No. 16-16698

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Intervenor-Plaintiff/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenor-Defendants/Appellees.

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

BRIEF OF INTERVENOR-DEFENDANT ARIZONA REPUBLICAN PARTY ON THE MOOTNESS OF THIS APPEAL

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FRAP 26.1 Corporate Disclosure Statement

Corporate Intervenor-Defendant Arizona Republican Party ("Party") hereby certifies that there is no parent corporation, nor any publicly held corporation, that owns 10% or more of the stock in the aforementioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

For a host of reasons arising out of the doctrine of mootness, this Court should not proceed to hear *en banc* the only issue before it, which was whether to preliminarily enjoin the enforcement of H.B. 2023 before the (now past) November 8, 2016, General Election. First, the only issue presented to this Court, and the only issue on which it granted *en banc* review, was whether to preliminarily enjoin the law's enforcement. There is no longer a justiciable request for preliminary injunction in this case, and the issue that was before this Court is now moot. Second, and relatedly, the request for relief in this case was to preliminarily enjoin H.B. 2023 before the November 8, 2016, General Election. That can no longer occur, and there is ample time for the Court to review any eventual district court ruling on a request for permanent injunction, now with the aid of data from the 2016 election cycle, per the guidance of *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). Third, retaining jurisdiction here to issue legal rulings—given that the issue on appeal is moot and was, in fact, rendered so by the Supreme Court—would result in the issuance of what could only be an advisory opinion, which is not permitted.

PROCEDURAL POSTURE AND STATUS OF H.B. 2023

Plaintiffs brought this action in April 2016 alleging, among other things, that H.B. 2023, a not-then-effective election law banning mass ballot collection, violated Section 2 of the Voting Rights Act and the Fourteenth Amendment to the Constitution. Almost two months later, in June 2016, Plaintiffs moved, based on those claims, to preliminarily enjoin H.B. 2023, which was still not in effect.[1] The specific injunction sought by Plaintiffs was that:

> Defendants . . . [be] ENJOINED from taking any action to implement, enforce, or otherwise give any effect to the law enacted by the State of Arizona on or around March 9, 2016 with the passage and signature of H.B. 2023, until such time as the Court enters a final judgment on Plaintiffs' claims related to H.B. 2023 in this action.

ER0169. Discovery, including expert reports and expert discovery, motion practice, and oral argument on this request ensued, prior to H.B. 2023 taking effect on the General Effective Date of August 6, 2016.[2] (One could argue that Plaintiffs' request that Defendants be

[1] The law took effect on August 6, 2016, and has remained largely so, with the exception of this Court's brief injunction of it from November 4 to November 5, 2016. Despite H.B. 2023 being effective in Arizona for both a Primary and a General Election, Plaintiffs have never come forth with additional evidence about its impact.

[2] Plaintiffs did not seek an expedited ruling from the district court prior

enjoined from implementing, enforcing, or otherwise giving any effect to the law became moot when the law, in fact, did take effect.) On September 23, 2016, and after the Primary Election took place without incident and with H.B. 2023 in effect, the district court denied Plaintiffs' motion for a preliminary injunction of the law. ER0001-27.

The district court found Plaintiffs unlikely to succeed on the merits of their claims, that they had not shown that H.B. 2023 would cause them irreparable harm (or shown anything beyond speculation that H.B. 2023 would prevent anyone from voting), and that the balance of hardships and public interest weighed against enjoining the law. Plaintiffs appealed, and the district court's decision was affirmed by a merits panel of this Court on October 28, 2016. (Doc. 55.)

On appeal to this Court, Plaintiffs did not expedite their own appeal by filing their opening brief early, as they could have (*see* Doc. 3 (allowing for answering brief by deadline set or 28 days after service of opening brief, whichever is *earlier*)). Instead, an extremely compressed and extraordinary process occurred before this Court and then the

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to the effective date of the law, though they previously sought bifurcation of the oral argument schedule for the case so that oral argument on H.B. 2023 could be held before the law's effective date.

