No. 16A-460

IN THE

SUPREME COURT OF THE UNITED STATES

ARIZONA SECRETARY OF STATE'S OFFICE, MICHELE REAGAN, MARICOPA COUNTY BOARD OF SUPERVISORS, DENNY BARNEY, STEVE CHUCRI, ANDY KUNASEK, CLINT HICKMAN, STEVE GALLARDO, MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT, HELEN PURCELL, KAREN OSBORNE, AND MARK BRNOVICH

AND

ARIZONA REPUBLICAN PARTY,

Applicants,

v.

LESLIE FELDMAN, LUZ MAGALLANES, MERCEDEZ HYMES, JULIO MORERA, CLEO OVALLE, PETERSON ZAH, DEMOCRATIC NATIONAL COMMITTEE, DSCC A/K/A DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, ARIZONA DEMOCRATIC PARTY, KIRKPATRICK FOR SENATE, AND HILLARY FOR AMERICA,

AND

BERNIE 2016, INC.,

Respondents.

RESPONSE TO EMERGENCY APPLICATION TO STAY OF INJUNCTION PENDING APPEAL IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NINTH CIRCUIT CASE NO. 16-16698

DIRECTED TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, corporate Plaintiff-Appellees the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America, and Intervenor-Plaintiff/Appellee Bernie 2016, Inc., respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the abovementioned corporations.

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

As Chief Judge Thomas explained, Arizona House Bill 2023 ("HB2023") makes one of the most popular and effective methods of minority voting in Arizona a crime. In particular, HB2023 makes it a felony for Arizonans to engage in "ballot collection"— the longstanding practice pursuant to which thousands of voters have relied on friends, neighbors, advocacy and political organizations, and campaigns to collect and deliver their early ballots to ensure they arrive by the 7 p.m. Election Day deadline. The largely unrefuted evidence shows that HB2023 imposes severe burdens on some voters and that these burdens fall disproportionately on minority voters. To justify these burdens, Arizona has offered nothing more than a hollow incantation of "voter fraud," even though there is not a shred of evidence linking ballot collection to voter fraud and Arizona has been unable to provide a logical explanation as to how HB2023 will prevent fraud. The en banc Ninth Circuit was therefore amply justified in enjoining HB2023 through the upcoming election.

This Court's holding in Purcell v. Gonzalez, 549 U.S. 1 (2006), does not counsel otherwise. Most significantly, the injunction has no effect at all on election administrators in the upcoming election; they had already made clear that they would not be enforcing HB2023, a criminal statute. Moreover, because the upcoming election would have been the first election in which ballot collection was illegal, the injunction restores the long-time status quo and thus will prevent voters

from being disenfranchised by confusion about the state of law. And now that the Ninth Circuit has ruled, a stay of that ruling would expose Arizonans who are presently engaged in ballot collection and do not learn of this Court's ruling to a felony conviction and criminal sanctions. A stay should be denied.

JURISDICTION

The U.S. District Court for the District of Arizona ("district court") had original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1357, because this case raises federal claims under § 2 of the Voting Rights Act of 1965 ("VRA"), as amended, 52 U.S.C. § 10301, and for violations of the 1st and 14th Amendments, cognizable under 42 U.S.C. § 1983. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

A. Arizona's History of Discrimination and its Continuing Effects

Arizona has a long history of racial discrimination that has permeated every aspect of social, political, and economic life, including voting restrictions meant to disenfranchise minorities. As a result, in 1975, Arizona became one of only nine states to be brought wholly under the VRA's § 5 as a "covered jurisdiction," required to "preclear" changes to its elections laws with the Department of Justice ("DOJ") or a federal court. 40 Fed. Reg. 43746. For the next 38 years, Arizona voters enjoyed protection in election practices and procedures as a result of this federal oversight. This lasted until June 25, 2013, when this Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), invalidating the formula for identifying covered jurisdictions, effectively suspending application of § 5. *See id.* But the

effects of centuries of racial discrimination did not evaporate in 2013. To the contrary, they remain an unavoidable present reality for Arizona's minority communities, which suffer marked disparities as compared to the white population in areas such as employment, wealth, transportation, health, and education. Dkt. 34[1] at 21-22; Dkt. 55-2 (Thomas, C.J., dissenting from panel majority) ("Dissent") at 27.

B. History of Ballot Collection and Delivery in Arizona

In recent years, Arizona has strongly encouraged voting by early mail-in ballot, including by establishing a Permanent Early Voting List ("PEVL"), which voters may join to have an early ballot automatically sent to them 27 days before any election in which they are eligible to vote. A.R.S. §§ 16-541, 16-544, 16-542. As a result, voting by early ballot now far surpasses any other means of participating in Arizona's elections. In the last presidential election, nearly 1.3 million voters in Maricopa County alone requested early ballots, Dkt. 34 at 4, and 81% of all who participated voted by early ballot. Dissent at 8-9.

As early voting has become the predominant means by which Arizonans vote, so, too, the record in this case establishes that thousands of voters have come to rely upon neighbors, friends, organizers, activists, and campaigns to collect and hand deliver their voted early ballots, to ensure that they safely arrive by 7 p.m. on Election Day, as required by Arizona law. A.R.S. § 16-548. Ballot collection and delivery has been particularly critical for minority voters, many of whom live in

[1] All references to the "Dkt." refer to documents filed on the docket in *Feldman v. Arizona Secretary of* State, No. 16-16698 (9th Cir.).

urban areas where they receive mail but lack secure outgoing mailboxes, or in rural areas—in particular, reservations or border towns with Hispanic populations of over 95%—with no mail service. Dkt. 34 at 5; Dissent at 21. These same voters are disproportionately likely to lack reliable transportation to vote in person or deliver the ballots themselves, or to have economic or personal circumstances that make ballot collection and delivery crucial to their exercise of the franchise. Dkt. 34 at 5.

