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UNITED STATES DISCTRICT COURT
DISTRICT OF ARIZONA

Leslie Feldman, et al., Plaintiffs, v. Arizona Secretary of State's Office, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OF HB2023**

Secretary of State Michele Reagan and Attorney General Mark Brnovich request that this Court deny Plaintiffs' Motion for a Preliminary Injunction of HB2023 because Plaintiffs have failed to demonstrate the need for this extraordinary relief. Although the Secretary and the Attorney General are named as Defendants on different claims, they agree that Plaintiffs have not shown a likelihood of success or an irreparable harm on the Section 2 claim or any of the constitutional claims. Plaintiffs have not shown the

discriminatory impact or severe burden necessary to succeed on their claims, relying on speculation rather than demonstrable harm. And Plaintiffs ignore Arizona's compelling interest in ensuring the integrity of elections and refuse to acknowledge the reasonable steps taken in HB2023 to ensure the integrity of the early voting process—a process that has played an ever-increasing role in Arizona's elections. Plaintiffs' pre-enforcement request for a preliminary injunction against HB2023 must therefore be denied.

I. Background

For many years, Arizona has been a leader among the states in increasing both the opportunity to vote and the convenience of voting for all registered voters. Ex. 1, ¶¶ 4-19; Ex. 2.[1] In addition to voting at polling places on Election Day, the State permits early voting during the 27 days before an election. A.R.S. § 16-542; Ex. 1, ¶¶ 4-8; Ex. 3. ¶¶ 7-8, 10-11. Early voting may be done in person or by mail. Ex. 1, ¶¶ 5, 15. The State also has a Permanent Early Voting List ("PEVL"). A.R.S. § 16-544. PEVL voters receive a mail-in ballot for every election in which they are entitled to vote without needing to request an early ballot for each election. *Id.* The county recorders accept early ballots delivered by mail up until 7:00 pm on Election Day. A.R.S. § 16-548(A); Ex. 3, ¶ 11.

For voters who prefer to vote in person, many counties operate multiple in-person early voting sites, some of which are open on Saturdays. Ex. 1, ¶¶ 16-17; Ex. 3 ¶ 10; Ex. 4. If a voter received an early ballot by mail, but did not mail the ballot back to the county recorder in time to be received by 7:00 pm on Election Day, the voter may drop the sealed ballot at any polling place or the county recorder's office while the polls are open. A.R.S. § 16-548(A); Ex. 1, ¶ 16; Ex. 3, ¶ 11.

In 2016, Arizona enacted HB2023 to regulate the collection of early ballots. The Arizona Legislature considered HB2023 in the normal course of its legislative process. Ex. 5. It was introduced at the beginning of the legislative session and assigned to

[1] All references to numbered exhibits are to the exhibits attached to the Declaration of Karen J. Hartman-Tellez, submitted herewith.

committee. *Id.* Numerous times throughout the debates on HB2023, legislators stated that the bill was directed to the integrity of the elections process. *See* Ex. 6, at 9:11-10:5; 28:22-30:2; 35:9-36:8; 73:11-21. After robust legislative debate, the bill passed and the Governor signed it. Ex. 5.

HB2023 does not limit any of the foregoing means of voting. It only limits who may return a ballot. HB2023 allows any member of a voter's family or household to return an early ballot for the voter. Ex. 7. In addition, voters may give their ballots to their caregiver or to an election worker performing official duties. *Id.* If the voter cannot go to the polls because of an illness or disability, the voter can request a special election board to facilitate voting. A.R.S. § 16-549; Ex 1, ¶ 18; Ex. 3, ¶ 12.

II. Legal Standard

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In order to justify such extraordinary relief, a plaintiff must show "(1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in her favor, and (4) an injunction is in the public interest." *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). "[T]he less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). Plaintiffs bear a heavy burden in attempting to show they are entitled to injunctive relief. *Ctr. for Competitive Politics v. Harr*is, 784 F.3d 1307, 1312 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015).

