No. 16-16698

In the United States Court of Appeals
for the Ninth Circuit

LESLIE FELDMAN, *et al.*,
Plaintiffs/Appellants,

and

BERNIE 2016, INC.,
Plaintiff-Intervenor/Appellant,

v.

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

and

ARIZONA REPUBLICAN PARTY, *et al.*,
Defendant-Intervenors/Appellees.

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

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEFING ON MOOTNESS OF PRELIMINARY INJUNCTION APPEAL

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants 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/Appellant 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. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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INTRODUCTION

As a result of Arizona House Bill 2023 ("HB2023"), "[o]ne of the most popular and effective methods of minority voting [in Arizona] is now a crime." Doc. 55-2 at 29 (Thomas, C.J., dissenting) ("Dissent").[1] HB2023 made it a *felony* for Arizonans to engage in "ballot collection," a longstanding practice in which thousands of voters—and, as the unrefuted evidence in the case shows, particularly Arizona's minority 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. Properly evaluated, it is plain that HB2023 violates Section 2 of the Voting Rights Act ("VRA") and the Fourteenth Amendment and, moreover, that the law results in the abridgement or denial of the fundamental right to vote of thousands of Arizona's voters, including many of Plaintiffs' members and constituents. While it is too late to protect the Arizona citizens whose rights were abridged or denied in the November 2016 election, it is not too late for this Court to protect the rights of Arizonans who will be harmed by HB2023 in the elections that will occur before the district court issues a final decision in this case. Accordingly, Plaintiffs' appeal is not moot.

Prior to the November 2016 election, Plaintiffs sought a preliminary injunction from the district court, asking that the court enjoin the enforcement of HB2023 not only during the 2016 Primary and General elections, but until the issuance of the district court's final decision on the merits. The reasons for this

[1] Unless otherwise noted, all "Doc." citations refer to the docket in the instant appeal, *Feldman, et al. v. Arizona Secretary of State, et al.*, No. 16-16698.

request for relief are clear. The harm posed by HB2023 did not cease when the last ballot was cast on November 8, 2016. Rather, it will persist in every Arizona election—including elections scheduled as early as March 2017—in which Arizona allows voting by mail, but restricts the collection of such ballots under HB2023. The only way to provide meaningful relief is for this Court to proceed with *en banc* review of Plaintiffs' appeal and vacate and reverse the district court's decision, remanding it with instructions to the district court to enjoin enforcement of HB2023. Without entry of a preliminary injunction, the rights of Arizonans will be violated by HB2023 in upcoming elections that will occur before the district court can issue a final decision in this case, and certainly before this Court could hear an appeal of such an order.

FACTUAL AND PROCEDURAL BACKGROUND

Arizona's voters have become increasingly reliant on early voting by mail. *See* ER967-69, 483, 487. As this Court has recognized, "80% of the [Arizona] electorate uses early absentee voting as the method by which they cast their ballots." Dissent at 8-9 (recognized by this Court in its Order granting *en banc* rehearing at page 3, Doc. 70-1). And for thousands of Arizona's minority voters, voting absentee (and voting at all) is only accomplished with the aid of a ballot collector. Dissent at 1-19.

Nevertheless, on March 9, 2016, the Arizona governor signed HB2023 into law, a sweeping prohibition on the collection of absentee ballots which not only severely burdens the rights of Arizona voters, but threatens to subject thousands of Arizona citizens to harsh criminal penalties. Less than six weeks after HB2023

was signed into law, Plaintiffs filed the underlying suit, alleging violations of Section 2 of the VRA and the Constitution. ER28. Plaintiffs also quickly sought a preliminary injunction, requesting that the district court enjoin HB2023 until the issuance of its final decision in the case. ER168-69; ER3-4; ER164-65. The district court denied Plaintiffs' motion on September 23. ER1.