Supreme Court. Simultaneous briefing and oral argument occurred before the Merits Panel within five days of a Motions Panel's *sua sponte* order expediting the appeal. (Doc. 28, 29.) (A similarly compressed schedule was then immediately set on the appeal of the denial of a preliminary injunction on Plaintiffs' out-of-precinct voting regulation claims, which arise out of the same district court case and were argued and submitted to the same Merits Panel. That appeal also resulted in an affirmance of the district court's ruling, which opinion was also *sua sponte* immediately ordered reheard *en banc*. An injunction of Arizona's longstanding out-of-precinct provisional ballot-counting system did not issue, however.)

The order for rehearing *en banc* of the issue before the Merits Panel in this case issued two days after supplemental briefing on whether it should be reheard, with a concurrence by Judge Reinhardt, and a dissent by Judge O'Scannlain, joined by Judges Tallman, Callahan, Bea, and Ikuta. (Doc. 68.) Both the concurrence and dissent cited *Purcell*, given its counsel on interfering with state election laws without a full record and with an election imminent.

On Friday, November 4, 2016, shortly after noon Arizona time, another *sua sponte* order issued regarding the *en banc* Court's *sua sponte* reconsideration of the Motions Panel's denial of Plaintiffs' motion for an injunction of the law pending appeal. The Motions Panel had denied that motion on October 11, 2016, along with its initial denial of Plaintiffs' motion to expedite their appeal.[3] (Doc. 27.) The *en banc* Court's order enjoined the law. (Doc. 70-1.) The Defendants filed an emergency application for stay of the injunction, and the Supreme Court issued an order granting the application on November 5, 2016, and providing that the injunction issued was "stayed pending final disposition of the appeal by [this Court]." ER3247.[4]

The now-effective law has, with that one exception, been in place without incident for just shy of four months, including for Arizona's most recent Primary and General elections, and, notably, has been previously upheld by both the district court and a merits panel of this

[3] Though the Motions Panel *sua sponte* reversed its decision on the motion to expedite the appeal three days later, it did not reconsider its decision on an injunction of the law pending appeal of the district court's ruling. (Doc. 28.)

[4] The Party files herewith Supplemental Excerpt of Record Vol. XV, which contains ER3247, the Supreme Court's November 5, 2016, Order in Pending Case.

Court. Though the Merits Panel decision is rendered non-citable as precedent, by the November 2, 2016, *sua sponte* order that this case be reheard *en banc*, it remains among the decisions and orders from which the district court might take guidance. Same for the *sua sponte en banc* order, and its concurrence and dissent; the order enjoining the law, and its dissents; and the Supreme Court order staying this Court's injunction of the law.

On November 21, 2016, the Clerk, on behalf of the Court, issued an order that the Parties should "submit supplemental briefs as to whether the completed election makes this preliminary injunction appeal moot and, if not, what relief is available[,]" and "also address whether the en banc court should stay proceedings pending the entry of judgment by the district court on the request for permanent injunctive relief." (Doc. 77.) This is that briefing from Intervenor-Defendant-Appellee Arizona Republican Party ("the Party").

I. PLAINTIFFS' APPEAL IS MOOT.

The mootness of this appeal dictates the appropriate result—dismissal of, or at the very least a stay of, the *en banc* proceedings. *See Center for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir.

2007) ("If an event occurs during the pendency of the appeal that renders the case moot," then the Court "lack[s] jurisdiction."); *see Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003) ("Mootness is a jurisdictional issue, and 'federal courts have no jurisdiction to hear a case that is moot, that is, where no actual or live controversy exists.'") (citation omitted).

Where, as here, a litigant can no longer obtain the relief sought, the appeal must be dismissed as moot. *See Foster*, 347 F.3d at 745; *see also Pardo v. Cate*, 510 F. App'x 674, at *1 (9th Cir. 2013) (declining to reach issues raised on appeal where pending district court proceedings might moot aspects of the appeal, a stay would unnecessarily fragment the case, and deferring to the district court was "in the interest of judicial economy, and . . . ensure[d] consolidated and orderly processing and consideration of all the issues").

The Supreme Court's order granting the stay of injunction as to H.B. 2023 foreclosed the relief sought here. ER3247; *see also Breswick & Co. v. United States*, 75 S. Ct. 912, 915 (1955) ("I think the matter is cast in no different light when one consequence of staying an injunction pending appeal may be to render the appeal moot in whole or in part.").