III. Plaintiffs Have Not Shown a Likelihood of Success on the Merits.

A. Plaintiffs Have Not Carried the Burden on Their Section 2 Claim.

Plaintiffs' Section 2 claim relies on misperceptions of the legal standard and

misinterpretation of the relevant facts.[2] If Plaintiffs were to succeed here, it would effectively permit Plaintiffs to invalidate any voting procedure or practice in Arizona that they chose to challenge. Viewed under the appropriate legal standard, Plaintiffs have not met their burden to show a likelihood of success on their Section 2 claim.

1. Plaintiffs Misconstrue the Applicable Standard for Section 2.

Section 2 prohibits voting practices and procedures "which result[ ] 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 of Section 2 therefore requires a showing that members of a group protected by Section 2 "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Where, as here, Plaintiffs allege vote denial under Section 2, "proof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) ("*Gonzalez II*") (internal quotation marks omitted). Put another way, "[t]o prove a § 2 violation, [Plaintiffs have] to establish that this requirement, as applied to Latinos, caused a prohibited discriminatory result." *Id.* at 407.

There are thus two requirements: a discriminatory impact and a causal connection. *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 240 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). Plaintiffs rely on factors from the Senate Report to the 1982 VRA amendments, Doc. 85, at 8-10, but the Senate factors by themselves do not show a Section 2 violation. Even in a traditional Section 2 claim,

[2] The Secretary also notes that Plaintiffs named incorrect defendants for their Section 2 claim. "It is well-established that . . . the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Bronson v. Swensen*, 500 F.3d 1099, 1110 (10th Cir. 2007). Plaintiffs challenge HB2023, but the only method for enforcing HB2023 is through a criminal proceeding. *See* Ex. 7. The Secretary does not enforce criminal laws. *See generally* A.R.S. § 41-121; Title 16.

plaintiffs had to make a threshold showing before moving on to the Senate factors.[3] *See, e.g.*, *Old Person v. Brown*, 312 F.3d 1036, 1040-41 (9th Cir. 2002).

And, as Section 2(b) makes clear, the Court must assess the opportunity provided to vote—not whether individuals chose to use the opportunity provided. *See Frank*, 768 F.3d at 753. "The question is not whether the voting law could be made more convenient—they virtually always can be. Rather, the question is whether the electoral system as applied treats protected classes the same as everyone else, determined by the totality of the circumstances." *McCrory*, 2016 WL 1650774, at *117.

2. Plaintiffs Have Not Shown a Discriminatory Impact.

Plaintiffs have not shown that the limitations on ballot collection in HB2023 will have a discriminatory impact. "[T]he challenged device must be shown actually to impair the ability of minority voters to elect representatives of their choice." *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992). Where the "plaintiffs did not establish that the [challenged law] resulted in plaintiffs having less opportunity to elect legislators of their choice," the claim must fail. *Id.* at 891 (internal quotation marks omitted); *see also Chisom v. Roemer*, 501 U.S. 380, 397-98 (1991) (holding that a Section 2 claim must show "an abridgment of the opportunity to participate in the political process and to elect representatives of one's choice").

Here, Plaintiffs have not offered any probative evidence of discriminatory impact. Plaintiffs have not alleged that HB2023 will have a statistically significant effect on minority voters' opportunity to participate in the political process and elect representatives of their choice. Plaintiffs refer to "thousands" of ballots being collected

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[3] The Plaintiffs also ignore key differences between the claims contemplated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and their claim. District drawing was the primary concern in *Gingles*. *See League of Women Voters*, 769 F.3d at 239. While Section 2 sweeps more broadly than district drawing, courts must be cautious in applying the Senate Factors to other contexts. *See, e.g.*, *N.C. State Conference of the NAACP v. McCrory*, 1:13CV658, 2016 WL 1650774, at *75 (M.D.N.C. Apr. 25, 2016); *see also Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