Within hours of the district court's denial, Plaintiffs filed a notice of appeal, ER2856, and an expedited appeal of the district court's denial of Plaintiffs' motion for preliminary injunction ensued. *See* Doc. 28; Doc. 70-1 at 6 ("plaintiffs have pursued expedited consideration of their claims at every stage of the litigation"). On October 28, a merits panel affirmed the district court's denial of injunctive relief by a 2-1 vote. Doc. 55-1, 55-2. On October 29, a judge *sua sponte* called for a vote to rehear the case *en banc*. Doc. 56. This Court granted rehearing *en banc* on November 2, Doc. 68, and on November 4, it set oral argument for the *en banc* hearing for January 2017. Doc. 71. On November 4 the *en banc* court also granted Plaintiffs' motion for injunction pending appeal, enjoining the enforcement of HB2023 for the November 2016 election. Doc. 70-1. Although the United States Supreme Court later stayed the injunction, *see* Docket Entry Granting Application to Stay, Case No. 16A460, Nov. 5, 2016, during the time that this Court's injunction was in effect ballots were collected across Arizona.[2]

[2] *See, 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

On November 8, 2016 the General Election took place. On November 21, this Court ordered the parties to submit supplemental briefing addressing: (1) whether the completion of the 2016 general election moots Plaintiffs' appeal of the district court's order denying preliminary relief; (2) what relief should be provided if Plaintiffs' appeal is not moot; and (3) whether this Court should stay its proceedings pending the district court's entry of judgment on Plaintiffs' request for permanent injunctive relief. Doc. 77. Plaintiffs respectfully submit the instant brief in response to the Court's request.

ARGUMENT

I. Plaintiffs' Appeal Of The District Court's Denial Of Its Motion For Preliminary Injunction Is Not Moot

The completion of the 2016 General Election does not moot Plaintiffs' appeal. Elections in Arizona are certain to take place prior to the district court's issuance of a final determination, and, consequently, Plaintiffs continue to face imminent and irreparable harm as a result of HB2023. As such, a preliminary injunction is not only warranted, but remains necessary to protect Plaintiffs, their

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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"); 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, @NatAmericanVote, 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").

members and constituents, and thousands of Arizona voters from the unconstitutional burdens imposed by HB2023. Moreover, because this harm remains a live threat, this Court can fashion meaningful relief for Plaintiffs. Indeed, it can grant precisely the relief that Plaintiffs sought in their underlying motion—an order preliminarily enjoining the enforcement of HB2023 until the issuance of a final determination by the district court. *See* ER168-69; ER3-4; ER164-65. Accordingly, this appeal is not moot, and this Court has jurisdiction to hear Plaintiffs' appeal as well as to enjoin enforcement of HB2023 until the district court issues its final determination on the merits.

"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, 1009–10 (9th Cir. 2016); *see also Tate v. Univ. Med. Ctr. of S. Nevada*, 606 F.3d 631, 634 (9th Cir. 2010) ("A claim is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (quotation marks omitted). As this Court has explained, mootness "is a flexible justiciability doctrine that allows review 'if there are present effects that are legally significant.'" *Flint v. Dennison*, 488 F.3d 816, 823 (9th Cir. 2007) (quoting *Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir.2003)); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (describing the Article III mootness doctrine as being of "flexible character"). "'[T]he question is not whether the precise relief sought at the time of the application for an injunction was filed is still available. The question is whether there can be any effective relief.'" *Amerco v. N.L.R.B.*, 458 F.3d 883, 886 (9th Cir.

2006) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1157 (9th Cir.2006) (internal quotation marks omitted)). "Where a court retains the ability to fashion some form of meaningful relief between the parties, an appeal is not moot, and the court retains jurisdiction." *Flint*, 488 F.3d at 823 (internal quotation marks omitted). A plaintiff's broad request for preliminary relief may be construed "to avoid mootness." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065-66 (9th Cir. 2002) (citations omitted).