The relief sought before the district court was an injunction of the enforcement of H.B. 2023, which injunction was denied. The Motions Panel declined to enter an injunction pending appeal, but the *en banc* Court did see fit to enjoin the law. The Supreme Court stayed that order, ruling that the law should not be enjoined pending appeal or before the November 8, 2016, General Election. ER3247. Mapped together, those decisions show Plaintiffs' previously sought relief to be unavailable. *See Breswick & Co.*, 75 S. Ct. at 915. There is nothing left for the *en banc* Court to determine at this point, rendering these proceedings moot and subject to dismissal. *See Foster*, 347 F.3d at 745.

Proceedings before an appellate court are also mooted when *the opportunity* to grant the relief sought in the injunction request has passed. Thus, an "interlocutory appeal of the denial of a preliminary injunction is moot when a court can no longer grant any effective relief sought in the injunction request." *Akina v. Hawaii*, 835 F.3d 1003, 1010 (9th Cir. 2016). When the Court "cannot undo what has already been done, the action is moot, and must be dismissed." *Bernhardt v. Cty. of L.A.*, 279 F.3d 862, 871 (9th Cir. 2002). While the time for the preliminary injunction sought by Plaintiffs is long past, the underlying

case presents a live controversy before the district court, which court should be deferred to as the proper venue for resolution of that controversy in the first instance. *Akina*, 835 F.3d at 1010. ("The interlocutory appeal may be moot even though the underlying case still presents a live controversy."); 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.3.1, at 77 (3d ed. 2015) ("Once the opportunity for a preliminary injunction has passed . . . the preliminary injunction issue may be moot even though the case remains alive on the merits.").

In their supplemental briefing about why this case should be reheard *en banc*, Plaintiffs cited authority for the proposition that "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *see* Doc. 60, at 28. That lack of available redress moots this appeal, which should be dismissed to allow the district court to proceed. *See Arizona Green Party v. Reagan*, 838 F.3d 983, 987 (9th Cir. 2016) ("The 2014 election has come and gone, so we cannot devise a remedy that will put the Green Party on the ballot for that election cycle. All specific demands for relief related to the 2014 election are moot").

Plaintiffs can no longer obtain the relief they sought when they filed their request for preliminary injunction—first, because H.B. 2023 has taken effect (codified as A.R.S. § 16-1005(H), (I)) and second, because the Primary, and the General Election both have already occurred with the sensible election law in effect.

This appeal also does not warrant any exception to the mootness doctrine, including that of "capable of repetition, yet evading review." *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (en banc). That exception only applies to "'extraordinary cases' in which (1) 'the duration of the challenged action is too short to be fully litigated before it ceases,' and (2) 'there is a reasonable expectation that the plaintiffs will be subjected to the same action again.'" *Akina*, 835 F.3d at 1011 (quoting *Madison Sch. Dist. No. 321*, 177 F.3d at 798). The exception "is concerned not with particular lawsuits, but with classes of cases that, absent an exception, would *always* evade judicial review." *Protectmarriage.com—Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014).

Plaintiffs do not satisfy even the first element of the exception. The litigation is pending in the district court,[5] and if the district court ultimately rules against the Plaintiffs after a full review of the facts and law, they will still have the opportunity to seek this Court's review of an adverse ruling on their permanent injunction request. *See Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (allowing appellate review only where an injury is "likely always to become moot before federal court litigation is completed"). Furthermore, there is ample time to litigate the permanent injunction proceedings in the district court. While certain city elections will take place in 2017, the next major election in Maricopa County will be in the 2018 election cycle, and Plaintiffs will likely litigate their claims in full before then. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1047 (9th Cir. 2007) ("The litigation remains pending in the district court. There, final resolution of the scope of any appropriate permanent relief can be determined on

[5] The district court stands at ready to proceed and has entered an order that the parties, within 14 days of this Court's rulings, submit a joint proposed briefing schedule on issues including the Party's and other Intervenor-Defendants' pending Motion to Dismiss Plaintiffs' Complaint (*see* ER2845, at Doc. 108); Plaintiffs' amendment of their Complaint, including to remove claims and parties they have voluntarily sought to dismiss; and dismissal of parties like Bernie 2016, Inc., from the pending proceedings due to lack of standing.

the basis of a fully developed record, and well before the next general election in 2008.") As a result, the case is moot and no exception applies. Thus, dismissal is appropriate and the parties may return on a fully developed district court record that applies applicable evidentiary[6] and procedural rules in evaluating the legal and factual issues presented.