from minority voters, yet they acknowledge that more than 1.3 million voters requested early ballots in Maricopa County alone in 2012. Doc. 85, at 1-2. As one of Plaintiffs' declarants admitted, she has "no way of knowing" how many voters, if any, HB2023 will impact. Ex. 8, at 40:25-41:2. Given that Plaintiffs and their declarants acknowledge that ballot collection may facilitate voting for all voters, not just minority voters, they have not shown a discriminatory impact. *See* Doc. 85, at 3 ("Ballot collection has guarded against the disenfranchisement of voters who do not or cannot mail their ballot in time, whatever the reason."); Doc. 86, ¶ 17 (stating that "groups from all ideological backgrounds use ballot collection"); *see also* Doc. 87, ¶ 8 (stating that burden falls "particularly on those that are elderly and homebound"); Doc. 89, ¶¶ 4, 8-9 (stating that AFL-CIO collects from "members of all political persuasions"). Plaintiffs have not identified any individual, much less an identifiable group, whose opportunity to participate in the political process and elect representatives of their choice will be demonstrably diminished.[4] Plaintiffs thus fail at the first step. *See Frank*, 768 F.3d at 755 (holding that the plaintiffs "fail[ed] at the first step, because in Wisconsin everyone has the same opportunity to get a qualifying photo ID").

Plaintiffs also ignore the many opportunities that Arizona provides its voters to cast their ballots. HB2023 does not limit these opportunities in any meaningful way. In fact, it does not prohibit any method of actually casting a ballot. Plaintiffs instead assert that HB2023 has a discriminatory impact because it makes it more difficult for some voters to take advantage of private individuals' offer to help them vote. To show this kind of discriminatory impact, Plaintiffs should at least identify the speculative population of those minority voters who (1) do not vote in person, (2) do not take advantage of early in-person voting, (3) do not mail in their ballot or drop it off at the polling location, (4) do not give their ballot to a family member, household member,

[4] For example, Plaintiffs rely heavily on Rep. Fernandez's assertions about the voters in her district. Doc. 85, at 3, 5, 8-9. But both Democrats running for state representative in her district are Hispanic, and the only Republican running is a write-in. Ex. 9.

caregiver, or election worker, and (5) do not use the special election board procedure. Therefore, "on the basis of the evidence in the record it is not possible to quantify . . . the magnitude of the burden on this narrow class of voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 200 (2008) (addressing a constitutional claim); *see also Frank*, 768 F.3d at 753; *Lee v. Va. State Bd. of Elections*, No. 3:15CV357-HEH, 2016 WL 2946181, at * 24 (May 19, 2016).

3. Plaintiffs Have Not Shown a Causal Connection.

Even if Plaintiffs had shown a discriminatory impact, they must still show that HB2023 "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47; *see also Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 316 (3d Cir. 1994) (rejecting reliance on societal factors where "the record reveals no link between the societal conditions and factors . . . and the electoral practice"); *McCrory*, 2016 WL 1650774, at *83 (holding that the history of discrimination factor, for example, must be connected to the challenged practice).

Here, Plaintiffs do not connect their analysis of the Senate factors to HB2023. For example, Plaintiffs offer a conclusory quotation from *Gingles* with regard to discriminatory voting practices and procedures. Doc. 85, at 9-10. Similarly, Plaintiffs assert that Arizona "has a demonstrated history of racially polarized voting" without any attempt to tie the assertion to HB2023. *Id.* at 10. For other factors, Plaintiffs attempt to show a link to HB2023 that is so tenuous that the same logic could be applied to literally any electoral practice. *See, e.g.*, *id.* at 9 (arguing that Senate factor 4 is satisfied because "disparities make participation in Arizona's elections more burdensome"). These generalizations do not establish that HB2023 interacts with evidence of any of the Senate factors. *See Frank*, 768 F.3d at 754 (rejecting interpretation of Section 2 that would "sweep[ ] away almost all registration and voting rules").

Plaintiffs also misinterpret many factors and rely on flawed evidence. Plaintiffs rely on distant history to prove official discrimination in voting related practices, but fail

to show a present-day impact.[5] Plaintiffs emphasize Arizona's coverage under Section 5 and 2004's Proposition 200, but in forty years of Section 5 coverage,[6] the only unwithdrawn DOJ objections to statewide practices were to redistricting plans. Ex. 12; Ex. 10, at 149:14-22, 154:12-20; Ex. 11, at 46:12-21, 50:24-51:15, 52:5-14. The DOJ approved the current redistricting plan on the first submission, and the redistricting process "put a priority on compliance with the Voting Rights Act and, in particular, on obtaining preclearance on the first attempt." *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1055 (D. Ariz. 2014), *aff'd*, 136 S. Ct. 1301 (2016). The DOJ also precleared Proposition 200's registration and voter ID requirements, and the Ninth Circuit rejected a Section 2 claim against the proposition.[7] Ex. 13; Ex. 10, at 160:6-10, 162:2-9; Ex. 11, at 30:11-14, 32:6:16; *Gonzalez II*, 677 F.3d at 407.