C. Senate Bill 1412 (2011)

It is no secret that ballot collection and delivery has been particularly beneficial for Arizona's minority voters, and legislators who have not traditionally enjoyed broad support in those communities have repeatedly tried to restrict it. Dkt. 34 at 5-6.[2] They were nearly successful in 2011, with SB1412. *Id.* At the time, § 5 was in force and State Elections Director Amy Bjelland (who worked with Secretary of State ("SOS") staff and the bill sponsor, Sen. Don Shooter, to draft SB1412) admitted to DOJ that SB1412's ballot collection restrictions were "targeted at voting . . . in predominantly Hispanic areas" near the border and "[m]any in the [SOS]'s office were worried about the § 5 review[.]" *Id.; see also id.* (FBI and SOS found no fraud, but Bjelland thinks a problem "may result 'from the different way that Mexicans do their elections'"). A Yuma County Recorder's Office employee similarly reported the bill would impact a border town where "almost everyone is Hispanic" and "where people . . . tend to bring up vote by mail ballots in groups." *Id.*

[2] Arizona's minority voters have been participating in elections in recent years in substantially greater numbers and are statistically far less likely than white voters to support Republican candidates. *See* Dkt. 34 at 6.

Rep. Ruben Gallego explained, "[t]he percentage of Latinos who vote by mail exploded" in 2010 because "municipalities . . . reduced their number of polling places and physical early voting locations." *See also* Dkt. 34 at 6 ("The number of registered Latino voters [on the] PEVL has more than tripled since 2010 . . . to more than 300,000 registered voters"). "This sudden increase in the Hispanic community's use" of vote by mail "caused Republicans to raise accusations of voter fraud," though the claims were revealed to be "baseless." *Id.* SB1412 was "meant to target Hispanic voters who are less familiar with the vote by mail process and are more easily intimidated due to the anti-Latino climate in the state." *Id.* Rep. Gallego described "the atmosphere in Arizona [as] scary" and advised that "[a]nti-immigrant and anti-Latino sentiment is stronger than ever." *Id.* at 7. He explained, "since Hispanics have come to voting by mail later . . . they are less comfortable with the process and more likely to be dissuaded from using it than others," and "[g]iven that Latinos often do not have as easy access to transportation . . . minority voters who are negatively affected by this law will not be able to mitigate its effects as easily [as] others." *Id.* at 7. He also advised SB1412 could hurt Native Americans voters. *Id.* at 7.

DOJ officials refused to preclear SB1412 unless Arizona provided more detailed information about the impact of its ballot collection provisions on minority voters. *Id.* Rather than provide answers, Arizona withdrew SB1412 from preclearance and repealed it the following session.

D. House Bill 2305 (2013)

In 2013, the Legislature enacted HB2305, banning partisan ballot collection and requiring other ballot collectors to complete an affidavit stating they returned the ballot. HB2305 (2013). Violation was a misdemeanor. *Id*. at 7. Shortly after enactment, citizen groups organized a referendum effort and collected more than 140,000 signatures to place HB2305 on the ballot for a straight up-or-down vote. *Id.* at 7. To avoid referendum, Republican legislators again repealed their own legislation along party lines, admitting publicly that their goal was to break the bill into smaller pieces and reintroduce individual provisions "a la carte." *Id.* at 7; *see also* ARIZ. CONST. art. 4, pt. 1, §§ 1(6)(C), (14) (restricting enactment of legislation after referendum). This they did in the 2015 legislative session, although that effort to restrict ballot collection died in committee. *Id*. at 8.

E. House Bill 2023 (2016)

In 2016, Republican legislator Rep. Ugenti-Rita introduced HB2023, which was even more extreme than its predecessors, making the "knowing[] collect[tion] of voted or unvoted early ballots from another person . . . a class 6 felony," punishable by up to a year in jail and a $150,000 fine. *Id*. at 8.

Representatives of minority communities argued forcefully against the bill, making the case that it would disproportionately burden minority voters. *Id.* at 8. They testified about its impacts on urban communities, where minority voters may lack access to a secure outgoing mailbox, as well as specific rural minority communities, urging the Legislature to consider "[the predominantly Hispanic community of] San Luis" and the Tohono O'odham Nation, which both lack home

mail delivery. *Id.* at 8. Rep. Ugenti-Rita dismissed these concerns as "not my problem." *Id.* at 8. When a representative of Native American communities described "what it's like to live . . . sometimes 40 miles away from the nearest post office box," and advised that "over 10,000" voters could be disenfranchised, many legislators *laughed*. *Id.* at 8 *See also id.* at 8 ("The convenience of having a car …. The convenience of walking to a post office. . . . The fact that you can open your front door . . . and . . . leave . . . mail there and somebody will pick it up is not afforded to everybody."). HB2023 proponents repeatedly characterized these voters as lazy, desiring "special treatment," or not taking "responsibility": "They certainly take care of themselves in other situations, so I don't know why we have to spoon-feed and baby them over their vote." *Id.* at 8-9.

