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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Leslie Feldman, et al.,

Plaintiffs,

v.

Arizona Secretary of State's Office, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' JOINT EMERGENCY MOTION FOR STAY AND INJUNCTION PENDING APPEAL

(EXPEDITED CONSIDERATION WITHOUT ORAL ARGUMENT REQUESTED)

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Pursuant to Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a)(1), Plaintiffs respectfully request that the Court stay its September 23, 2016 Order (the "Order" or "Op.") (Doc. 204) and enjoin the implementation and enforcement of HB2023, pending resolution of Plaintiffs' appeal of the Order.

I. INTRODUCTION

A stay and injunction pending appeal are necessary to prevent irreparable harm to Plaintiffs, their members and constituents, and thousands of other Arizona voters, which will result from HB2023's criminalization of ballot collection, a practice that minority voters in particular have come to rely upon to exercise their fundamental right to vote. There is *no evidence* that ballot collection has led to voter fraud in Arizona, and the state's purported justifications—that HB2023 "eliminates the perception of fraud, thereby preserving public confidence in the integrity of elections," Op. 19-20—are not only unsupported by the record, they are belied by the fact that, after enacting a *more lenient* version of the law three years earlier, the Legislature was faced with intense public backlash and, rather than permit the electorate to vote on it in a referendum, voluntarily repealed the law. It was error for the Court not even to mention this in assessing the important question of whether a state may criminalize a practice that its citizens use to vote, particularly in a case such as this—where there is extensive evidence that the practice made voting more accessible (for all voters, but in particular for minorities) in a state with an odious history of discrimination, and *no* credible evidence that the law serves any legitimate state interest. Indeed, the Court failed to acknowledge or rejected out of hand substantial evidence of both discriminatory intent and effect (including significant evidence directly quoting legislators and staff responsible for the legislation), while crediting Defendants' unsupported, conclusory, and pretextual explanations for a law that is plainly a disingenuous partisan effort to make it harder for those not within the majority party's traditional base—including, in particular, racial minorities—to vote. Plaintiffs thus respectfully request that the Court issue a stay and injunction pending appeal, or deny this motion promptly without further briefing or argument.

II. PROCEDURAL BACKGROUND

HB2023 was enacted on party line votes, passing the Arizona House on February 4, 2016, and the Senate on March 9, then signed into law the same day. *See* Pls.' Mem. In Supp. of Mot. for Prelim. Inj. of HB2023 ("PI Mot.") 8 (Doc. 85). Plaintiffs filed a Complaint with this Court on April 15 (Doc. 1), which they amended on April 19 (Doc. 12). In an initial scheduling conference on May 10, Plaintiffs stated their readiness to file a motion for preliminary injunction as soon as May 13, but explained that the motion would benefit from limited discovery. *See* Status Conf. Tr. at 19:18-23 (Doc. 71). The Court granted that request and ordered Plaintiffs to file their motion on June 10, with argument set for August 12. Minute Entry (Doc. 44). In setting the schedule, the Court stated it would attempt to render a decision before the effective date of HB2023, which Plaintiffs initially believed was August 20. *See id.* When Plaintiffs discovered that the true effective date was August 6, they requested the schedule be modified to ensure that the Court could issue an order before that date. The Court granted the request and rescheduled argument for August 3. Minute Entry (Doc. 63). The argument took place as scheduled, and at the culmination of that hearing, the Court stated it would take the matter under advisement. Minute Entry (Doc. 172). On September 23—less than three weeks before the approximately 80% of voters who are on the Permanent Early Voting List are scheduled to begin receiving their ballots for the upcoming election, PI Mot. 1—the Court issued its Order denying Plaintiffs' motion. Plaintiffs promptly filed a notice of appeal (Doc. 206).

III. FACTUAL BACKGROUND

As established by the extensive evidence submitted to the Court, as the overwhelming majority of Arizona's voters have come to vote using mail-in ballots, ballot collection has become an important means for effectuating the right to vote, particularly for racial minorities. PI Mot. 1-4. Hispanic, Native American and African American voters are more likely to reside in communities without access to secure mailboxes. PI Mot. 3. Many Native American reservations and overwhelmingly Hispanic communities near the Mexican border do not have home mail delivery at all. *Id.* at 3, 5-6. Arizona's

minority voters are similarly much more likely to lack reliable transportation to vote in person or deliver ballots themselves and to have economic or personal circumstances that make ballot collection particularly important to their exercise of the franchise. *Id*. at 3, 5.