Here, Plaintiffs' motion for preliminary injunction was not limited to the 2016 General Election. Rather, it seeks to enjoin Defendants from enforcing HB2023 until the issuance of a final judgment by the district court. ER168-69; ER3-4; ER164-65. Because this Court can still issue that relief in this appeal, Plaintiffs' appeal is not moot.[3] *See, e.g.*, *Neighbors of Cuddy Mountain*, 303 F.3d at 1065-66 (explaining in a logging suit that the cutting of timber did not moot the

[3] This case is distinguishable from election cases where mootness was found due to the completion of an election. In those cases, almost across the board, mootness is found because once that election had passed the harm had already occurred and the Court could not provide relief. *See, e.g.*, *Akina*, 835 F.3d at 1009–10 (finding appeal of denial of preliminary injunction moot where request for relief was limited to an election that had been cancelled *and* there was no argument that similar elections would occur in the future); *Watkins v. Mabus*, 502 U.S. 954 (1991) (finding that the completion of an election rendered an appeal moot with regard to the specific relief sought, i.e., enjoining the specific election that had occurred); *Thournir v. Buchanan*, 710 F.2d 1461, 1463 (10th Cir. 1983) (finding an election case moot where the only relief requested was that a candidate's name be placed on the ballot for a particular election, which had already passed by the time the appeal occurred, thus the appellate court could no longer effectively prevent the harm from occurring). In contrast, in the instant case relief can be granted beyond the 2016 election because harm will continue to occur after that election.

appeal where meaningful relief could still be provided). *Cf. Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 779-80 (9th Cir. 2006) (finding under the capable of repetition yet evading review exception that the 2002 election did not render plaintiffs' suit moot where there was sufficient likelihood that plaintiff would again be required to comply with the challenged law); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003) (same); *Porter v. Jones*, 319 F.3d 483, 489-90 (9th Cir. 2003) ("Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws—including the one under consideration here—could never reach appellate review.") (citation omitted); *see also Wilson v. Birnberg*, 667 F.3d F.3d 591, 596 (5th Cir. 2012) ("we held that an election case is not moot when 'other individuals certainly will be affected' by the complained-of injury.") (quoting *Ctr. For Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006)).

Further, the continuing need for preliminary relief is clear. Elections are already scheduled to take place in Arizona as early as March and May of 2017.[4]

[4] Defendants may argue that these elections are inconsequential to the actual controversy between the parties because the Arizona Democratic Party ("ADP") primarily utilizes ballot collection during general elections and because neither the Hillary for America nor Kirkpatrick Campaigns will be participating in these elections. These arguments are red herrings. The record demonstrates that use of ballot collection is not limited to general elections. *See* ER1198-99 (Latino-led advocacy organization collected ballots during city council races, a recall election, and special elections); ER219 (Latino-led advocacy organization collected nine thousand ballots during 2012 sheriff's election alone); *id.* (discussing use of ballot collection in special elections). Regardless of whether ADP utilizes ballot collection outside of general elections, ADP has maintained, and the evidence

See Elections, Goodyear Arizona, http://www.goodyearaz.gov/government /elections (last visited Dec. 2, , 2016) (explaining that primary elections for the mayor and three city council seats will take place on March 14, and the general election will occur on May 16, 2017). It is anticipated that these elections will utilize vote by mail. *See id.* (explaining that Maricopa County supports Goodyear's elections by counting ballots, including, the verification of mail-in ballots).

Likewise, citywide elections are scheduled in Phoenix and Tucson as early as August 2017. *Elections Information*, City of Phoenix, https://www.phoenix.gov/cityclerk/services/election-information (last visited Nov. 29, 2016); *About City of Tucson Elections*, https://www.tucsonaz.gov/clerks/about-city-tucson-elections (last visited Nov. 27, 2016). The Tucson election is likely to be entirely vote by mail, further necessitating ballot collection and exacerbating the harm that will be caused by HB2023.[5] *See* Tucson, Arizona Code of Ordinances, Art. III § 12-38(a) ("The City of Tucson shall conduct all elections as vote by mail elections, unless otherwise prescribed by mayor and council."). Moreover, historically, counties and cities across Arizona have held multiple elections in non-presidential years,[6] demonstrating that it is not only highly likely, but virtually

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demonstrates, that ballot collection is primarily used by Hispanics and Native Americans, two key constituencies of ADP and members on whose behalf ADP has brought this suit and these claims. ER42.