HB2023 was purportedly necessary to "prevent fraud," although not a single proponent could point to even one incident of ballot collection fraud. Arizona's criminal code has long protected against ballot collection fraud, *see* A.R.S. § 16-1005(A)-(F); *see also* A.R.S. §§ 16-545;16-1018; 16-1017, and even HB2023's sponsor admitted that "ballot fraud, electoral fraud, is already addressed all over [the elections code]," Dkt. 34 at 9. Further, there are substantial security measures already in place: voters can confirm ballot delivery online, *Id.*; hand-delivered ballots are verified, *Id.*; ballots are subject to rigorous signature-matching, A.R.S. § 16-5450 ballot envelopes are tamper-proof, A.R.S. § 16-545, and the record reflects that many collectors voluntarily implement additional security measures Dkt. 34 at 9.

When it was pointed out that Arizona already amply penalizes voter fraud, the bill sponsor admitted that HB2023 "doesn't . . . tackle" "fraud": it "is about an activity that *could potentially lead to* [fraud]." *Id.* Yet, several amendments that could have addressed concerns of fraud by less burdensome means were rejected—including an amendment that would have permitted collection if the voter and collector signed an affidavit that the ballot was collected with permission, voted and sealed when collected, and the collector would deliver the ballot by Election Day. *See Id.*(rejecting amendments to permit collection with tracking receipt, to permit counting ballots postmarked by Election Day, and to reduce penalty to misdemeanor).

On February 4, the House passed HB2023 by a 34-23 vote. All but one Republican supported, all Democrats opposed. *Id.* at 10 It passed the Senate on party lines on March 9, and was signed into law that afternoon.

F. HB2023's Enforcement

In response to records requests and in public statements, county recorders have advised they do not intend to take any action to enforce HB2023. *Id.* at 10. The SOS has not provided elections officials with any guidance on the issue. *Id.* at 10. The Arizona Republican Party, however, has confirmed it is training volunteers to demand identifying information from voters dropping off ballots, and is encouraging those volunteers to interrogate and follow them, record their faces and license plates, and even call 911 to report "a felony in progress." *Id.* at 10.

PROCEDURAL HISTORY

Appellants initiated this action less than six weeks after HB2023 was signed into law, filing a complaint in the district court on April 15, which was amended on April 19. *Id.* at 10. Plaintiffs requested an expedited briefing and hearing schedule. The district court denied that request, relying on Defendants' objections and assurances that no decision was needed until "late in the game" because the injunction "would be essentially just saying not to enforce a new law." *Id.* at 10. The district court ordered that the preliminary injunction motion be filed on June 10. The district court stated it would attempt to render a decision before the effective date of HB2023 and scheduled oral argument for August 3, three days before the effective date. The district court did not render a decision, however, until September 23, when it denied the motion for a preliminary injunction. Plaintiffs filed a notice of appeal within hours and a motion for injunction pending appeal in the District Court five days later. Two hours after the District Court denied that motion on October 4, Plaintiffs filed an emergency motion for an injunction pending appeal and for expedited review with the Ninth Circuit. Dkt. 16. That motion was denied by the motions panel without explanation, but the panel ordered expedition of the appeal. Dkt. 28. The motions panel denied the request for an injunction but expedited the appeal. Dkt. 27, Dkt. 28. On October 28, the merits panel affirmed the district court's denial of injunctive relief by a 2-1 vote, with a strong dissent from Chief Judge Thomas. Dkt 55-1, 55-2. The court *sua sponte* voted to rehear the case *en banc,* and on November 4 the *en banc* court issued a decision enjoining HB2023 during the 2016 general election and setting oral argument on the merits at a date

in January. Three hours after the Ninth Circuit's decision, the State and the Arizona Republican Party jointly filed an application asking this Court to stay the injunction and re-instate HB2023 for the 2016 general election.

ARGUMENT

Defendants cannot demonstrate that they are entitled to a stay from this Court pending the filing and disposition of a petition for a writ of certiorari. The practical effect of the requested stay would be to permit the State to criminalize a longstanding safeguard for Arizona voters in the November 2016 election, resulting not only in the certain disenfranchisement of the thousands of Arizona voters—and, particularly, minority voters—who rely on this practice to cast their ballot, but also the imposition of severe criminal penalties on a myriad Arizona citizens who assist these voters in exercising their right to vote. This is no supposition. In reliance on the Ninth Circuit's injunction, many Arizona citizens have *already* collected ballots from fellow citizens to aid them in exercising their right to vote. Against this backdrop, there is simply no justification proffered by the State that would remotely satisfy this Court's exacting standards and warrant a stay of the Ninth Circuit's injunction.

To obtain the extraordinary remedy of a stay, Defendants bear the burden of establishing three threshold elements: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In applying this

standard, the "judgment of the court below is presumed to be valid," *Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers), and this Court defers to the judgment of the court of appeals "absent unusual circumstances," *Id.* Irreparable harm to the applicant alone is not enough to establish entitlement to a stay. *Curry v. Baker,* 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers) (denying stay where candidate might experience irreparable harm, but case does not meet standards for granting certiorari).

Further, "[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted)). "Denial of . . . in-chambers stay applications," pending the filing of a petition for certiorari, "is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (quoting *Rostker*, 448 U.S. at 1308). "The party requesting a stay bears the burden of showing that the circumstances justify" such extraordinary relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). As demonstrated below, Defendants' have plainly failed to meet these requirements and show that they are entitled to such extraordinary relief.

I. The Purcell Doctrine Does Not Bar An Injunction From Issuing

For decades, Arizona voters have assisted fellow citizens exercise their right to vote by collecting and delivering completed (and sealed) ballots. Arizona is a vast and diverse state, and this long-standing practice has been of particular aid in helping some of Arizona's most vulnerable citizens exercise the franchise. In this presidential election year, the Arizona legislature criminalized ballot collection drastically changing the status quo and disrupting the accepted and expected voting habits of thousands of Arizona voters.