II. PROCEEDING *EN BANC* WOULD RESULT IN AN ADVISORY OPINION.

If the Court issues an opinion here, it would, as this Court has recently recognized, "amount to an impermissible advisory opinion." *Akina*, 835 F.3d at 1010–11. That is in part because the Court's review of a denial of a preliminary injunction is "limited and deferential." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003); *see also CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 620 (1st Cir. 1995) ("This is an interlocutory appeal. It is brought strictly and solely to test whether the district court

[6] That record may include additional scrutiny of experts and their reports, which review the district court is best equipped to engage in. For example, Plaintiffs' expert Dr. Allan Lichtman's polarization analyses have been found deficient by other federal trial courts. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1269-71 (M.D. Ala. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 1257 (2015) (criticizing racial polarization analysis by Plaintiffs' expert Dr. Allan Lichtman); *Johnson v. Mortham*, 926 F. Supp. 1460, 1474-75 (N.D. Fla. 1996) (same).

abused its discretion in withholding certain *provisional* relief.") (emphasis added). With the law in effect and the 2016 General Election complete, the district court should be allowed to proceed, as it will have the opportunity to direct development of, and rule on, a full record. *See Gonzalez*, 485 F.3d at 1050 ("[W]hether the law severely burdens anyone, as the district court observed, is an intensely factual inquiry, requiring development of a full record.") (internal quotations and punctuation omitted).

The prohibition of advisory opinions is "the oldest and most consistent thread in the federal law of justiciability." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotation marks omitted). "The Constitution limits the jurisdiction of the federal courts to live cases and controversies, and as such, federal courts may not issue advisory opinions." *Kittel v. Thomas*, 620 F.3d 949, 951 (9th Cir. 2010). Advisory opinions are of little value, specifically when they concern a preliminary injunction:

> We have noted that "in some cases, parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation," but . . . "our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits"

> and . . . such appeals often result in "unnecessary delay to the parties and inefficient use of judicial resources."

DISH Network Corp. v. F.C.C., 653 F.3d 771, 776 (9th Cir. 2011) (quoting *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752–53 (9th Cir. 1982)).

In the preliminary injunction context, the advisory opinion prohibition is closely linked to the doctrine of mootness because it concerns the Court's fundamental ability to decide a matter: "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). Here, any *en banc* opinion would be an impermissible advisory opinion.

Any advisory opinion from this Court on the preliminary injunction would quickly become irrelevant as the district court's ruling on the permanent injunction arises. *Sports Form, Inc.*, 686 F.2d at 753 ("[O]ur disposition of this appeal will affect the rights of the parties only until the district court renders judgment on the merits of the case, at which time the losing party may again appeal."). Whatever the district court concludes regarding the permanent injunction, this Court's opinion on this preliminary injunction appeal would not provide

permissible guidance. By hearing the case and issuing an opinion, the *en banc* Court would be squandering valuable judicial resources to reach an advisory opinion, one that will have no lasting effect. *DISH Network Corp.*, 653 F.3d at 776 (appellate opinions on denials of preliminary injunctions are often an "inefficient use of judicial resources").

The General Election is over, and any permissible relief Plaintiffs will obtain is only available through the permanent injunction phase after a trial on the merits. The Supreme Court order (ER3247) and the passage of time mooted the question of relief before this Court at this time. The Court should refuse to issue an advisory opinion and instead allow the district court to decide the merits of the case in the first instance. Thus, dismissal or, at minimum a stay, is warranted.

III. AT THE VERY LEAST, THE PROCEEDINGS SHOULD BE STAYED PENDING ENTRY OF JUDGMENT BY THE DISTRICT COURT ON THE REQUEST FOR PERMANENT INJUNCTIVE RELIEF.

The Supreme Court long ago recognized that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North*

American, Co., 299 U.S. 248, 254 (1936). This Court has exercised significant judgment in administering proceedings in this matter and consideration of a stay of the *en banc* proceedings calls again for exercise of that judgment. *See id.* at 254-55. In exercising its judgment, the Court "must weigh competing interests and maintain an even balance." *Id.* at 255. Generally, to be sure, the party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.*

This may place the standard for a stay of these proceedings pending the district court's resolution of the request for permanent injunctive relief in similar vein to the standard for a stay of an order pending appeal. *Cf. Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327, 1330 (1980) (guiding principles to be considered in entering a stay equally applicable when vacating one). Yet the Supreme Court's stay of the injunction of H.B. 2023 actually provides the answer here—these proceedings should be dismissed as moot, or, if necessary, stayed

pending the district court's completion of its work.[7] *See Breswick & Co.*, 75 S. Ct. at 915; ER3247.