That ballot collection has been particularly beneficial to Arizona's minority communities is no secret. Legislators have been aware of this fact for some time and, for just as long, Republicans have attempted to restrict the practice. PI Mot. 4-8; Pls.' Reply In Supp. of PI Mot. 2-3 ("PI Reply") (Doc. 156); Doc. 161-01 ("DOJ File"). Those efforts were first successful in 2011 with the enactment of SB1412. PI Mot. 4. At the time, Arizona was still subject to preclearance and, in response to DOJ inquiries about SB1412's ballot collection restrictions, then-State Elections Director Amy Bjelland, who worked with members of the Secretary of State's staff and the bill's sponsor Senator Shooter in drafting SB1412, admitted that SB1412 "was targeted at voting practices in predominantly Hispanic areas in the southern portion of the state near the Arizona border" and that "[m]any in the Secretary of State's office were worried about the § 5 review of S.B. 1412." DOJ File at 111-12; *see also id.* (Bjelland thinks there is a problem that "may result 'from the different way that Mexicans do their elections'"). An employee of the Yuma County Recorder's Office similarly reported the bill would impact the City of Marin, a community near the Mexican border where "almost everyone is Hispanic" and "where people … tend to bring up vote by mail ballots in groups." *Id.* at 104, 106. Rep. Ruben Gallego provided further context, explaining to DOJ that "[t]he percentage of Latinos who vote by mail exploded" in 2010 because "municipalities in Maricopa County … reduced their number of polling places and physical early voting locations." *Id.* at 100. "This sudden increase in the Hispanic community's use of the vote by mail process caused Republicans to raise accusations of voter fraud," particularly in Yuma County, even though the County Recorder "later publicly stated that the claims were baseless." *Id.* at 101. SB1412 was thus "meant to target Hispanic voters who are less familiar with the vote by mail process and are more easily intimidated due to the anti-Latino climate in the state." *Id.* Rep. Gallego described "the atmosphere in Arizona [as] scary, particularly for

minorities," and advised that, "[a]nti-immigrant and anti-Latino sentiment is stronger than ever." *Id.* He explained that, "since Hispanics have come to voting by mail later [than] other groups, they are less comfortable with the process and more likely to be dissuaded from using it than others," and "[g]iven that Latinos often do not have as easy access to transportation compared to others, minority voters who are negatively affected by this law will not be able to mitigate its effects as easily [as] others." *Id.* Rep. Gallego also pointed out that SB1412 "could have a retrogressive effect on the ability of Native American voters to participate in the electoral process" in part "due to the isolated nature of reservations and their oftentimes communal living structure." *Id*. Senator Shooter and others responsible for SB1412 did not respond to DOJ's requests for information about its ballot collection restrictions, *id.* at 103, 106, 110; instead, they repealed the law. PI Mot. 4; PI Reply 2 n.2.

In 2013, the Republican-controlled Legislature tried again, enacting HB2305, which banned partisan ballot collection and required others to complete an affidavit saying they had returned the ballot for the voter. PI Mot. 4. Violation of these restrictions was made a class 1 misdemeanor. *Id*. HB2305 was wildly unpopular and quickly attracted an opposition effort. *Id*. After citizen groups collected more than 140,000 signatures to put it on the ballot for a vote by the people of Arizona, the Legislature repealed HB2305, avoiding what would have been the legal consequence of a successful referendum effort—a prohibition on the enactment of similar legislation in the future. *Id*.

In 2016, Rep. Ugenti-Rita introduced HB2023. *Id*. at 5. The bill was subject to impassioned opposition, with members representing minority communities arguing against it on the grounds that it "disproportionately affects" those populations "and makes it more difficult for those citizens to vote." *Id*. They emphasized HB2023's impacts on urban communities, where minority voters may receive mail but are likely to lack secure outgoing mail, as well as rural minority communities, urging legislators specifically "to consider voters in places like [the predominantly Hispanic community of] San Luis" and the Tohono O'odham Nation, which lack have mail delivery. *Id*. at 5-6. The response from

the lead sponsor was shockingly dismissive. *Id*. ("If you can't get it done [i.e., the ballot returned in the mail on time], that is not my problem."); *see also id*. at 4-5. At the same time, proponents rejected amendments that could have both addressed their purported concerns by less burdensome means *and* helped determine conclusively which communities were particularly reliant upon the practice of ballot collection. *See id*. at 7.