Despite Defendants' suggestions, this Court in *Purcell v. Gonzalez* did not establish a *per se* rule against enjoining voting laws close in time to an election. 549 U.S. 1 (2006); *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."). Instead, *Purcell* urged courts to take careful account of considerations unique to the election context before intervening, such as whether the change is likely to confuse voters or to create insurmountable administrative burdens on election officials. 549 U.S. at 4. Here, as the *en banc* Ninth Circuit explained, those factors counseled *in favor* of the *en banc* Ninth Circuit's decision to enjoin HB2023 in the impending general election.[3] And they strongly counsel

[3] All references to the en banc Ninth Circuit refer both to the November 4, 2016 Order issued by the en banc Ninth Circuit, No. 16-16698, as well as Judge Thomas' dissent in *Feldman v. Arizona Sec'y of State*, 2016 WL 6427146, at *21-31 (9th Cir. 2016), which was incorporated in

against disturbing that ruling at this juncture—and thereby exposing *to a felony conviction* Arizonans who have heard that ballot collection has been reinstated but will not learn of a subsequent, contrary ruling from this Court.

Staying the injunction and re-instating HB2023 will result in substantial voter confusion. Ballot collection is a longstanding and popular voting method in Arizona; the upcoming general election would have been the first major election in which it would have become a crime. Further, ballot collection efforts began within hours of the Ninth Circuit's ruling and are already well under way. The Ninth Circuit's injunction has been widely reported in Arizona. E.g., Howard Fischer, *Appeals Court Suspends Ban on Ballot Harvesting for Tuesday Election*, CAPITOL MEDIA SERVICES, Nov. 4, 2016, http://azdailysun.com/news/local/appeals-court-allows-ballot-harvesting-for-tuesday-election/article_f4ee00c7-e24f-586f-b75f-2c81a1e1be0d.html; Rafael Carranza, *Anti-Sheriff Joe Arpaio Campaign Will Collect Ballots, Give Any Voters Free Ride To Polls*, THE ARIZONA REPUBLIC, Nov 4, 2016, http://www.azcentral.com/story/news/politics/elections/2016/11/04/anti-sheriff-joe-arpaio-campaign-collect-ballots-give-voters-free-ride-polls/93196046/; PAZ Promise Arizona Press Release, *Arizona's Major Voting Rights Advocacy Groups Respond To Ninth Circuit Ruling Knocking Down State Ban On Collecting Early*

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to the Order. Given the emergency nature of this injunction, and the severe irreparable harm that would occur if the Ninth Circuit waited to issue an order, it is proper that they cited to Judge Thomas's dissent, which fully discussed the relevant standards as well as the merits of Plaintiffs' case.

Ballots, Nov. 4, 2016, http://us2.campaign-archive1.com/?u=7fc3fbd3837cef560eee4c22b&id=3e414799d1; Ariane de Vogue, *Arizona Ballot Collection Practice Can Continue, Appeals Court Says*, CNN POLITICS, Nov. 4, 2016, http://www.cnn.com/2016/11/04/politics/arizona-ballot-collection/index.html; Bob Christie, *US Court Blocks Arizona Ban On Groups Collecting Ballots*, ASSOCIATED PRESS, Nov. 4, 2016, http://www.680news.com/2016/11/04/us-court-blocks-arizona-ban-on-groups collecting-ballots/; Howard Fischer, *Emergency Stay Requested After Appeals Court Blocks Arizona Ballot Harvesting Law*, ARIZONA CAPITOL TIMES, Nov.4, 2016, http://azcapitoltimes.com/news/2016/11/04/appeals-court-blocks-arizona-ballot-harvesting-law/.

Within hours of that highly publicized ruling, advocacy organizations and campaigns across Arizona jumped into action and immediately began collecting ballots. Within hours of that highly publicized ruling, advocacy organizations and campaigns across Arizona jumped into action and immediately began collecting ballots. *E.g.*, Rafael Carranza, @RafaelCarranza, Twitter (Nov. 4, 2016, 5:11 PM), https://twitter.com/RafaelCarranza/status/794693488994435073 (State Senator holds press conference to discuss mobilization of organized ballot collection efforts, as of Friday at 5 p.m. "there are ballots that are already being collected"); Mary Jo Pitzl, @maryjpitzl, Twitter (Nov. 4, 2016 1:27 PM), https://twitter.com/maryjpitzl/status/794637266475958272 (reporter for The Arizona Republic tweets "The @BaztaArpaio campaign is ready to pick up voters'

early ballots: text BAZTA to 33888 and someone will come and get it"); Arizona Advocacy Network, @AZadvocacy, Twitter (Nov. 4, 2016 4:48 PM) https://twitter.com/AZadvocacy/status/794687804873678848 ("GREAT NEWS FOR VOTERS! Ballots can be delivered."), Bazta Arpaio, @BaztaArpaio, Twitter (Nov. 4, 2016 1:25PM), https://twitter.com/BaztaArpaio/status/794636710915162112 ("BREAKING: Voters can text "BAZTA" at 33888 to have a volunteer come pick their ballot up at their door"); Yvonne Wingett, @yvonnewingett, Twitter (Nov. 4, 2016 5:28 PM), https://twitter.com/yvonnewingett/status/794697846825984000 (reporter for The Arizona Republic: "Anti- @realSheriffJoe campaign will collect ballots, give voters free ride to polls"); Native American Vote @NatAmerVote, Twitter (Nov. 4, 2016 7:29 PM) https://twitter.com/NatAmericanVote/status/794728316678864896 ("Arizona ballot collection practice that benefits Native Americans can continue, court says"); Maria Castro, @maria4az, Twitter (Nov. 4, 2016 1:44 PM), https://twitter.com/maria4az/status/794641432753491968 (volunteer for advocacy organization offers to collect ballots). Ballot collection has already begun.Volunteers and the media alike have widely broadcast the message that voters could again rely on ballot collectors to vote in the upcoming election. A departure from that ruling would confuse voters and volunteers alike.