Moreover, given the unique procedural posture of this appeal, the 'wise judicial administration' or abstention standard is more analogous on the question of a stay of these proceedings. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 912 (9th Cir. 1993) ("Considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' may counsel granting a stay when there are concurrent state proceedings involving the same matter as in the federal district court."). While this *Colorado River* abstention doctrine is a narrow one, this is because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *See id.* (quoting *Colorado River*

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[7] Because *en banc* courts are convened for extraordinary reasons, *see* Fed. R. App. P. 35 and Circuit Rule 35-1, none of which are present here, one could just as easily reason that this matter should be returned to the Merits Panel upon the lifting of any stay of these proceedings once the district court has completed its work. *See* Ninth Circuit Gen. Order 3.6(a) ("Matters on remand from the United States Supreme Court will be referred to the last panel that previously heard the matter before the writ of certiorari was granted."), (b) ("Where a new appeal is taken following a remand or other decision by an en banc court, . . . [t]he en banc court will decide whether to keep the case or refer it to the three-judge panel.").

Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)). In cases, as here, where this Court's jurisdiction is in significant question due to mootness or where full and final district court proceedings may moot any appeal, this Court's abstention and deference to the district court—either through dismissal or, if necessary, stay of the *en banc* proceedings—is called for. *See Breswick & Co.*, 75 S. Ct. at 915 (circuit justice entering partial stay of three-judge court's injunction despite noting that stay might moot appeal); *Pardo*, 510 F. App'x 674 at *1 (noting, however, that stay of proceedings on appeal where multiple independent issues remained pending before district court would "unnecessarily fragment the case," so full remand was the better course); *cf. Guam Sasaki Corp. v. Diana's Inc.*, 881 F.2d 713, 716 (9th Cir. 1989) ("The order staying the appeal was unambiguously designed for one purpose only, completion of proceedings below.").

Relatedly, this Court's review of a district court's decision on a preliminary injunction is very limited. *See CMM Cable Rep., Inc.*, 48 F.3d at 620; *see Sports Form, Inc.*, 686 F.2d at 752–53 (describing differences between this Court's review of preliminary and permanent injunctions). And this Court's decision will only affect the parties until

the district court decides the permanent injunction issue. *Sports Form, Inc.*, 686 F.2d at 753. There is no prejudice to Plaintiffs and abstaining from considering this appeal avoids wasting valuable judicial resources. *See id.*

In the current procedural posture, and because the 2016 General Election is in the past, there is no longer any reason for this Court to consider the preliminary injunction appeal. This Court's review of a preliminary injunction is limited, in any event. *Sports Form, Inc.*, 686 F.2d at 752. A ruling from the district court on the permanent injunction may yet reach a different conclusion—and, particularly in the election law context, conflicting rulings at various levels of courts are a recipe for voter confusion. *See Crawford v. Marion Cty. Elec. Bd.*, 553 U.S. 181, 197 (2008) ("[C]onfidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); *see also Purcell*, 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.").

If this Court issues an opinion on the preliminary injunction, the opinion, as this Court has recently recognized, "would amount to an impermissible advisory opinion that would, at most, guide any future" election. *Akina*, 835 F.3d at 1010–11. It is the district court's role to determine the permanent injunction issue in the first instance. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981) ("[W]hen the injunctive aspects of a case become moot on appeal of a preliminary injunction, any issue preserved by an injunction bond can generally not be resolved on appeal, but must be resolved in a trial on the merits.").

