argue that H.B. 2023 imposes more of a burden on voters than the Indiana law, instead it just does not cite *Crawford*.

The majority argues that the "state's justification for the law was weak." *Feldman*, 2016 WL 6427146, at *24 (Thomas, C.J., dissenting). This cannot be reconciled with *Crawford*'s language that "[t]here is no question" that a state's interest in preventing voter fraud is an important interest. 553 U.S. at 194–197 (holding this even though there was no evidence in the record that the particular type of voting fraud the law was trying to prevent has occurred). Arizona's interest in protecting public confidence in elections is also an established important

[5] Rational basis review only requires the legislature to have some rational reason for the law, even if it is not important and even if the judge, rather than the legislature, proffers that reason. *E.g.*, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 487–88 (1955).

interest. *Id.* at 197. Once again the majority "solves" this problem by pretending that *Crawford* does not exist.

B

The majority's Voting Rights Act of 1965 (VRA) Section 2 analysis is equally shoddy. 52 U.S.C. § 10301. It concedes that no statistical or quantitative evidence exists in the record. *Feldman*, 2016 WL 6427146, at *27 (Thomas, C.J., dissenting). It concedes that "the Voting Rights Act focuses on the burdens disproportionately place [sic] on minorities *in comparison with the general voting population*." *Id.* at 27 (emphasis added). It concedes that "[t]he relevant question is whether the challenged practice . . . places a *disproportionate burden* on the *opportunities* of minorities to vote." *Id.* at 26. It concedes the burden lies with the plaintiffs and that "the parties seeking a preliminary injunction in this case must show they are likely to prevail on the merits." *Id.* at 28.

Yet, it then argues that the district court erred by asking plaintiffs to show the burden on minority voters was greater than that of white voters. *Id.* at 28–29. But the plaintiffs had the burden of showing disparate treatment. Instead of acknowledging that the current record's lack of facts showing a disparate impact is fatal to this claim, the majority invents a burden-shifting requirement. *Id.* at 21–22. It argues that "once the plaintiffs had established the burden on minority voters"

the district court erred by not "shifting the burden of rejoinder to the State." *Id.* at 29. This burden-shifting requirement—which would require the state to prove a negative (no disparity if minorities are burdened)—has no support in the law.

IV

Finally, the unusual procedural history leading up to this decision and the contrived time pressure we placed ourselves under in rendering this decision underscores exactly why courts refrain from intervening in elections at the last minute unless they absolutely have to.[6]

After presumably fuller consideration than our own, a district court judge, a three-judge motions panel, and a two-judge majority of a separate merits panel all rejected Feldman's attempt to have enforcement of H.B. 2023 enjoined for the current election. Yet, with only three days of review (and no oral argument), a majority of our hastily constructed en banc panel has reversed course, requiring Arizona to change its voting procedures the weekend before Election Day. The record presented in this appeal exceeds 3000 pages; the parties' briefs (which now total five, after additional en banc briefing) present complex and well-reasoned arguments; and the alleged constitutional violations are serious. But our en banc

[6] Sometimes we are forced to act under time pressure, such as death penalty habeas review, but while the final orders may issue hours before execution, these cases are usually the cumulation of years of carefully considered litigation.

panel has found it appropriate (indeed imperative) to resolve the matter in less time than we might usually take to decide a motion to reschedule oral argument.

Despite the majority's pretenses to having "given careful and thorough consideration" to the issues presented in this case, Order at 7, one wonders how much the obvious dangers inherent in our rushed and ad hoc process have infected the decision in this case. *Cf. Purcell*, 127 S. Ct. at 6 (Stevens, J., concurring) ("Given the importance of the constitutional issues, the Court wisely takes action that will enhance the likelihood that they will be resolved correctly on the basis of historical facts rather than speculation.").

The circumstances of this case do not inspire confidence in the majority's order. First, the majority does not appear even to have resolved what to label the relief it has determined must be handed down in this case.[7] More concerning, and as discussed above, the order fails seriously to grapple with controlling Supreme Court precedent pertaining both to appropriateness of our action at this stage of litigation and to the underlying merits of the issues in this case. The order also wholly fails to explain why it is now necessary to overrule a unanimous order from October 11—which was approved by one of the judges who now joins the majority—denying an identical emergency motion in this same case. We are left

[7] *Supra* note 1.

only to wonder why that decision, acceptable four weeks ago, is now the cause for immediate correction.