Even worse, a stay would expose the volunteers who have mobilized to collect ballots but do not learn of the stay to criminal sanctions. Permitting volunteers to mobilize one day and then declaring them criminals the next would cause precisely

the kind of confusion that *Purcell*—and common sense—warns against. Tellingly, as the Ninth Circuit pointed out, "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." Dkt. 70 ("Op.") at 6.

Purcell is also inapplicable because the injunction here, unlike that in *Purcell,* "would not affect the state's election process or machinery" and in fact "does not involve any change at all to the actual election process." Op. at 4-5. Election administrators made clear even before the Ninth Circuit's ruling that they have no plans to enforce HB2023, Dkt. 16 at 19, and the law does not affect the procedures for election administrators. The only actors who would need to change to accommodate the injunction would be law enforcement, who would simply be directed *not* to act. In *Purcell*, the Court was concerned about court orders that imposed insurmountable administrative burdens on the eve of the election; here, the Ninth Circuit's decision has quite literally no impact whatsoever on election administrators.

Nor should the Court countenance Defendants' attempt to transform *Purcell* from a commonsense recognition of the unique issues presented in election litigation into a shield for those instituting unconstitutional restrictions on voting rights in election years. In the years since this Court issued its decision in *Purcell*, defendants in voting rights cases have increasingly misread that case as an invitation to attempt to delay litigation long enough to argue that *Purcell* bars relief. It was the State of Arizona's choice to pass HB2023 in a presidential election

year. And as the Ninth Circuit noted, Plaintiffs filed this action less than six weeks after the passage of HB2023—and a full seven months before the upcoming general election—and requested injunctive relief two full months before the law went into effect. The record reflects that Plaintiffs sought expedited consideration "at every stage of the litigation" and "it was the State that opposed an expedited briefing and hearing and briefing schedule at every turn, not the plaintiffs." Op. at 6. Moreover, it is the State that chose to enact a harshly restrictive voting law that went into effect just *eight weeks* before a presidential election. The State did not merely drag its feet once the litigation was brought; it also superbly engineered the timing of the law's passage to position itself to argue that any challenge—no matter how quickly brought—was untimely. If *Purcell* is read to be the near-categorical bar the Defendants wish it to be, then it encourages states to wait until the last minute to pass suppressive voting laws, confident that such laws are inoculated from review for at least one election. Where states engage in gamesmanship like this, the citizens deterred from voting are the losers. The Ninth Circuit properly rejected the State's attempt to simply run out the clock.

The Ninth Circuit also correctly noted that this Court decided *Purcell* prior to its decision in *Shelby Cty. Ala. v. Holder*, 133 S. Ct. 2612 (2013). Thus, this case "presents precisely the opposite concern" as *Purcell* in that H.B. 2023 has not been precleared by the Department of Justice, and indeed the Department expressed concerns and refused to preclear a previous version of the law, S.B. 1412. Op. at 7. The Ninth Circuit therefore correctly concluded that "it is quite doubtful that the

Justice Department would have granted preclearance [to H.B. 2023]," and that the judiciary could provide "the only meaningful review of legislation that may violate the Voting Rights Act." Op. at 8.[4]

In sum, the Ninth Circuit's decision to enjoin HB2023 for the November 2016 election did not create "voter confusion and consequent incentive" not to participate in the election. It accomplished the opposite: it preserved the pre-litigation status quo, avoided irreparable injury to fundamental rights, prevented intimidation and harassment as a result of vigilante attempts to enforce HB2023, and protected Arizonans against the risk of criminal penalties for doing nothing more reprehensible than helping their neighbors vote. Reversing that injunction now, after it was widely publicized and after ballot collection efforts are well under way, would sow precisely the kind of confusion and chaos that *Purcell* warns against.

II. Defendants Have Failed to Demonstrate That They Meet Any of the Standards for a Stay

A. Defendants Will Not Suffer Irreparable Harm Absent a Stay, and the Balance of Equities Weighs in Favor of Preserving the Status Quo

On the uncontroverted facts in the record, the *en banc* Ninth Circuit correctly concluded that the balance of the equities weighs in favor of enjoining HB 2023, which will ensure not only that thousands of Arizona voters are able to vote in the November 2016 election, but will also prevent scores of Arizona citizens from facing criminal sanctions with no constitutional justification. Indeed, not only do

[4] The Ninth Circuit also noted that "unlike the situation in *Purcell*, we have, as a court, given careful and thorough consideration to these issues." Op. at 8.

Defendants fail to demonstrate irreparable harm absent a stay, but, notably, they have failed to even *argue* that they will be irreparably harmed. Given the immediate harms faced by Arizonans—potential disenfranchisement and criminal sanctions—there is simply no reason for this Court to disturb the sound decision of the *en banc* Ninth Circuit court.

As an initial matter, a State has no interest in enforcing unconstitutional laws. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). And, as the *en banc* court made clear, it is highly likely that HB 2023 violates the Fourteenth Amendment as well as Section 2 of the Voting Rights Act ("VRA"). Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *21-31).