The Court should defer to the district court's process and at least stay these proceedings, particularly because the preliminary injunction appeal is not only moot, but disfavored. *See DISH Network Corp.*, 653 F.3d at 776 (quoting *Sports Form, Inc.*, 686 F.2d at 753). Reversing the denial of a preliminary injunction provides little guidance in general and now, with the General Election over, the advisory opinion that further hearing would create would likewise provide little permissible guidance. The federal judicial system is structured so that the district court has the greatest competence and opportunity to assess the factual record, particularly when a General Election has occurred that might

supplement the record. *See Purcell*, 549 U.S. at 6 (Stevens, J., concurring); *Harman v. Apfel*, 211 F.3d 1172, 1176 (9th Cir. 2000); *see also Frank v. Walker*, 769 F.3d 494, 499 (7th Cir. 2014) (Williams, J., dissenting from denial of rehearing *en banc*) ("We, as 'the Court of Appeals,' are required to weigh . . . considerations specific to election cases,' and to 'give deference to the discretion of the District Court,' and we must do this because the Supreme Court tells us to.") (citing *Purcell*, 549 U.S. at 4).

Proceeding *en banc* now further cannot be squared with this Court's and Supreme Court precedent on the proper standard of review. *See, e.g.*, *Pierce v. Underwood*, 487 U.S. 552, 557-62 (1988); *United States v. Hinkson*, 585 F.3d 1247, 1263 n.23 (9th Cir. 2009) ("It would make no sense to review the district court's factual finding under a standard other than the abuse of discretion standard . . . If we attempted a de novo review of that factual finding, we would be straying far from our role as an appellate court."); *see also Rita v. United States*, 551 U.S. 338, 362-63 (2007); *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) ("[A]s long as the district court got the law right, it will not be reversed simply because

the appellate court would have arrived at a different result if it had applied the law to the facts of the case.").

Specifically, the abuse-of-discretion standard is itself "limited and deferential," and 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." *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053 (9th Cir. 2013) (noting standard and affirming denial of preliminary injunction); *Sw. Voter Registration Educ. Project,* 344 F.3d at 918 (same). The Merits Panel's conclusion "that the district court did not abuse its discretion in denying [Plaintiffs'] motion for a preliminary injunction," which seems credited by the Supreme Court's order (ER3247), need not be further disturbed by an advisory opinion on a moot issue. Indeed, the Merits Panel opinion is already non-precedential and need not be reinstated, even if the order for rehearing *en banc* is vacated. *See Northern Arapahoe Tribe v. Wyoming*, 429 F.3d 934, 935 (10th Cir. 2005) (vacating order granting rehearing *en banc* as improvidently granted but stating that merits panel opinion remained non-precedential).

Put differently, the "denial of a preliminary injunction lies within the discretion of the district court. . . ." *DISH Network Corp.*, 653 F.3d at 776. On denying rehearing *en banc* in *DISH Network Corp.*, the Court noted the long-contemplated risk—likely elevated in election law cases—that at times "parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation[.]" *Id.* (quoting *Sports Form, Inc.*, 686 F.2d at 753).

The Court counseled, however, that due to the "'limited scope of our review . . . our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits'" and that such appeals often result in "'unnecessary delay to the parties and inefficient use of judicial resources.'" *DISH Network Corp.*, 653 F.3d at 776 (quoting *Sports Form, Inc.*, 686 F.2d at 753, and denying rehearing *en banc*). Of course, *any* preliminary injunction appellate review arrives with the "necessary caveat" that the resulting opinion was "not an adjudication on the merits." *See id.* at 776. Thus, continued proceedings *en banc* not only result in an advisory *en banc* opinion of questionable value to the full merits of the case, but would

also throw into disarray this Court's precedent on selecting the proper standard of review.

The standard remains deferential here: This Court chooses "between the *de novo* and abuse of discretion standards by balancing the peculiar need of a full appellate review, against the argument that the district court's . . . determination requires the exercise of discretion and therefore is due the correlative level of deference on review." *Harman*, 211 F.3d at 1176. Here, the choice was clear—the district court was and is in the best position to review and find facts; it should be allowed to continue to do so. *See Pierce*, 487 U.S. at 560 ("Even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense.").

The standard for appellate review is "'[a]n essential characteristic of [the federal court] system.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 (1996) (alterations in original) (citations omitted). The Supreme Court has recognized "that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Salve Regina Coll. v. Russell*, 499 U.S.

225, 238 (1991) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984)).