Errors infect Plaintiffs' articulation of the other factors as well. They provide arbitrary selections from limited races to demonstrate racially polarized voting, citing (1) exit polls only from elections where the margin of victory was narrow, and (2) draft analysis of proposed majority-minority districts from the 2011 redistricting process. Ex. 10, at 186:1-188:11, 189:22-192:5, 195:15-196:10. This falls far short of the standard required to prove racially polarized voting. *See, e.g.*, *Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1270 (M.D. Ala. 2013), *vacated and remanded on other grounds*, 135 S. Ct. 1257 (2015) (holding that "Lichtman did not conduct any statistical analysis to determine whether factors other than race were responsible for the voting patterns"); *see also Johnson v. Mortham*, 926 F. Supp. 1460, 1474-75 (rejecting Dr. Lichtman's racial polarization analysis).

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[5] Plaintiffs' experts also cite a variety of other allegedly discriminatory policies, but admitted that they did not assess how they affected political participation. *See, e.g.*, Ex. 10, at 167:15-168:1, 168:5-169:6, 170:18-172:21; Ex. 11, at 23:2-25, 57:9-23, 58:461:9.

[6] The Supreme Court has made clear that "[t]he inquiries under §§ 2 and 5 are different." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009)

[7] Plaintiffs other allegations of official discrimination suffer similar flaws. Ex. 10, at 157:1-6, 158:15-160:2, 162:2-9, 163:4-165:6, 166:20-170:17; Ex. 11, at 36:12-22, 40:6-10, 42:16-19.

Plaintiffs' evidence of discriminatory voting practices under Senate factor 3, meanwhile, ignores *Gonzalez II*'s determination that those laws do not violate Section 2 and bizarrely relies on the size of Arizona's congressional and legislative districts when the size of the congressional districts is mandated by federal law and one person, one vote.[8] Ex. 10, at 197:12-199:1. And Plaintiffs suggest that data on wait times at polling places for fifteen minority voters across two election cycles shows a discriminatory voting policy, but Plaintiffs cannot identify a policy that caused the wait, the polling places they waited at, or the distribution of the voters across polling places.[9] Ex. 10, at 202:4-204:13.

Plaintiffs also argue that the comments of a private citizen in a hearing about HB2023 constitute a racial appeal under Senate factor 6, which looks instead to racial appeals in political campaigns.[10] *Gingles*, 478 U.S. at 37. Plaintiffs argue that Senate factor 7 is present even where their expert concedes rough minority proportionality in the state house and significant representation in the state senate.[11] Ex. 10 at 221:21-222:9; Doc. 101-4, at 44-45; *see also McCrory*, 2016 WL 1650774 (finding this factor was at best only minimally present where there was rough proportionality in the Legislature). For Senate factor 8, meanwhile, Plaintiffs rely on HB2023's legislative history, but the

[8] Plaintiffs also suggest that an error in the circulation of the publicity pamphlet for the May 2016 special election and the lack of a recent revision to the Election Procedures Manual were discriminatory voting practices. Doc. 85, at 10. But Plaintiffs' expert conceded these were isolated events, Ex. 10, at 207:3-208:21, and there is no evidence of a discriminatory intent or impact for either.

[9] Plaintiffs' expert reports are so seriously flawed that the flaws cannot be fully detailed within the page constraints of this Response. The Secretary and the Attorney General therefore incorporate by reference the expert reports submitted in support of the Intervenor-Defendants' Response.

[10] To the extent that Plaintiffs' expert suggests the presence of other racial appeals, "[t]he evidence that was presented was often disconnected from actual campaigning," and it did not "meaningfully interact with" HB2023. *See McCrory*, 2016 WL 1650774, at *94.