Moreover, it is unclear whether Arizona *would* enforce the law even if it *were not enjoined.* In response to public records requests and in public statements, county recorders have advised they do not intend to do so. *See, e.g.*, Dkt. 16 at 19. And the Secretary of State has failed to provide elections officials with guidance on the issue. *Id.*. Thus, it is unclear how the State would be harmed in the absence of a stay given that election officials have in effect stated that they will in effect proceed to act as if the law has been enjoined *anyway*.

In contrast, however, Plaintiffs and thousands of Arizona voters do face imminent and irreparable harm if a stay is issued. As the *en banc* court recognized, "80% of the [Arizona] electorate uses early absentee voting as the method by which they cast their ballots." Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *24). And,

as the uncontroverted evidence demonstrated, for thousands of Arizona's minority voters, voting absentee (and voting at all) is only possible with the aid of a ballot collector. *Feldman,* 2016 WL 6427146 at *27-28. Thus, as [the dissent] found, the ability to cast a vote by absentee in Arizona "has transcended convenience and has become instead a practical necessity." *Id.* And the loss of the ability to do so with the aid of a ballot collector poses a substantial burden on the right to vote—a burden that will be felt immediately in the November 2016 election. *Id.* As courts have recognized, "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LOWV*"); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Melendres v. Arpaio*,, 695 F.3d 990, 1002 (9th Cir. 2012); *Obama for America* v. Husted,, 697 F.3d 423,436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986). Thus, it is Plaintiffs—and myriad Arizona voters—not Defendants who will suffer irreparable injury if this Court stays the injunction.

Moreover, the Arizona Republican Party (intervenor-defendants in this suit) have publicly confirmed plans to train volunteers to demand identifying information from voters dropping off multiple ballots, encouraging volunteers to follow suspected violators out into parking lots, interrogate them, record their license plates, and even call 911. Dkt. 16 at 19-20. These efforts are plainly intended to have a chilling effect on their targets' constitutional rights and are fundamentally incompatible with the freedom of expression that our democratic system affords.

Resulting only in further immediate and irreparable harms on the rights of Arizona voters, harms which plainly outweigh any purported harm suffered by the State.

B. The En Banc Court Correctly Held That Plaintiffs Are Likely To Prevail On The Merits

The *en banc* Ninth Circuit correctly held that Plaintiffs are likely to succeed on their claims that criminalizing the collection of absentee ballots violated the Fourteenth Amendment and Section 2 of the VRA. Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *21-31).

1. Plaintiffs Are Likely To Succeed On The Merits Of Their Fourteenth Amendment Claim

The *en banc* Ninth Circuit properly applied the correct balancing test to determine whether facially nondiscriminatory elections laws impose an "undue" burden on voters in violation of the Fourteenth Amendment. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The result of the *en banc* Ninth Circuit's review is a sound application of the law that would not warrant this Court's certiorari review and that is unlikely to be reversed on the merits.

In applying the "*Anderson-Burdick*" test, as instructed by the clear precedent of this Court, the *en banc* Ninth Circuit court "weigh[ed] 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff [sought] to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This is a "flexible" sliding scale, in which

"the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which [the challenged law] burdens [voting rights]." *Id.* The standard must be calibrated in each case to "[t]he precise character of the state's action and the nature of the burden on voters." *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592-93 (6th Cir. 2012) (quotation marks omitted). As the *en banc* court explained, this test results in a "balancing and means-end fit analysis." Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *22). And, importantly, *Anderson-Burdick* does not permit rational basis review or burden shifting. Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *22 (citing *Pub. Integrity All.*, 2016 WL 4578366, at *4 (en banc)).

In light of this standard, the *en banc* court found that the district court as well as the majority panel opinion were based in legal error as they employed a rational basis review and failed to conduct a true *Anderson-Burdick* balancing test. Op. at 2-3 (citing *Feldman*, 2016 WL 6427146, at *22-23). When the proper balancing test is applied, it is clear that there is an unconstitutional burden, and one that falls on some of the most vulnerable Arizonan citizens. As the *en banc* court found, "[t]he uncontradicted evidence presented to the district court showed that a substantial number of minority voters used ballot collection as their means of voting." *Feldman*, 2016 WL 6427146 at *23.

There are many reasons why this is so. First, the evidence showed that "a substantial number of minority voters used ballot collection as their means of voting," and, moreover, that ballot collecting "has come to be critical in enabling

voters in those communities to exercise their fundamental right to vote." *Id.* (quotation marks omitted). "[I]n many rural areas with a high proportion of minority voters, home mail delivery was not available, and it was extremely difficult to travel to a post office." *Id.*; *see also id.* at *5 (discussing severe burdens on rural communities near the Mexican-American border). It was further apparent that "many minority urban voters lived in places with insecure mail delivery; that many minority urban voters were dependent upon public transportation, which made election day in-person voting difficult; that many minority voters worked several jobs, making it difficult to take time off work to vote in person; and that many infirm minority voters did not have access to caregivers or family who could transmit ballots." *Id.* Likewise, in "urban areas [] there are not only few places to vote, but that the polling locations change frequently." *Id.* at *24. The court also outlined how the law imposed specifically heightened burdens on Arizona's Native American voters. *Id.* at *23 (uncontested evidence established Tohono O'odham Nation—which rests on land approximately the size of Connecticut—has no home mail delivery and only one post office); *id.* (undisputed that Cocopah Indian Tribe Reservation does "not have home mail delivery or easy access to a post office"). Thus, the court correctly found that the burden on voters was substantial and, then went on to properly weigh it against the State's interests.