Indeed, the choice between *de novo* review and review for abuse of discretion often determines the outcome. *See Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) ("The upshot" is a "practical difference in outcome depending upon which standard is used."). Here, the litigation should be allowed to proceed in the district court without need for continued proceedings *en banc* that would be outcome-determinative for a very short time. *Cf. Sports Form, Inc.*, 686 F.2d at 753 ("We think it likely that this case, for instance, could have proceeded to a disposition on the merits in far less time than it took to process this appeal.").

At this point, very limited discovery and depositions were conducted below, including of a few representatives of named Plaintiffs and their experts. The district court expressly relied on deposition testimony from the Executive Director of the Arizona Democratic Party along with that of a well-known ballot collector. ER0008-9, 0018. And, the district court was in the best position to do such an expedited review of the limited factual record. *See Gonazalez*, 485 F.3d at 1050. It is indeed limited. None of the declarations produced by Plaintiffs so far

are from a voter prevented from or hindered in voting by H.B. 2023. Plaintiffs referenced below alleged "voters in rural and Native American communities who do not have mail service," but did not provide any declarations from anyone living in such a community. ER0019.[8] ("Given the severe burdens Plaintiffs allege H.B. 2023 will place on rural voters without reliable transportation or access to secure outgoing mail, it is telling that they have not produced a single declaration from a voter who fits this profile.").[9] Proceeding *en banc* on such a record is simply not called for and would not, in any event, produce fertile appellate ground for the *en banc* Court's review. *See Gonzalez*, 485 F.3d at 1047 (noting the limitations of the record before it); *see also* Doc. 70-5, at 6 (Arizona's law should "be evaluated on facts rather than speculation.").

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[8] Peterson Zah, former Chairman and First President of the Navajo Nation, is a named Plaintiff and a registered voter in Apache County, but has not provided a declaration below, despite Plaintiffs' allegations in their Complaint "on information and belief" that H.B. 2023 would "directly harm the members of the Navajo Nation . . . ." ER0001, 39.

[9] *Compare* ER2117, ¶¶ 5, 8 (declaration of C. Begay, member of the Navajo Nation, provided below by Intervenor-Defendants, describing partisan practices driving mass ballot collection in rural and tribal communities).

IV. THERE IS NO BENEFIT TO ISSUING A FURTHER AND INHERENTLY ADVISORY OPINION, BECAUSE THIS COURT'S *EN BANC* ORDER AND THE SUPREME COURT'S ORDER STAYING ITS OPERATION PROVIDE THE DISTRICT COURT WITH SIGNIFICANT ADDITIONAL GUIDANCE.

Oftentimes upon revisiting a merits panel decision when considering proceeding *en banc*, the Court determines that starting over from scratch would be overkill and simply amends and supersedes the merits panel decision. *See, e.g.*, *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1237 (9th Cir. 2016) (amending and superseding opinion at 793 F.3d 1122 on denial of rehearing *en banc*); *DISH Network Corp.*, 653 F.3d at 773 (amending and superseding opinion at 636 F.3d 1139 and denying petition for rehearing *en banc*); *Sternberg v. Johnston*, 595 F.3d 937, 939-40 (9th Cir. 2009) (amending and superseding opinion at 582 F.3d 1114 on denial of petition for rehearing and rehearing *en banc*) (overruled by *In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015)). Here, the superseding has already been done by the order for rehearing *en banc*. (Doc. 68).

With this Court's jurisdiction in significant question on the preliminary injunction issue, given that the law is in effect, given the Supreme Court's order, and given that both a Primary and General

Election have occurred under it, the prudent course would be to allow the district court to proceed with the multitude of guidance it now has at hand. This includes, but is not limited to: the Motions Panel's orders (Docs. 27 and 28), the Merits Panel opinion (Doc. 55-1 and 840 F.3d 1057 (9th Cir. 2016) (not precedent)), the *sua sponte en banc* call (Doc. 56), the *en banc* order and related documents (Doc. 68), the order enjoining the law, with its 120-plus pages of concurrence and dissents (Doc. 70), and the Supreme Court's order staying the injunction (ER3247).

This is particularly true given that H.B. 2023 is not an extraordinary law meriting any *en banc* hearing at this point. (Doc. 70-4, at 4 (noting that H.B. 2023 "hew[s] closely to the . . . recommendation" of the bipartisan Commission on Federal Election Reform). The law "applies to all Arizonans. At this stage of the proceedings, appellants have not shown that it is anything other than an even-handed and politically neutral law." *See Gonzalez*, 485 F.3d at 1049.