[11] Plaintiffs also ignore the large number of Hispanic county and local elected officials, and they make much of the fact that Arizona has had one Hispanic Governor—despite the fact that only three other states have elected Hispanic governors since 1917. Ex. 10, at 224:3-225:7; Ex. 14, at 6; Ex. 15.

Legislature's disagreement with Plaintiffs' policy is insufficient to show unresponsiveness. *See McCrory*, 2016 WL 1650774, at *96; *see also* Ex. 10 at 227:8-228:18. Finally, Plaintiffs incorrectly assert that the policy underlying HB2023 is tenuous where other states employ similar policies,[12] and the Supreme Court has recognized that states have a legitimate interest in combating the perception of fraud. *Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). Plaintiffs' analysis of the Senate factors thus falls far short of showing the necessary causal link between HB2023 and a discriminatory impact.

Plaintiffs' claim is akin to the claim rejected in *Gonzalez II*. There, the Ninth Circuit rejected the claim, despite the presence of some Senate factors, because Plaintiffs "adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice." 677 F.3d at 407. Plaintiffs similarly do not show how a reduction in the availability of ballot collection will leave minority voters with less opportunity to participate and elect representatives of their choice. Without that evidence, Plaintiffs' Section 2 claim must fail.

B. Plaintiffs Are Not Likely to Succeed on the Merits of Their Constitutional Claims.

Plaintiffs have not shown that HB2023 is unconstitutional. Plaintiffs have brought a "disfavored" facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). As in *Washington State Grange*, "[t]he State has had no opportunity to implement [HB2023], and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context." 552 U.S. at 450. Plaintiffs thus must show that "no set of circumstances exists under which the Act would

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[12] *See, e.g.*, Cal. Elec. Code §§ 3017, 18403; N.M. Stat. Ann. §§ 1-6-9, 1-6-10.1, 1-20-7.

be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

1. Plaintiffs Have Not Shown HB2023 Violates the Fourteenth Amendment.

A claim that a state election law burdens the Fourteenth Amendment right to equal protection must be analyzed under the "flexible standard" set forth in *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The *Burdick* standard requires courts to "weigh the character and magnitude of the asserted injury to the rights protected by the . . . Fourteenth Amendment[ ] against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010) (per curiam) (internal quotation marks omitted). The extent of the burden on the asserted rights determines the level of scrutiny. Where the burden is not severe, courts "apply less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (internal quotation marks omitted)); *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 (9th Cir. 2015) (applying rational basis review when there was a *de minimis* burden on the asserted rights).

Under *Burdick*, Plaintiffs must show a severe burden on an identified right, and they must offer specific evidence to demonstrate the severity of the burden. *See id*. at 731. Here, Plaintiffs have not done either. Plaintiffs have not shown that the right to vote is severely burdened. *See Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1199 (Ill. Ct. App. 2005) (holding that the burden from a law limiting the return of absentee ballots more strictly than HB2023 "is slight and is nondiscriminatory"). And Plaintiffs have not identified a single voter whose ability to vote will be burdened by HB2023. *See* Ex. 8, at 40:25-41:3 ("I have no way of knowing if and how many voters could be impacted by [the Arizona Democratic Party's] inability to mail their ballot for them."); Ex. 16, at 92:5 ("All voters can mail in their ballot."). Plaintiffs do not show that HB2023 burdens voters' ability to vote in person on Election Day or at an early voting site, vote by mail, vote by a special election board, or by giving their ballot to a family member, household

member, caregiver, or election worker.[13] Moreover, counties may still count a ballot even if it is returned in violation of HB2023. *See* Ex. 7; *compare* Cal. Elecs. Code § 3017(d) (mandating that ballots returned by an unauthorized person not be counted).

In view of the minimal burden (if any) that HB 2023 imposes, Plaintiffs must show that HB2023 has no rational basis. *Ariz. Libertarian Party*, 798 F.3d at 732. This Court "may look to any conceivable interest promoted by the challenged procedures." *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 763 (9th Cir. 1994).