IV. ARGUMENT

The Court has the power to grant a stay or injunction "[w]hile an appeal is pending from an interlocutory order or final judgment that … denies an injunction[.]" Fed. R. Civ. P. 62(c). Whether to grant such a motion is "'an exercise of judicial discretion … [that] is dependent upon the circumstances of the particular case.'" *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 566 U.S. 418, 433 (2009)). That discretion is guided by four factors: (1) whether the applicant makes a strong showing of likely success on the merits; (2) whether the applicant will be irreparably harmed absent relief; (3) whether issuing relief will substantially injure other parties; and (4) where the public interest lies. *Id*. *See also Se. Alaska Conservation Council v. U.S. Army Corps of Eng'gs.*, 472 F.3d 1097, 1100 (9th Cir. 2006). Although "'[t]here is substantial overlap between these and the factors governing preliminary injunctions,'" *id*. at 1203 n.2 (quoting *Nken*, 556 U.S. at 434), several courts have recognized that "[c]ommon sense dictates …. that the standard cannot … require that a district court confess to having erred in its ruling" to grant the motion. *Evans v. Buchanan*, 435 F. Supp. 832, 843 (D. Del. 1977); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 149 (D. Mass. 1998). *See also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (holding "serious questions" test for preliminary injunctions and stays pending appeal survives *Winter v. Nat. Resources Def. Council*, 555 U.S. 7 (2008)).

In this case, where Plaintiffs have diligently sought relief to protect their members and constituents, who are among the thousands of Arizonans whose ability to exercise their fundamental right to vote will be burdened and, in some cases, entirely denied by

HB2023—and where there is *no* evidence that ballot collection resulted in fraud, but substantial evidence that HB2023 was meant to and will make it more difficult for voters in minority communities to vote (whether by the threat of its enforcement, or harassment of citizens targeted by the Republican Party, which has publicly acknowledged its intention to police voters pursuant to HB2023), both the standard elements for relief and commonsense justify issuing a stay and injunction pending appeal.

A. THE THREAT OF IRREPARABLE HARM ABSENT A STAY AND INJUNCTION IS IMMEDIATE

"Courts routinely deem restrictions on fundamental voting rights irreparable injury," recognizing that, "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N. Carolina v. N. Carolina ("LOWV")*, 769 F.3d 224, 247 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). *See also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge, Md.*, 799 F.2d 137, 140 (4th Cir. 1986). Here, Plaintiffs, their individual members and constituents, as well as thousands of other Arizona voters, will experience precisely this type of irreparable, constitutional harm if HB2023 is not enjoined prior to the November election.

In concluding Plaintiffs were unlikely to suffer irreparable harm in the absence of a preliminary injunction, the Court relied solely on the deposition testimony of Sheila Healy, the current Executive Director of ADP, to find that "representatives of the ADP admit that they have no way of knowing if any voters will be impacted by the limitation on ballot collection." Op. 25. But the Court's reliance is misplaced; Ms. Healy expressly testified in her personal capacity and not on behalf of ADP. Ex. A (Tr. 5:19-6:2, 40-25-41:2).[1] Further, Plaintiffs proffered substantial evidence that thousands of voters—including specifically Plaintiffs' core constituencies and registered Democrats—rely on

[1] Defendants did not notice a 30(b)(6) deposition of ADP; they chose to depose Ms. Healy in her personal capacity. Ex. B. Ms. Healy had been employed at ADP for less than a year and not yet participated in a general election at ADP. Ex. A at 21:19-21.

ballot collection to vote and that these voters will be harmed if HB2023 bans them from voting by their preferred method. *See, e.g.*, PI Mot. 1-2, 16-17; PI Reply 21, 22 n.14. The Court erred in disregarding and minimizing the weight of the evidence that Plaintiffs, their members and constituencies—as well as thousands of other Arizona voters—will suffer irreparable harm if HB2023 is not enjoined.