[5] In Tucson's August 2015 primary, 33,010 Arizona voters voted by mail. *Official Canvass*, City of Tucson August 25, 2015 Primary, *available at* https:// www.tucsonaz.gov/apps/elections/current.html.

[6] In 2015 alone, Maricopa County oversaw elections in March, August, and November on ballot measures, recalls, the primary election, and the general

certain that elections will occur in Arizona before the issuance of a final ruling by the district court. Absent a reversal of the district court's denial of Plaintiffs' motion for preliminary injunction by this Court, HB2023 will continue to criminalize and prevent the collection of mail-in ballots and unconstitutionally burden the rights of Plaintiffs and other Arizona voters prior to the district court's final determination on the merits.

In particular, the history of this case demonstrates that it would be nearly impossible for the district court to issue a permanent injunction before the next scheduled Arizona election in 2017.[7] Specifically, the underlying case is currently

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election. *See* Election Results Archived, Maricopa County Recorder's Office, http://recorder.maricopa.gov/electionresults/archivedelectionresults.aspx (last visited Dec. 2, 2016); http://recorder.maricopa.gov/electionarchives/2015/03-11-2015%20Final%20Summary%20Report.pdf (March election); http://recorder.maricopa.gov/electionarchives/2015/08-25-2015%20Final%20Summary%20Report.pdf (August election); http://recorder.maricopa.gov/electionarchives/2015/11-03-2015%20Final%20Summary%20Report.pdf (November election). Tucson held a primary and general election for its mayor and several city council seats. *See* City of Tucson General Election Results, City of Tucson, https://www.tucsonaz.gov/files/clerks/2015_General_Election_Canvass.pdf (last visited Dec. 2, 2016). In 2014, Arizona held primary and general elections for the U.S. House, state executives, state senate, state house, statewide ballot measures, school boards and state courts. *See* 2014 State of Arizona Official Canvasses, http://apps.azsos.gov/election/2014/primary/Canvass.pdf (primary), http://apps.azsos.gov/ election/2014/general/Canvass2014GE.pdf (general). In 2013, Tucson held elections on ballot measures and held primary and general elections for city council seats. *Primary Election Summary Report*, City of Tucson, https://www.tucsonaz.gov/files/clerks/2013Election/GEMS_ELECTION_RESULTS.pdf; *General Election Summary Report*, City of Tucson, https://www.tucsonaz.gov/apps/elections/archive/20131105/current.html (last visited Dec. 2, 2016).

[7] Special elections are called in the event of a vacancy, withdrawal, or death and can be called at any time. For example, on June 15, 2016, the Phoenix City Council

stayed until this Court issues its decision on this appeal, *see Feldman, et al. v. Arizona Secretary of State, et al.*, Case No. 16-1065 (D. Ariz.), Doc. 225. Even assuming that this Court were to issue its decision as early as December 6, 2016, the day after this briefing is submitted, given the litigation timeline set out in previous schedules proposed by the parties, *see Feldman, et al. v. Arizona Secretary of State, et al.*, Case No. 16-1065 (D. Ariz.), Doc. 223-1, at best, it would be at least late May or June before a trial date would even be set. *See id*. Further, the *expedited* preliminary proceedings in this case took five and a half months to complete, and there is simply no reason to conclude that a full trial on the merits would move any faster (and, indeed, it would likely move slower) than the preliminary injunction briefing, hearing, and decision did. Indeed, it is highly likely that—absent a preliminary injunction—Plaintiffs would not receive relief even prior to the later elections discussed above, let alone the election coming up in March.[8] Accordingly, there can be no question that even after November 2016 a live controversy remains and preliminary relief is still necessary to prevent imminent harm to Plaintiffs. Moreover, this Court, by hearing this appeal and reversing the district court's denial of Plaintiffs' motion, can provide Plaintiffs not

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called for a special election in short order to fill a City Council vacancy, to be held within five months. *See* City of Phoenix Ordinance S-42631, https://apps-secure.phoenix.gov/PublicRecordsSearch/Home/RenderPDF/?id=rcifb7s71z8EfxnVO1z5PAV5P2GdiU8yxfH5pJCyM2E= (last visited Dec. 2, 2016).