The State need not "show specific local evidence of fraud in order to justify preventive measures," *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013). There are real risks associated with voting by mail-in ballot. It is widely recognized that "[v]oting fraud . . . is facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (holding that the Constitution does not require states to allow all registered voters to vote by absentee ballots); *Qualkinbush*, 826 N.E.2d at 1197 ("It is evident that the integrity of a vote is even more susceptible to influence and manipulation when done by absentee ballot."). And evidence of ballot collectors engaging in improper conduct exists. *See* Ex. 3, ¶ 21, Ex. A; Ex. 18, ¶¶ 4-6; *see also* Ex. 6, at 70:20-71:18; Ex. 17, at 52-58 (describing instances of fraud in absentee and early voting).

As the Supreme Court has observed:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

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[13] By comparison, Arizona's requirement of documentary evidence of citizenship in order to register to vote is not a severe burden, even though a person without such evidence cannot register to vote in state elections. *See Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007) ("*Gonzalez I*"). And voter ID requirements likewise impose only a minimal burden. *Crawford*, 553 U.S. at 198 (stating that the steps necessary to obtain a photo identification card, including travel to a bureau of motor vehicles office, "surely do[ ] not qualify as a substantial burden on the right to vote").

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (internal quotation marks and citations omitted); *Qualkinbush*, 826 N.E.2d at 1199 (recognizing the important interest in ensuring that each ballot "will be voted based on the intent of the voter, not someone else"). Consequently, eliminating even the perception of fraud is a legitimate state interest. Plaintiffs thus have not demonstrated that there is no rational basis for HB2023.

2. Plaintiffs' First Amendment Claim Cannot Succeed on the Merits.

Plaintiffs also argue that HB2023 burdens their associational rights. Doc. 85, at 13. The *Burdick* test applies to this claim as well, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), but Plaintiffs' witnesses have admitted that HB2023 does not burden their expressive activity. Ex. 8, at 99:19-103:13; Ex. 16, at 123:14-127:12. It will not prevent them from engaging with voters to discuss candidates and issues, to inform them about the process of voting, or to encourage them to vote. *Id.* HB2023 only prevents Plaintiffs from collecting voters' voted ballots. Like the voter registration laws in *Voting for America*, 732 F.3d at 391, HB2023 "do[es] not in any way restrict or regulate who can advocate pro-vot[ing] messages, the manner in which they may do so, or any communicative conduct. [It] merely regulate[s] the receipt and delivery of completed [ballots], two non-expressive activities."[14] Indeed, if collecting and delivering early ballots were protected First Amendment activity, *not* delivering those ballots would also be protected activity. *See id.* As the burden on Plaintiffs' First Amendment rights, if it exists at all, is not severe, the State's interests in deterring fraud related to early ballots are more than enough to justify HB2023.

3. Plaintiffs' Partisan Fencing Claim Does Not Withstand Scrutiny.

Plaintiffs' "partisan fencing" claim also cannot succeed. The term derives from

[14] Plaintiffs suggest that cases analyzing laws restricting voter registration activities provide guidance here. Doc. 85, at 13 (citing *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (D. Ohio 2006)). Unlike the district court in *Project Vote*, the Fifth Circuit's decision in *Voting for America* provides exactly that analysis: the court carefully reviewed the conduct at issue and concluded that returning completed voter registration forms does not implicate the First Amendment. 732 F.3d at 392.

Carrington v. Rash, 380 U.S. 89, 91-92 (1965) (invalidating a law that completely denied the right to vote to military personnel who were not permanent state residents), but *Carrington* does not "create a separate equal protection cause of action to challenge a facially neutral law that was allegedly passed with the purpose of fencing out voters of a particular political affiliation." *Ohio Org. Collaborative v. Husted*, 2:15-CV-1802, 2016 WL 3248030, at *48 (S.D. Ohio May 24, 2016); *Lee*, 2016 WL 2946181, at *26. Instead, *Burdick* provides "the proper standard under which to evaluate an equal protection challenge to laws that allegedly burden the right to vote of certain groups of voters." *Husted*, 2016 WL 3248030, at *48. And Arizona's interest in preserving the integrity of elections again outweighs Plaintiffs' speculative burden under HB2023.