B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs are highly likely to succeed on the merits, but even if the Court disagrees, a stay and injunction pending appeal is appropriate, because of the serious questions that this matter presents, which go to the heart of the fundamental right to vote and the protections provided for that right by the Constitution and the VRA. This is particularly true here, where in rejecting Plaintiffs' VRA claim, the Court created a new threshold test, never before applied by any court, and in evaluating the constitutional claims, applied tests that run contrary to Supreme Court and Ninth Circuit precedent.

1. HB2023 Violates § 2 of the VRA

Plaintiffs are likely to succeed on their claim that HB2023 violates § 2. A violation of § 2 may be proven by showing the challenged law (1) imposes a discriminatory burden on members of a protected class, and (2) viewed in light of "the totality of the circumstances," interacts with social and historical conditions such that members of that class "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). *See also Veasey v. Abbott*, No. 14-41127, -- F.3d --, 2016 WL 3923868, at * 17 (5th Cir. July 20, 2016). Because § 2 prohibits "abridgement" as well as denial of voting rights, 52 U.S.C. § 10301(a), Plaintiffs need not show that the practice makes voting *impossible* for minorities—only that it makes it disproportionately more *burdensome*. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986). The number of voters affected is not relevant. "[W]hat matters … is … simply that 'any' minority voter is being denied equal opportunities." *LOWV*, 769 F.3d at 244 (quoting 52 U.S.C. § 10301(a)).

Plaintiffs adduced substantial evidence to more than meet their burden of demonstrating by a preponderance that HB2023 likely violates § 2.[2] But rather than carefully evaluate that evidence as required, the Court adopted a brand new test, holding a § 2 violation cannot be proven without "quantitative or statistical evidence comparing the proportion of minority versus white voters who rely on others to collect their early ballots." Op. 8. No court has ever before found that the only way to show disparate impact is with "quantitative or statistical evidence," and for good reason. It flies directly in the face of the Supreme Court's admonition that courts be mindful that "Congress enacted the [VRA] for the broad remedial purpose of rid[ding] the country of racial discrimination in voting," and must interpret it to "provide[] the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and internal quotation marks omitted). To this end, courts have held that the "totality of the circumstances" inquiry is relevant not just to the second step of the effects analysis, but also to the initial inquiry into disproportionate impact. *See, e.g.*, *LOWV*, 769 F.3d at 245 ("In assessing both elements, courts should consider the totality of the circumstances") (quotation marks omitted). *See also Gonzalez v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012) ("[A] § 2 analysis requires the district court to engage in a searching practical evaluation of the past and present reality") (quotation marks omitted; citing *Gingles*, 478 U.S. at 45). Indeed, in § 2 vote dilution cases, courts have rejected arguments that there is only one way for voting rights plaintiffs to meet their burden of proof. *See, e.g.*, *Jenkins v. Red*

[2] The Court further misapplied this standard, considering not whether Plaintiffs were *likely* to prove that HB2023 violated § 2 or imposed unconstitutional burdens on voters, but whether Plaintiffs had definitively done so. Op. 8 (stating "based on the current record" Plaintiffs submitted "insufficient evidence" to show a § 2 violation). Thus, even if there were a legal basis for the conclusion that Plaintiffs were required to adduce empirical evidence to succeed on a VRA claim (and as discussed, there is not), holding Plaintiffs to such a requirement at the preliminary injunction stage was inappropriate. *See, e.g., Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("a preliminary injunction is customarily granted on the basis of …evidence that is less complete than in a trial on the merits"); *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953). Worse, the Court never assessed which way the preponderance of the evidence presented to it points. If it had done so, it would have found a disparate burden. *See, e.g.*, *Farrakhan v. Gregoire*, No. 96-076, 2006 WL 1889273, at *3 (E.D. Wash. July 7, 2006), *rev'd and remanded on other grounds*, 590 F.3d 989 (9th Cir. 2010).

Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1126 (3d Cir. 1993) (plaintiff may show a candidate is minority-preferred "with a variety of evidence, including lay testimony or statistical analyses"); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1320-21 (10th Cir. 1996) (same); *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) ("[W]here … lack of data prevents … statistical analysis, a court should rely on other totality of the circumstances to determine if the electoral system has a discriminatory effect"). And when jurisdictions covered by § 5 bore the burden of demonstrating that any change to their voting practices had neither the purpose nor effect of denying or abridging the right to vote on account of race, DOJ did not require that they do so through statistical evidence, recognizing that, in many circumstances, it would not be available. *See* Procedures for the Admin. of § 5, as amended, 28 CFR Ch. 1, Part 51, Subpart C – Contents of Submissions, §§ 51.26-.28.[3] There is no doctrinally sound reason to impose such a requirement on plaintiffs challenging a voting law under § 2, particularly where doing so contrary to the statute's very purpose.

A "practical evaluation" of the "past and present reality," *Gonzalez*, 677 F.3d at 406, must take into account that—not only does Arizona *not track* how mail-in ballots are delivered to elections administrators—the Legislature affirmatively *rejected* an amendment to HB2023 that would have enabled Plaintiffs (or the State) to statistically demonstrate whether certain groups of voters are more reliant upon ballot collection. *See supra*. Under these circumstances, the Court's brand new requirement cannot be sustained. To do so would read an enormous loophole into § 2, enabling legislatures to insulate from challenge laws with disparate impacts, provided the relative impact of that law on voters cannot be tracked. Indeed, under the Court's novel construct, a state could give literacy tests primarily to minority voters, but if it did not track who was tested, it

[3] Indeed, in support of HB2023's precursor bill, SB1412, Arizona's § 5 submission did not include statistical analysis—or *any other* evidentiary support (must less anything remotely similar to the substantial evidence submitted by Plaintiffs in this case)—for its conclusion that the law did not deny or abridge the right of Arizonans to vote on account of race, color, or membership in a language minority group. *See* DOJ File at 73-92.

could survive a § 2 challenge. The *en banc* Fifth Circuit rejected a comparable argument recently in *Veasey*, where defendants contended plaintiffs must show reduced turnout to prevail on a § 2 claim. 2016 WL 3923868, at *29. The court rejected the argument, recognizing it would "present[] problems for pre-election challenges to voting laws, when no such data is yet available," and—"[m]ore fundamentally"—would run contrary to the text of § 2, which prohibits abridgement as well as denial. *Id*. Such a requirement, the court recognized, would "cripple" the VRA. *Id*. at *30.

The Court's analysis in the alternative, in which it "[a]ssum[es], *arguendo*, that a § 2 violation could be proved using non-quantitative evidence," Op. 10, is also deeply flawed. The Court dismisses out of hand the many declarations submitted by Plaintiffs from community activists with extensive, personal knowledge about ballot collection's real beneficiaries as "anecdotal" and "not compelling," *id*.; ignores evidence HB2023's proponents knew that ballot collection was crucial to minority participation in urban and rural communities, but pursued legislation restricting the practice despite of, indeed *because of*, the disproportionate use in particular Hispanic communities; and presumes—without any evidentiary basis—that the same burdens would fall on white voters. Yet, the Court credits the State's contention that HB2023 "is a prophylactic measure intended to prevent absentee voter fraud" and "eliminates the perception of fraud," *id*. at 19-20, without any evidence that HB2023 is necessary to prevent fraud—or to justify anyone's "perception" that it may be—save the constant refrain of legislators who have a political interest in suppressing minority voter turnout. PI Mot. 6-7. Indeed, in crediting the State's contention that HB2023 "eliminates the perception of fraud, thereby preserving public confidence in the integrity of elections," Op. 19-20, the Court failed to explain how this conclusion can be squared with the fact that, just three years before HB2023's enactment, *more than 140,000 Arizonans* signed a petition to refer a law that would have imposed a *lesser penalty* for ballot collection to the voters to declare whether they believed that dangers of fraud and the preservation of public confidence required such a law; rather than let the voters have their say, the Legislature repealed it. Lichtman Rpt. (Doc. 139-1) at 10.