Worse still is the precedent this hastily crafted decision will create. The majority purports to delay ruling on the merits of the challenge to H.B. 2023—presumably so that this case can be carefully considered. Order at 8. But it "essentially" adopts the reasoning of a twenty-nine page dissent from the original three-judge panel opinion, Order at 2, which concludes that it is clear "this law violates the Constitution and the Voting Rights Act." *Feldman*, 2016 WL 6427146, at *21 (Thomas, C.J., dissenting). If our court agrees with the essence of that dissent, what is left to decide after oral argument? The majority's framing of this issue as just a "stay," Order at 8, only obfuscates the fact that our en banc panel has blocked Arizona's voting law, declared it presumptively unconstitutional, and overturned the status quo the weekend before voting ends, all without first taking the time needed to gain a thorough mastery of the record, to hear oral argument from the parties, or to write a considered opinion.

As the majority is quick to remind us, the issues in this case are important.[8] Those issues deserved more than seventy-two hours of consideration. This court's hasty rush to decide those issues on the basis of ad hoc procedure is regrettable. I fear our action in this case will set a precedent that will harm not only the current election in Arizona, but presumably many more down the line, whenever a State enacts a voting regulation that more than half of the active judges on the Ninth Circuit simply deem unwise.

I respectfully dissent.

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[8] Indeed, the majority strongly implies the issues are *so important* that they need to be decided right away. But every voting rights case pits similar arguments about the fundamental right to vote against arguments about a State's need and right to regulate its elections. *See*, *e.g.*, *Crawford*, 553 U.S. at 191.

To accept the majority's argument that the importance of this case compels action leaves one wondering what change in election law would not qualify as important. *Cf. Clingman v. Beaver*, 544 U.S. 581, 593 (2005) ("To deem ordinary and widespread burdens [on voting] like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes."). This "importance" exception would whittle *Purcell* down to nothing. As Justice Stevens explained in *Purcell*, it is precisely *because* these issues are important that we should not rush to decide them. *See*, 549 U.S. at 6 (Stevens, J., concurring).

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U.S. COURT OF APPEALS

Feldman v. Arizona Secretary of State, No. 16-16698

Bybee, Circuit Judge, with whom Circuit Judges O'Scannlain, Clifton, Callahan, and N.R. Smith join, dissenting:

I join in full Judge O'Scannlain's dissent. I write separately to emphasize two brief points: First, Arizona's restrictions on who may *collect* an early ballot—a question very different from who may *vote* by early ballot—follows closely the recommendation of the bipartisan Commission on Federal Election Reform. Second, the Arizona early ballot law at issue here is a common provision, and similar restrictions on the collection of early or absentee ballots may be found on the books of some twenty-one states. Those provisions have been in effect for decades, and they have been enforced. Unless the Voting Rights Act means that identical provisions are permissible in some states and impermissible in other states, our decision would invalidate many of those provisions, including provisions in other states of the Ninth Circuit.

I

There is no constitutional or federal statutory right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm'rs of Chic.*, 394 U.S. 802, 807–08 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . [T]he absentee statutes, which are designed to make

voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise . . . ."); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *Grifffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting the claim that there is "a blanket right of registered voters to vote by absentee ballot;" "it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting or Internet voting").