Plaintiffs nonetheless urge the Court to adopt a framework for alleged partisan discrimination that has been reserved for discrimination on the basis of race or other suspect classes.[15] *One Wis. Inst., Inc. v. Nichol*, 15-CV-324-JDP, 2016 WL 2757454, at *12 (W.D. Wis. May 12, 2016) (declining to adopt the position "that Democrats should enjoy heightened constitutional protection akin to the level of scrutiny that the Constitution requires for laws that discriminate on the basis of race or any other suspect class"). But even if this Court adopts Plaintiffs' approach, Plaintiffs have not shown invidious partisan discrimination in HB2023. Indeed, their expert conceded that "[t]he law was just pas[sed]. So we can't do, you know, here was this election and the law had this kind of impact. We don't know yet." Ex. 10, at 261:7-11; *see also* Doc. 101-2, at 3-21 (discussing four of the five *Arlington Heights* factors, but omitting any analysis of the discriminatory impact factor). And the anecdotal declarations of partisans and advocacy organizations similarly fail to show a cognizable discriminatory impact.

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[15] The Secretary moves to strike Plaintiffs' expert on this topic. *See* Fed. R. Evid. 702(a); *see also McCrory*, 2016 WL 1650774, at *140 ("Dr. Lichtman's ultimate opinions on legislative intent . . . constitute[ ] nothing more than his attempt to decide the ultimate issue for the court, rather than assisting the trier of fact in understanding the evidence or any fact at issue."); *United States v. Tamman*, 782 F.3d 543, 552 (9th Cir. 2015) ("[A]n expert cannot testify to a matter of law amounting to a legal conclusion).

Plaintiffs also assert that HB2023 is discriminatory because of alleged improprieties surrounding its passage. But there is no question that the Legislature followed appropriate procedures or that there was robust debate from all sides on HB2023. *See Lee*, 2016 WL 2946181, at *27 ("Additionally, the evidence failed to show any departure from normal legislative procedures. Instead, although ultimately passing on a near-party-line vote, the bill was subject to robust debate from all sides."); *see also* Ex. 10, at 105:3-106:9; Ex. 11, at 84:23-85:15 (stating that, based on his knowledge of Arizona's legislative processes, he did not see any issues with the process that resulted in HB2023).

Finally, Plaintiffs claim direct evidence of partisan discrimination, Doc. 85, at 20, but the alleged "direct evidence" is nothing of the sort. "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (internal quotation marks and alteration omitted). Plaintiffs must also show a nexus between the comments and the passage of HB2023. *See id.* There is no nexus between the Secretary's comments at a political conference and the Legislature passing HB2023, and the comments do not show discriminatory animus without inference.

IV. Plaintiffs Have Not Shown Irreparable Harm.

Plaintiffs also cannot satisfy the irreparable harm requirement. Because Plaintiffs have not demonstrated a likelihood of success on the merits, they have not shown an irreparable harm. *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986). Even ignoring that fundamental flaw, Plaintiffs have failed to show anything more than a speculative harm. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22; *see also Kamerling v. Massanari*, 295 F.3d 206, 214-15 (2d Cir. 2002). Plaintiffs offer nothing more than speculation that HB2023 will have a discriminatory impact or burden any constitutional rights. Ex. 8, at

40:25-41:2; Ex. 10, at 261:7-11. Because their irreparable harm is—at best—speculative, Plaintiffs have not satisfied this factor.

V. The Balance of the Equities and the Public Interest Do Not Favor a Preliminary Injunction.

In a claim against the government, the public interest merges with the balance of the equities. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of equities does not favor Plaintiffs as they assert only a speculative harm and they fail to give any weight to the harm the injunction would cause. Unlike Plaintiffs' speculative harm, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (internal quotation marks and citation omitted).

Plaintiffs seek an injunction against an election law, and the "State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 203. The Ninth Circuit has therefore held that the "law recognizes that election cases are different form ordinary injunction cases," because "hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration Educ.*, 344 F.3d at 919.

As such, Plaintiffs' motion "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 451. "Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the public interest." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). The Court should therefore find that these factors also cut against the Plaintiff's request for a preliminary injunction.

VI. Conclusion

For the foregoing reasons, Plaintiffs' Motion should be denied.

RESPECTFULLY SUBMITTED this 19th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

s/ Maureen Riordan

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