In analyzing the disparate impact question, the Court also erred in failing to consider the undisputed socio-economic disparities that make ballot collection critical for minority voters to have equal access to Arizona's elections, in which the overwhelming majority of voters now participate by way of mail-in ballot. *See infra*; PI Reply 8. To conclude, as the Court did, that other means of voting—such as traveling to the polls on Election Day or to an early voting site—"alleviate[]" burdens on these voters, Op. at 16-17, ignores that Arizona's history of discrimination and its continued impacts make these alternatives less accessible to minorities. That is the very essence of what § 2 is meant to protect against. Yet, the Court mistakenly assumed that it need not grapple with this ugly reality, based on its unsupportable conclusion that the VRA requires, in all cases, that plaintiffs show disparate impact by "quantitative or statistical evidence." In fact, these socio-economic disparities are highly relevant to the question of whether the criminalization of ballot collection has a disparate impact, and are necessarily part of the "practical evaluation" of the "past and present reality" that the Court should have considered in assessing Plaintiffs' VRA claim. *Gonzalez*, 677 F.3d at 406; *see also NAACP v. McCrory*, No. 16-1468, -- F.3d --, 2016 WL 4053033, at *17 (4th Cir. July 29, 2016) ("These socioeconomic disparities establish that no mere 'preference' led African Americans … to disproportionately lack acceptable photo ID."); *LOWV*, 769 F.3d at 245.

Because the Court erred in applying the first part of the § 2 test, it did not reach the second. But Plaintiffs amply demonstrated that they were likely to carry their burden here, as well, introducing evidence that eight of the nine Senate Factors are present. Arizona has a long history of discrimination against minorities, extending to every area of social, political, and economic life, including discriminatory elections practices aimed at minority groups that have continued in recent decades (*Factors 1 and 3*). *See* PI Mot. 9-10; Pl.'s Mot. for PI on OOP & Allocation Claims ("OOP PI Mot.") 12, 18-19; PI Reply 9-10. The effects of Arizona's storied and systemic discrimination against minorities in areas such as education, employment and public life persist today, impacting social, economic, and political life in profound degrees as reflected in disparate poverty rates, depressed wages,

higher levels of unemployment, lower educational attainment, less access to transportation, residential transiency, and poorer health (*Factor 5*). *See* PI Mot. 9; PI Reply 8-10; OOP PI Mot. 12, 14 n.5, 18-19. Arizona's long history of racial discrimination and its continued effects are also reflected in official lack of responsiveness to its minority populations, including as illustrated by the consideration of HB2023 in which proponents of HB2023 not just ignored the substantial testimony as to the bill's likely impact on Arizona's minority communities, but dismissed them as "not [their] problem." (*Factor 8*). PI Mot. 5-6, 10. Arizona also has a demonstrated history of racially polarized voting, and politicians have relied and continue to rely on both explicit and subtle appeals to racial prejudice—including in promoting ballot collection laws such as HB2023 (*Factors 2 and 6*). *See* PI Mot. 4 n.3, 10-11; OOP PI Mot. 12, 21-22.[4] Given this background it is not surprising that the rate of electoral success for minority candidates "has been minimal in relation to the percentage of these groups as part of the general population." (*Factor 7*). PI Mot. 10-11; *see also* OOP PI Mot. 12, 21-22. Finally, the purported justification for HB2023 is highly tenuous (*Factor 9*). Despite having pressed for some form of this legislation for years, none of HB2023's proponents were able to identify even one concrete example of voter fraud that HB2023 could have guarded against. *See* PI Mot. 4-7, 11; PI Reply 13; Mot. Hr'g Tr. at 46:21-47:2 (Doc. 175); *see also Veasey*, 2016 WL 3923868, at *32 (explaining in tenuousness finding that "[a]t least

[4] Most recently, Donald Trump made racial appeals in a much-publicized speech in Phoenix, stating he would build a wall at the Mexican border, transport undocumented workers "great distances," and warning that immigration will result in "millions more illegal immigrants; thousands of more violent, horrible crimes; and total chaos and lawlessness." LOS ANGELES TIMES, Transcript: Donald Trump's Full Immigration Speech, Annotated (Aug. 31, 2016), *available at* http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-story.html (last accessed Sept. 28, 2016). The crowd reportedly chanted, "Build the wall." THE ARIZ. REPUBLIC, Trump in Phoenix: 10-point plan to end illegal immigration (Aug. 31, 2016), *available at* http://www.azcentral.com/story/news/politics/elections/2016/08/31/donald-trump-immigration-phoenix-arizona-policy-speech-mexico/89615128/ (last visited Sept. 28, 2016).

one Representative who voted for SB 14 conceded that he had no evidence to substantiate his fear of undocumented immigrants voting").