Arizona's restrictions on the collection and handling of absentee ballots are neutral provisions designed to ensure the integrity of the voting process. Although the majority claims that there is no evidence of "voter fraud caused by ballot collection," Maj. Op. at 2, (adopting *Feldman v. Ariz. Sec'y of State*, --- F.3d ---, 2016 WL 6427146 *24 (9th Cir. 2016) (Thomas, C.J., dissenting)), Arizona does not have to wait until it possesses such evidence before it acts. It may be pro-active, rather than reactionary. And the evidence for voter fraud in the handling of absentee ballots is well known. In 2005, the bi-partisan Commission on Federal

Election Reform[1] found: "Absentee ballots remain the largest source of potential voter fraud." *Comm'n on Fed. Elections Reform, Building Confidence in U.S. Elections* 46 (2005) [hereinafter *Building Confidence*]. As the Seventh Circuit so colorfully described it: "Voting fraud is a serious problem in the U.S. elections generally . . . and it is facilitated by absentee voting. . . . [A]bsentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin*, 385 F.3d at 1130–31; *see also Wrinn v. Dunleavy*, 440 A.2d 261, 270 (Conn. 1982) ("[T]here is considerable room for fraud in absentee voting and . . . a failure to comply with the regulatory provision governing absentee voting increases the opportunity for fraud." (citation omitted)); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. Times (Oct. 6, 2012), http://nyti.ms/QUbcrg (discussing a variety of problems in states).

The Commission on Federal Election Reform recommended that "States . . . should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Building Confidence*, *supra*, at 46. It made a formal

[1] The Commission on Federal Election Reform was organized by American University's Center for Democracy and Election Management and supported by the Carnegie Corporation of New York, The Ford Foundation, the John S. and James L. Knight Foundation, and the Omidyar Network. It was co-chaired by former President Jimmy Carter and former Secretary of State James Baker.

recommendation:

> State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.

Id. at 47 (Recommendation 5.2.1). Arizona's restrictions hew closely to the Commission's recommendation. H.B. 2023 provides that "A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony." Ariz. Rev. Stat. Ann. § 16-1005(H) (codifying H.B. 2023). Consistent with the Commission's recommendation, the law does not apply to three classes of persons: (1) "[a]n election official," (2) "a United States postal service worker or any other person who is allowed by law to transmit United States mail," and (3) "[a] family member, household member or caregiver of the voter." *Id.* § 16-1005(H)–(I)(1). I don't see how Arizona can be said to have violated constitutional or statutory norms when it follows bipartisan recommendations for election reform in an area well understood to be fraught with the risk of voter fraud. Nothing could be more damaging to confidence in our elections than fraud at the ballot box. *See* Liptak, *supra* (describing a study by a political scientist at MIT finding that election officials rejected 800,000 absentee ballots in the 2008 presidential election; "That suggests an overall failure rate of as much as 21

percent.").

II

Moreover, the Arizona provision is substantially similar to the laws in effect in other states. In Indiana, for example, it is a felony for anyone to collect a voter's absentee ballot, with exceptions for members of the voter's household, the voter's designated attorney in fact, certain election officials, and mail carriers. Ind. Code § 3-14-2-16(4). Connecticut also restricts ballot collection, permitting only the voter, a designee of an ill or disabled voter, or the voter's immediate family members to mail or return an absentee ballot. Conn. Gen. Stat. § 9-140b(a). New Mexico likewise permits only the voter, a member of the voter's immediate family, or the voter's caregiver to mail or return an absentee ballot. N.M. Stat. Ann. § 1-6-10.1. At least seven other states (Georgia, Missouri, Nevada, North Carolina, Oklahoma, Ohio, and Texas) similarly restrict who can personally deliver an absentee ballot to a voting location. Ga. Code Ann. § 21-2-385(a) (limiting who may personally deliver an absentee ballot to designees of ill or disabled voters or family members); Mo. Rev. Stat. § 115.291(2) (restricting who can personally deliver an absentee ballot); Nev. Rev. Stat. § 293.330(4) (making it a felony for anyone other than the voter or the voter's family member to return an absentee ballot); N.C. Gen. Stat. § 163-231(b)(1) (allowing only family members or

guardians to personally deliver an absentee ballot); Okla. Stat. Tit. 26, § 14-108(C) (voter delivering a ballot must provide proof of identity); Ohio Rev. Code Ann. § 3509.05(A) (limiting who may personally deliver an absent voter's ballot); Tex. Elec. Code Ann. § 86.006(a) (permitting only the voter to personally deliver the ballot).[2]