Multiple other jurisdictions—26 other states,[10] in fact—restrict third-party collection of ballots. ER1053, n.18, *citing* Cal. Elec. Code § 3017 (2016); Colo. Rev. Stat. Ann. § 1-7.5-107; Nev. Rev. Stat. §§ 293C.330, 293C.317; N.M. Stat. Ann. §§ 1-6-10.1, 1-20-7, 3-9-7.[11] Most of those punish it criminally. In fact, Arizona is one of *fifteen states* that attach a felony penalty to violations of their anti-ballot-harvesting laws. *See* ER2084; Ark. Code § 7-1-104; Cal. Elec. Code § 18403; Conn. Gen. Stat. § 9-359; Ga. Code Ann. § 21-2-574; Ind. Code § 3-14-2-16(4); Mich. Comp. Laws § 168.932; Mo. Rev. Stat § 115.304; N.C. Gen. Stat. § 163-

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[10] While other states' laws, as with all statutes, may be open to some interpretation on this point, Judge Bybee's dissent to the order enjoining the law did find at least 21 other states, in addition to Arizona, that do so. (Doc. 70-4, at 1, 5-8.)

[11] *See also* Ala. Code § 17-11-18; Ark. Code §§ 7-5-403, 7-5-411; Conn. Gen. Stat.§ 9-140b; Ga. Code Ann. § 21-2-385; Ind. Code §§ 3-11-10-1, 3-14-2-16(4); La. Stat. Ann. § 18-1308 (2015); Me. Stat. tit. 21-A §§ 753-b, 754-A, 791 (ballot harvesting a felony when committed by a candidate); Mass. Gen. Laws ch. 54 § 92; Mich. Comp. Laws § 168.764a; Miss. Code Ann. § 23-15-719; Mo. Rev. Stat. § 115.291; N.H. Rev. Stat. Ann. § 657:17; N.J. Rev. Stat. §§ 19:63-27, 19:63-16; N.C. Gen. Stat. § 163-231; Ohio Rev. Code § 3509.05; Okla. Stat. Ann. tit. 26 §§ 14-108 (2014), 14-113.2, 14-115.1; 25 Pa. Stat. and Cons. Stat. Ann. § 3146.6; S.C. Code Ann. §§ 7-15-310, 7-15-385 (prohibiting collection by a candidate or campaign staff); Tenn. Code Ann. § 2-6-202; Tex. Elec. Code Ann. §§ 86.006, 86.0051; Va. Code Ann. §§ 24.2-705, 24.2-707, 24.2-709(A); W. Va. Code § 3-3-5.

226.3; Nev. Rev. Stat. § 293C.330; N.J. Rev. Stat. § 19:63-28; N.M. Stat. Ann. §§ 1-6-9, § 1-6-10.1, § 1-20-7; Ohio Rev. Code § 3599.21; 26 Okla. Stat. Ann. § 16-102.1; Tex. Elec. Code Ann. § 86.006(g). There has not been a showing that, in Arizona, or in any other state, these laws are of the type of feared "inequity and essential vice" that appeared to originally motivate the order for rehearing *en banc*.

CONCLUSION

Plaintiffs' appeal is moot. The district court stands ready to proceed on the request for permanent injunctive relief and all authorities counsel that it should be permitted to do so. *See, e.g.*, *Purcell*, 549 U.S. at 5-6 (noting that rehearing *en banc* "can consume further valuable time," and that it "was still necessary, as a procedural matter" for this Court "to give deference to the discretion of the District Court.") This appeal should be dismissed, or at least stayed, so that "appropriate permanent relief can be determined on the basis of a fully developed record, and well before the next general election cycle . . . ." *Gonzalez*, 485 F.3d at 1047.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor-Defendant states it is aware of Case No. 16-16865 pending before this Court, in which Plaintiffs appealed the district court's October 11, 2016, order denying them preliminary injunctive relief on their provisional ballot claims. That case was argued and submitted on October 26, 2016, decided on November 2, 2016, and, on November 4, 2016, ordered reheard *en banc*.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set by the Order dated November 21, 2016 and with the formatting requirements of Fed. R. App. 32, and Circuit Rules 32-3 and 35-4, as modified by Court Order, because this brief contains 6,523 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century font size 14.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 5, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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