In contrast, to the overwhelming evidence of the burdens imposed by the law, the State presented no evidence of voter fraud, which was its primary justification for passing HB 2023. *Id.* Indeed, the State could not identify even one example of

voter fraud connected to ballot collection. *Id.* And, in fact, the primary sponsor of HB 2023 admitted that no such examples existed. *Id.* Thus, under the *Anderson-Burdick* balancing test the means in this instance—the disenfranchisement and criminalization of numerous Arizona voters—simply do not fit the end—the prevention of a crime that does not exist. Arizona voters should not suffer disenfranchisement or severe burdens on their voting rights so that the State can slay a dragon. Accordingly, the *en banc* court correctly found that Plaintiffs are likely to succeed on the merits of their claim and that an injunction should issue prior to the 2016 General Election. *Id.* at *25 ("Thus, when one balances the serious burdens placed on minorities by the law against the extremely weak justification offered by the state, one can only conclude under the *Anderson-Burdick* analysis that the plaintiffs have established a likelihood of success on the merits of their Fourteenth Amendment claim. Based on the mostly uncontroverted record, the district court erred in misapplying *Anderson-Burdick*.").

2. Plaintiffs Are Likely To Succeed On The Merits Of Their VRA Claim

The *en banc* Ninth Circuit court also properly applied the correct standards under the VRA to the uncontroverted facts in the record, and its application of the VRA would not warrant this Court's certiorari review and is unlikely to be reversed on the merits.

Section 2 of the VRA provides in relevant part: "No voting . . . standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on

account of race or color." 52 U.S.C. § 10301(a). A violation "is established if, based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Courts have repeatedly found that the text of § 2 requires that, "'[i]n assessing *both* elements, courts should consider 'the totality of the circumstances.'" *LOWV*, 769 F.3d at 240 (quoting 52 U.S.C. § 10301(b)); *see also Veasey v. Abbot*, 830 F.3d 216, 248 (5th Cir. 2016 (en banc); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998). As the *en banc* court recognized, both the panel majority and the district court committed legal error in their Section 2 analyses. These errors included, among other things: (1) requiring proof of disparate impact only by quantitative or statistical evidence; (2) invoking an incorrect comparative analysis; (3) applying the wrong burden of proof; and (4) failing to consider the Senate Factors. Op. 2-3 (citing *Feldman*, 2016 WL 6427146, at *26-31). Once these errors were corrected, the *en banc* court appropriately found that Plaintiffs were likely to succeed on their Section 2 claim.

As discussed *supra*, the uncontroverted facts showed, that "a substantial number of minority voters used ballot collection as their means of voting," and, moreover, that ballot collecting "has come to be critical in enabling voters in those communities to exercise their fundamental right to vote." *Id.* at *22 (quotation marks omitted). Indeed, Plaintiffs presented "voluminous and undisputed"

affidavits from partisan and non-partisan organizers, community advocates, legislators, volunteers, and individual voters across Arizona "showing the burden that the restriction on ballot collection would impose on minorities." *Id.* at *28. This evidence was complemented by the legislative history, which showed that legislators were aware that ballot collection was used disproportionately in minority communities and that HB2023 was passed in spite of this knowledge, Dkt. 34 at 20-21; the preclearance file kept by DOJ on HB2023's precursor bill, SB1412, which documented serious concern by legislators, elections officials, and DOJ itself that SB1412—a bill far *less restrictive* than HB2023—would disparately impact Arizona's minority voters as compared to whites, *Id.* at 20-21; and expert evidence of severe disparities that prevented minority voters from casting their ballots without assistance from collectors. *Id.* at 20-22. Thus, as required by the statutory language of the VRA, which directs the court to look at the "totality of the circumstances," and in keeping with the repeated directives of this Court to "provid[e] the broadest possible scope," to effectuate "the broad remedial purpose of rid[ding] the country of racial discrimination in voting" for which it was enacted, *see Feldman,* 2016 WL 6427146, at *24 (citing *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and quotation marks omitted), the *en banc* court found that Plaintiffs had demonstrated proof of disparate impact and satisfied the first prong of the Section 2 test.[5] *Id.* at *28.

[5] Moreover, it also found that the district court and majority had erred by failing to do so, specifically because they misconstrued the burden of proof. In particular, in light of the substantial

The *en banc* court also correctly found that Plaintiffs had established a likelihood of success on the second prong of the Section 2 test, noting that Plaintiffs had presented evidence that eight out of nine Senate Factors were present including an established history of discrimination, *Feldman,* 2016 WL 6427146, at *29-30, as well as significant evidence of ongoing disparities and effects in Arizona's minority community. *Id.* Thus, the court correctly found that "[t]he totality of the circumstances of this election, coupled with the historic discrimination in Arizona's electoral politics are sufficient to satisfy the second Section 2 requirement." *Feldman,* 2016 WL 6427146, at *22-28.

3. The En Banc Panel Employed The Proper Standard Of Review

Defendants' argument that the *en banc* Ninth Circuit applied the wrong standard of review is wrong.[6] This argument is not only incorrect but, more

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evidence presented by Plaintiffs, and the dearth of evidence to the contrary submitted by Defendants, Defendants failed to meet their burden to rejoin and Plaintiffs amply met their burden under the preponderance of the evidence standard. *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009); *see Feldman,* 2016 WL 6427146, at*28-29, Dkt. 34 at 16-21.