2. HB2023 Violates the First and Fourteenth Amendments

The Court also made a number of errors in its *Anderson-Burdick* analysis. Those errors caused the Court to significantly understate burdens that HB2023 imposes on First and Fourteenth Amendment rights, give too much deference to the state's proffered interests, and conclude incorrectly that HB2023 is likely to be found constitutional.

With respect to the nature of HB2023's burdens on voting rights, the Court clearly erred in writing that HB2023 "does not eliminate or restrict any method of voting, it merely limits who may possess, and therefore return, a voter's early ballot." Op. 16. In fact, HB2023 *criminalizes* one of the means through which voters can submit their absentee ballots. The Court also erred in ignoring the clear evidence that, without ballot collection, many voters would not have been able to vote in previous elections. *See* PI Reply 15-16. It follows from that evidence that the elimination of ballot collection will prevent voters from casting ballots in the upcoming general election. *See also Veasey*, 2016 WL 3923868, at *32 ("[I]ncreasing the cost of voting decreases voter turnout—particularly among low-income individuals, as they are the most cost sensitive.").

The Court further erred in its discussion of the burdens that HB2023 imposes on particular groups of voters. *See* Op. 16-19. *See generally Public Integrity Alliance v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at *3 n.2 (9th Cir. Sept. 2, 2016) (en banc) (court may consider "not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe"). Specifically, while the Court wrote that Arizona's election regime "alleviates" many of HB2023's burdens through other voting options, Op. 16-17, it failed to consider that the alternatives it identified (e.g., a disabled voter's working with the county recorder to arrange for a special election board to deliver a ballot) are more burdensome for the voters who were particularly reliant upon ballot collection than is the simple act of handing a ballot to a ballot collector. The Court also overlooked that forcing voters to

learn about these alternative (and in some cases obscure) methods of voting shortly before an election imposes a real burden and will unquestionably result in voter confusion and thus disenfranchisement. Indeed, there is no evidence in the record indicating that these alternative means of voting will meaningfully offset the burdens imposed by HB2023; on the contrary, and as the Court points out, even several of the declarants *in this case* are confused about the limited exceptions to the ban on ballot collection. *See* Op. 17 n.8.

The Court also incorrectly concluded that the ban on ballot collection does not burden associational rights. In holding that "there is nothing inherently expressive or communicative about receiving a voter's completed early ballot and delivering it to the proper place," Op. 22, the Court undervalued the expressive significance of participation in, and the assistance of others in participating in, the political process—activities at the very core of the First Amendment's protections. By participating in ballot collection, individuals and organizations plainly convey that they support the democratic process, are committed to having others participate in it, want to ensure that even those who have difficulty voting are able to participate in the political process, and are willing to invest resources into ensuring that others can vote. In other words, ballot collectors convey that voting is important in general and important to them *not only with their words but with their deeds*. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 700 (N.D. Ohio 2006); *cf. Coal for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 398-99 (8th Cir. 1985) (organization had standing where members were prevented from registering voters); *People Organized for Welfare & Emp't Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 170 (7th Cir. 1984). And, to the extent that individuals or organizations (such as Plaintiff ADP) participate in ballot collection to assist in the election of candidates from a political party or a particular candidate, they clearly express their support for and further their association with that party or candidate. *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech").

The Court made several additional errors in assessing the state's interests in the elimination of ballot collection and in balancing those interests against HB2023's burdens on voting. To begin with, it is not correct that "[l]aws that do not significantly increase the usual burdens of voting do not raise substantial constitutional concerns." Op. 15 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)). *Crawford* itself explained that, "[h]owever slight th[e] burden [on voting] may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." 553 U.S. at 191 (controlling op.) (internal quotation marks omitted). Likewise, the Court erred in assuming the interests proffered by the state necessarily outweigh burdens imposed by HB2023 because the proffered state interests are "important regulatory interests." Op. 19. This approach is inconsistent with the Supreme Court's instruction that courts must not "apply[] any 'litmus test' that would neatly separate valid from invalid restrictions" and instead must "make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190; *cf. Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("[T]he state's important regulatory interests are *generally* sufficient to justify *reasonable, nondiscriminatory* restrictions") (emphases added).