Other states are somewhat less restrictive than Arizona because they permit a broader range of people to collect early ballots from voters but restrict how many ballots any one person can collect and return. Colorado forbids anyone from collecting more than ten ballots. Colo. Rev. Stat. § 1-7.5-107(4)(b); *cf.* Ga. Code Ann. § 21-2-385(b) (prohibiting any person from assisting more than ten physically disabled or illiterate electors in preparing their ballot). North Dakota prohibits anyone from collecting more than four ballots, N.D. Cent. Code § 16.1-07-08(1); New Jersey, N.J. Stat. Ann. § 19:63-4(a), and Minnesota, Minn. Stat. Ann. § 203B.08 sbd. 1, three; Arkansas, Ark. Code Ann. § 7-5-403, Nebraska,

[2] Moreover, at least two states had similar provisions on the books until recently. California formerly limited who could return mail ballots to the voter's family or those living in the same household. Cal. Elec. Code § 3017. It only amended its law earlier this year. 2016 Cal. Legis. Serv. Ch. 820. Illinois also used to make it a felony for anyone but the voter, his or her family, or certain licenced delivery companies to mail or deliver an absentee ballot. 10 Ill. Comp. Stat. 5/19-6 (1996); 10 Ill. Comp. Stat. 5/29-20(4). Illinois amended that provision in 2015 to let voters authorize others to mail or deliver their ballots. 10 Ill. Comp. Stat. 5/19-6 (2015).

Neb. Rev. Stat. § 32-943(2), and West Virginia, W. Va. Code § 3-3-5(k), two. South Dakota prohibits anyone from collecting more than one ballot without notifying "the person in charge of the election of all voters for whom he is a messenger." S.D. Codified Laws § 12-19-2.2.

Still other states have adopted slightly different restrictions on who may collect early ballots. California and Maine, for example, make it illegal to collect an absentee ballot for compensation. 2016 Cal. Legis. Serv. Ch. 820 (amending California Election Code § 3017 to enable anyone to collect an early ballot provided they receive no compensation); 21-A Me. Rev. Stat. Ann. § 791(2)(A) (making it a crime to receive compensation for collecting absentee ballots); *see also* Fla. Stat. § 104.0616(2) (making it a misdemeanor to receive compensation for collecting more than two vote-by-mail ballots); N.D. Cent. Code § 16.1-07-08(1) (prohibiting a person to receive compensation for acting as an agent for an elector); Tex. Elec. Code Ann. § 86.0052 (criminalizing compensation schemes based on the number of ballots collected for mailing).

Some of the laws are stated as a restriction on how the early voter may return a ballot. In those states, the voter risks having his vote disqualified. *See, e.g.*, *Wrinn v. Dunleavy*, 440 A.2d 261, 272 (Conn. 1982) (disqualifying ballots and ordering a new primary election when an unauthorized individual mailed

absentee ballots). In other states, as in Arizona, the statute penalizes the person collecting the ballot. *See* Ind. Code § 3-14-2-16 (making it a felony knowingly to receive a ballot from a voter); Nev. Rev. Stat. § 293.330(4) (making it a felony for unauthorized persons to return an absentee ballot); Tex. Elec. Code Ann. § 86.006 (making it a misdemeanor for an unauthorized person to possess between one and twenty ballots and a felony to possess more than twenty); *see also Murphy v. State*, 837 N.E.2d 591, 594–96 (Ind. Ct. App. 2005) (affirming a denial of a motion to dismiss a charge for unauthorized receipt of a ballot from an absentee voter); *People v. Deganutti*, 810 N.E.2d 191, 198 (Ill. App. Ct. 2004) (affirming conviction for absentee ballot violation); *see also* Ga. Code Ann. § 21-2-385(b) (providing for penalties up to ten years and a fine of $100,000 for anyone assisting more than ten physically disabled or illiterate electors). In those states, the ballot, even if collected improperly, may be valid. *See In re Election of Member of Rock Hill Bd. of Educ.*, 669 N.E.2d 1116, 1122–23 (Ohio 1996) (holding that a ballot will not be disqualified for technical error).

III

"[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). H.B. 2023 is well within the range of

regulations that other states have enacted. I see no infirmity, constitutional or statutory, in Arizona's efforts to prevent the potential for fraud in the collection of early ballots. I respectfully dissent.