[6] Defendants also make a conclusory assertion in their brief that this Court should issue a stay because "the district court opinion is consistent with this Court's precedent." Notably, this argument does not cite to even one Supreme Court case. It is plain from reading the *en banc* determination that the district court's opinion is anything but consistent with this Court's precedent. Rather, as discussed in the opinion, it is rife with legal errors which directly contravene the precedents that this Court has set for *Anderson-Burdick* review as well as Section 2 of the VRA.

importantly, it is a smokescreen designed to distract this Court from Plaintiffs' likely success on the merits, as well as the overwhelming evidence of irreparable harm and severe injustice that Plaintiffs and thousands of Arizona voters will suffer if the Ninth Circuit's injunction is stayed. This Court should see through that screen and deny Defendants' request for a stay.

When evaluating a motion for injunction pending appeal, the Ninth Circuit has explained that the district court's decision will "be reversed if the lower court abused its discretion or based its decision upon erroneous legal premises." *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983) (quotation marks omitted). Indeed, even Defendants recognize this, repeatedly citing case law which explicitly states

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Accordingly, this argument does nothing to undermine Plaintiffs' likelihood of success or this Court's denial of a stay.

Further, Defendants attempts in this same section to present HB2023 as if it were part of a seamless tapestry of identical laws nationwide similarly fails. Many states that Defendants cite *regulate* ballot collection in some form rather than criminalize it outright—a crucial difference. Other states, such as California, have markedly different contexts that make an analogy to Arizona's law inapt. For instance, in California, as in many other states, ballots are valid if *postmarked* by Election Day, Cal. § 4103((b)(1-2). In Arizona they must be *received* by Election Day. A.R.S. § 16-548. There is extensive—and unrefuted—evidence in this case that this rule is little-known and that much of ballot collection takes place during the weekend before Election Day, when low-information voters often do not realize that it is too late to mail in their ballot. In any event, no inferences can be drawn about the validity of HB2023 by looking to other states; HB2023 has a deeply troubling legislative history, was enacted despite sustained opposition from Arizona's minority communities, and operates against the backdrop of Arizona's long and infamous history of vote suppression.

that "a Panel only 'reverse[s] the district court's decision if it was based on an erroneous legal standard or clearly erroneous findings of fact." Defs.' Emergency App. at 14 (quoting *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053 (9th Cir. 2013); *see also Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). Nevertheless, despite recognizing that reversal based on erroneous legal standards is accepted, they fail to acknowledge that this is precisely what the *en banc* court did in this instance.

As explained at length in the *en banc* opinion the district court's opinion was based upon numerous erroneous legal premises, which permeated both its Fourteenth Amendment and Section 2 analyses. *Feldman*, 2016 WL 6427146, at *22 (legal errors in analysis of the Fourteenth Amendment claims by employing rational basis review); *id.* at *23 (misapplied Anderson-Burdick analysis); *id.* at *26 (district court made a number of legal errors in Section 2 analysis, including requiring disparate impact be proved through statistical evidence); *id.* at *27 (erred in comparative analysis). Accordingly, in keeping with the proper standard for review, when faced with these numerous legal errors the *en banc* court did precisely what its precedent instructed it to do—find that the district court abused its discretion and review de novo. *See, e.g.*, *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014). Accordingly, as the *en banc* Ninth Circuit appropriately exercised its discretion, Defendants' argument foes not weigh in favor of a stay and should be rejected by this Court.

CONCLUSION

Every day remaining in this election cycle provides an opportunity for citizens to cast their vote using ballot collection: a familiar, popular and long-standing method of exercising the franchise in Arizona. HB2023's criminalization of this practice suffers from serious defects under both the Voting Rights Act and the First and Fourteenth Amendments, and the *en banc* Ninth Circuit properly enjoined it for the upcoming election so that the fundamental constitutional right of Plaintiffs, and thousands of voters across Arizona, remain protected pending final outcome of the appeal. Ballot collection is already under way in Arizona, and a contradictory order from the Court at this juncture would subject voters and volunteers across Arizona to a felony conviction for the simple act of helping someone vote. Plaintiffs respectfully request the Court not disturb the injunction issued by the Ninth Circuit.

Respectfully submitted,

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No. 16A-460

IN THE
SUPREME COURT OF THE UNITED STATES

ARIZONA SECRETARY OF STATE'S OFFICE, MICHELE REAGAN, MARICOPA COUNTY BOARD OF SUPERVISORS, DENNY BARNEY, STEVE CHUCRI, ANDY KUNASEK, CLINT HICKMAN, STEVE GALLARDO, MARICOPA COUNTY RECORDER AND ELECTIONS DEPARTMENT, HELEN PURCELL, KARAN OSBORNE, AND MARK BRNOVICH

AND

ARIZONA REPUBLICAN PARTY,

Petitioners,

v.

LESLIE FELDMAN, LUZ MAGALLANES, MERCEDEZ HYMES, JULIO MORERA, CLEO OVALLE, PETERSON ZAH, DEMOCRATIC NATIONAL COMMITTEE, DSCC A/K/A DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE, ARIZONA DEMOCRATIC PARTY, KIRKPATRICK FOR SENATE, AND HILLARY FOR AMERICA,

AND

BERNIE 2016, INC.,

Respondents.

CERTIFICATE OF SERVICE

DIRECTED TO ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

I, Marc E. Elias, a member of the Supreme Court Bar, hereby certify that the a copy of the forgoing Response to Emergency Application to Stay Injunction Pending Appeal in the United States Court of Appeals for the Ninth Circuit was filed by email with the Clerk's Office of the Supreme Court of the United States, and was served via email on the following parties listed below on this 5th day of November, 2016:

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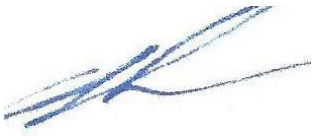

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