The Court compounded these errors by applying rational-basis review to the State's proffered interests. *See* Op. 21 ("… Arizona has proffered two important state regulatory interests that are rationally served by H.B. 2023."). As the en banc Ninth Circuit explained earlier this month, "*Burdick* calls for neither rational basis review nor burden shifting." *Public Integrity Alliance*, 2016 WL 4578366, at *4. On the contrary, courts must conduct a "balancing and means-end fit analysis." *Id.*; *accord Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015). Under the proper standard, this Court should have found that the means-end fit between HB2023 and its purported interests is weak, at best, and that HB2023's purported goals could have been achieved through means that are less burdensome on voting rights. *See* PI Mot. 6-8, 12; PI Reply 17-19. The State's interests in

HB2023 are far too limited to justify the law's burdens on voting rights, and Plaintiffs are likely to succeed on the merits on this claim, as well.

C. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY SUPPORT PLAINTIFFS' MOTION

To a large extent, the Court's conclusion that "the balance of hardships and public interest weigh against preliminary injunctive relief" was derivative of its incorrect conclusions on the merits. *See* Op. 25-26. *Compare* Op. 25 ("Plaintiffs' belief that H.B. 2023 will prevent certain people from voting is speculative"), *with* PI Reply 15-16 (discussing evidence that voters would have been unable to vote in prior elections without ballot collection). It is thus likely to be overturned on the appeal for the same reasons.

The Court also erred in failing to assess whether Plaintiffs' claim raised a serious question on the merits and the balance of the hardships tips sharply in their favor. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (finding "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met"); *see also id.* at 1135 ("Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction[.]"). This error was critical. For the reasons explained above and in Plaintiffs' prior briefing, this case—at the very least—raises serious questions on the merits. In addition, "[t]he public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights." *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) (citation and quotation marks omitted); *see also* OOP PI Mot. 28-30; PI Mot. 16-17.

And, the state will not suffer any material harm if a stay and injunction is issued. First, the state has no interest in enforcing unconstitutional laws. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003). Second, to the extent the Court found that the state is irreparably injured when it is enjoined from effectuating its statutes, Op. 26, that conclusion is on shaky footing in the Ninth Circuit. As the court of appeals has explained,

while individual justices have expressed that view in orders issued from chambers, "[n]o opinion for the [Supreme Court] adopts this view." *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014). Indeed, it is unclear why a state has any interest in *effectuating* a law that is distinguishable from the interests (if any) that the law serves. Moreover, it is unclear whether Arizona *will* enforce the law even if it *can.* County recorders across Arizona have publicly declined to enforce HB2023 during the upcoming election cycle. *See, e.g.*, Doc. 189-01 at 2. And the Secretary of State has yet to fulfill her duty of issuing an updated Election Procedures Manual, leaving elections officials across Arizona with no guidance whatsoever on enforcing the new law. PI Mot. 17. These objective manifestations of the state's disinterest in the law plainly undermine the state's claimed harm.

At the same time, partisan actors across Arizona intend to use HB2023 as a vehicle for the harassment and intimidation of voters. The Arizona Republican Party publicly confirmed plans to train volunteers to demand identifying information from voters dropping off multiple ballots at a polling location, encouraging volunteers to follow suspected violators out into parking lots, record their license plates, and even call the police. Doc 189-1 at 2-3. These efforts are plainly intended to have a chilling effect on their targets' constitutional rights and are further fundamentally incompatible with the freedom of expression that our democratic system affords. Although these harms to voters are imminent and profound, there can be no countervailing harm experienced by the state when it is prevented from enforcing laws *that it has no plans to enforce anyway*. Thus, the balance of the equities tips sharply in Plaintiffs' favor, and the Court should have issued a preliminary injunction under the serious-questions approach.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court stay its September 23 Order and enjoin the implementation and enforcement of HB2023 pending the resolution of Plaintiffs' appeal. In the alternative, if the Court intends to deny Plaintiffs' motion, Plaintiffs respectfully request that the Court rule on this motion as expeditiously as possible, without requiring a response from Defendants or oral argument.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and a Notice of Electronic Filing was transmitted to counsel of record.

s/ *Daniel R. Graziano*