[8] As this Court is already aware, given that the *Purcell* doctrine often prevents the issuance of any relief too close to an election, waiting to see if the district court issues its final order prior to March or August 2017 would also be imprudent.

only with "some form of meaningful relief," *Flint*, 488 F.3d at 823 (citation omitted), but precisely the preliminary relief they requested in their underlying motion. Thus, Plaintiffs' appeal of the district court's denial of its motion for preliminary injunction is not moot, and this Court has jurisdiction to hear Plaintiffs' appeal.

II. The Proper Relief Is To Reverse And Vacate The District Court's Order, And Remand To The District Court With Instructions To Enjoin Enforcement of HB2023 Until A Decision On The Merits Issues

A district court's denial of a plaintiff's motion for preliminary injunction may be reversed where the district court has abused its discretion, which occurs when a court "applies an incorrect legal rule or relies upon a factual finding that is illogical, implausible, or without support in inference that may be drawn from the record." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quotation marks and citation omitted); *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 314 (9th Cir. 1978) (explaining that reversal occurs where there is an abuse of discretion). In the Ninth Circuit, when the court finds that an abuse of discretion has occurred, it generally issues one of two forms of relief, either (1) reversing and remanding to the district court for further proceedings in line with the circuit court's opinion, *see, e.g.*, *Arc of California v. Douglas*, 757 F.3d 975, 992 (9th Cir. 2014); or (2) reversing or vacating the district court's decision, and remanding the case to the district court with instructions to issue a preliminary injunction as directed. *See, e.g.*, *Arizona Dream Act Coal.*, 757 F.3d at 1069.

This Court should reverse the district court's order and remand the case for issuance of a preliminary injunction. As explained in the dissent to the panel opinion, which this Court adopted in its ruling on Plaintiffs' motion for preliminary injunction pending appeal, Doc. 70-1 at 3, the district court abused its discretion in denying Plaintiffs' motion for preliminary injunction. *See generally* Dissent. Importantly, this abuse of discretion was not premised upon disputes with or misinterpretations of the underlying facts surrounding HB2023. The pertinent factual evidence in front of the district court was largely "uncontradicted." Dissent at 5, 10-11. Rather, the district court erroneously applied Section 2 and Fourteenth Amendment law. *Id.* at 1-29. As such, unlike reviews of denials of preliminary injunctions which involve factual questions and, therefore, typically require further proceedings by the district court, *see, e.g.*, *Arc of California*, 757 F.3d at 992 ("Where the propriety of an injunction raises intensely factual issues, the matter should be decided in the first instance by the district court." (quotation marks and citations omitted)), this Court should find an abuse of discretion based on the district court's legal errors, and, consequently, there will be nothing for the district court to do on remand, outside of issuing an injunction in keeping with this Court's decision. *See, e.g.*, *Arizona Dream Act Coal.*, 757 F.3d at 1069 (reversing and remanding with instructions to enter a preliminary injunction in an equal protection case where the district court erred by applying the incorrect legal standard); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 995 (9th Cir. 2006) (reversing and remanding with instructions to enter a preliminary injunction where the district court erroneously applied the law); *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920,

932 (9th Cir. 2003) (same). Thus, the proper course of action is to reverse the district court and order that a preliminary injunction be entered enjoining the enforcement of HB2023 until the district court issues a final decision on the merits.[9] Moreover, given the fundamental rights at stake, and the need to prevent imminent and irreparable injury to Plaintiffs, instruction to the district court to issue an injunction (rather than to engage in additional analysis), will expedite relief to Plaintiffs both on a preliminary and permanent basis, by allowing the district court to focus wholly on the underlying merits determination rather than engaging in additional analysis of preliminary issues.[10]

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[9] This course of action is not limited to the Ninth Circuit, but has been accepted by the Supreme Court and utilized by other circuit courts as well. *Elrod v. Burns*, 427 U.S. 347, 350 (1976) (affirming the Seventh Circuit's grant of a preliminary injunction the district court had denied); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 248-49 (4th Cir. 2014) ("*LOWV*") (explaining that appellate courts have the power to vacate and remand a denial of a preliminary injunction with instructions to enter an injunction until the conclusion of a full hearing on the merits, and doing the same in a case challenging election practices) *cert. denied*, 135 S. Ct. 1735 (2015); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 608 (7th Cir.2012) (reversing and remanding with instructions to enter a preliminary injunction); *Patton v. Dole*, 806 F.2d 24, 31 (2d Cir. 1986) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction.").

[10] While it is Plaintiffs' position that this appeal is not moot, if this Court were to find to the contrary, because the appeal would be mooted by a circumstance beyond the parties' control, the proper course of action would be to remand the case to the district court with instructions to vacate the September 23, 2016 order. *See, e.g.*, *United States v. Munsingwear*, 340 U.S. 36, 39 (1950) ("The established practice of the Court [where a case] has become moot while . . . pending our decision . . . is to reverse or vacate the judgment below and remand with a direction to dismiss."); *accord, e.g.*, *IBTCWHA Local Union No. 2702 v. Western*

III. A Stay of This Court's Proceedings Until The District Court's Issuance Of A Permanent Injunction Is Not Warranted And Would Subject Plaintiffs To Irreparable Harm

As discussed *supra*, absent relief ordered by this Court, Plaintiffs, their members and constituents, and thousands of Arizona voters will be harmed by HB2023 as early as March 2017, and are at imminent risk of being harmed in at least four additional elections before any permanent injunction can be issued by the district court. This Court has repeatedly recognized that "[t]he deprivation of constitutional rights unquestionably constitutes irreparable injury." *Planned Parenthood of Ariz. v Humble*, 753 F.3d 905, 911 (9th Cir. 2014). And "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury," recognizing that, "once the election occurs, there can be no do-over and no redress." *LOWV*, 769 F.3d at 247. Accordingly, a decision by this Court to stay Plaintiffs' appeal until the district court's final determination would effectively cut off the only route to relief available to Plaintiffs for the ensuing elections, ensuring that Plaintiffs will, yet again, be subjected to the irreparable, unconstitutional burdens imposed by HB2023, a law that this Court has already found to inflict substantial burdens on voters, and has noted warrants meaningful review. Doc. 70-1 at 8 n.1; *see also* Dissent at 5. As such, this Court should not stay this appeal

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Air Lines, Inc., et al., 854 F.2d 1178, 1178 (9th Cir.1988) (dismissing an appeal from denial of an injunction prohibiting merger of two airlines where the merger occurred while appeal was pending); *Local No. 44 of Int'l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada v. Int'l All. of Theatrical Stage Employees & Moving Picture Mach. Operators of U.S. & Canada*, 886 F.2d 1320 (9th Cir. 1989) (dismissing appeal from granting of preliminary injunction as moot and remanding to the district court with instructions to vacate).

until the issuance of the district court's permanent injunction but, rather, hear this appeal and issue a preliminary injunction protecting Plaintiffs from further irreparable harm.

CONCLUSION

Accordingly, Plaintiffs respectfully request that this Court find that Plaintiffs' appeal of the district court's denial of Plaintiffs' motion for preliminary injunction is not moot. Further, Plaintiffs respectfully request that this Court hear Plaintiffs' appeal and, ultimately, issue an order reversing and vacating the district court's denial of a preliminary injunction, and remanding the case back to the district court with instructions to the district court to enjoin the enforcement of HB2023 until the conclusion of a full trial on the merits.

RESPECTFULLY SUBMITTED this 5th day of December, 2016.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs hereby inform the Court that they have also appealed an order issued by the district court on October 11, 2016, denying Plaintiffs' motion for preliminary injunction on the rejection of provisional ballots cast out of precinct. That appeal is currently pending before this Court under Case No. 16-16865.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on 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.

s/ *Sarah R. Gonski*

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by the Clerk's Order at Doc. 77, and is jointly filed by separately represented parties. The brief contains 4,353 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Amanda R. Callais*