

1 MARK BRNOVICH
2 Attorney General
3 Firm Bar No. 14000
4 Kara Karlson (029407)
5 Karen J. Hartman-Tellez (021121)
6 Assistant Attorneys General
7 1275 W. Washington Street
8 Phoenix, AZ 85007
9 Telephone (602) 542-4951
10 Facsimile (602) 542-4385
11 kara.karlson@azag.gov
12 karen.hartman@azag.gov
13 *Attorneys for State Defendants*

10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 Leslie Feldman, et al.,

13 Plaintiffs,

14 v.

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

16 Defendants.

) Case No. CV-16-01065-PHX-DLR

) **STATE AND INTERVENOR**
) **DEFENDANTS' JOINT RESPONSE IN**
) **OPPOSITION TO PLAINTIFFS'**
) **JOINT EMERGENCY MOTION FOR**
) **STAY AND INJUNCTION PENDING**
) **APPEAL**
)

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1 No good cause exists to grant the relief sought by Plaintiffs' Emergency Motion
2 for Stay and Injunction Pending Appeal (the "Motion") (Doc. 210). Plaintiffs cannot make
3 the required showing for this extraordinary relief (and tellingly ask the Court for a prompt
4 denial if the Court denies the Motion). (*Id.* at 1). H.B. 2023 has now been in effect for
5 nearly two months, including through a Primary Election, and Plaintiffs present no new
6 evidence—in fact, no evidence at all—requiring implementation and enforcement of H.B.
7 2023 to cease. The State and Intervenor Defendants (collectively, "Defendants") thus
8 jointly respond in opposition to the Motion, and request that it be denied.¹

9 **I. BACKGROUND**

10 On September 23, 2016, this Court entered its Order denying Plaintiffs' Motion
11 for Preliminary Injunction of H.B. 2023. (Doc. 204). That same day, Plaintiffs filed a
12 Notice of Appeal (Doc. 206), but did not move for reconsideration.² Plaintiffs did not file
13 their "Emergency" Motion (Doc. 210) until five days later.

14 As an initial matter, the Defendants point out that the Court also denied their Joint
15 Motion to Strike Portions of Plaintiffs' Reply Memorandum and Reply Exhibits (Doc.
16 167). (Doc. 204, at 5). In ruling on Plaintiffs' motion to preliminarily enjoin H.B. 2023,
17 the Court reasoned in relevant part that it "must assess the likelihood that Plaintiffs will
18 succeed on the merits of their claims," and that it "would disserve that end for the Court
19 to blind itself to evidence" that would be presented in a summary judgment motion or at
20 trial. (*Id.*) Plaintiffs have put forth *no additional evidence* in support of the relief sought
21 by their Motion. Instead, Plaintiffs essentially rehash items presented by their P.I.
22 Motion, which this Court properly denied after full consideration of all evidence—even
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24 ¹ The Maricopa County Defendants, who took no position on Plaintiffs' Motion for
25 Preliminary Injunction of H.B. 2023 (the "P.I. Motion"), have informed Defendants that
26 they will similarly take no position on the Motion.

27 ² Grounds for a motion for reconsideration include "a showing of new facts or legal
28 authority that could not have been brought to [the Court's] attention earlier with
reasonable diligence." *See* LRCiv. 7.2(g)(1).

1 evidence disclosed for the first time with a reply brief. (*Id.*) This Court has thus given
2 Plaintiffs the benefit of the doubt, but determined that it is unlikely that they will succeed
3 on the merits. Plaintiffs’ Motion provides no reason to alter that determination.

4 Perhaps even more telling, however, is what has occurred since the Court heard
5 oral argument on Plaintiffs’ P.I. Motion on August 3, 2016—three days before the
6 effective date of H.B. 2023.³ The Legislature adjourned May 7, 2016, so the effective
7 date of H.B. 2023 was available to Plaintiffs (1) shortly after they filed their Complaint
8 on April 15, 2016, (2) more than a month before they filed their P.I. Motion on June 10,
9 2016 (Doc. 84), and (3) certainly before any of the scheduling conferences in this matter
10 that Plaintiffs reference in their Motion (Doc. 210, at 5). Despite that, Plaintiffs did not
11 request that the Court expedite its ruling to enter an order before the August 6 effective
12 date even though they sought—and received—an expedited hearing date. (*See generally*
13 Doc. 175, Official Tr. of Mot. Hr’g held 8/3/16). Neither did Plaintiffs seek emergency
14 relief from this Court once H.B. 2023 took effect, though they admit they knew by then
15 that the law was effective. (*See* Doc. 210, at 5).

16 In fact, H.B. 2023 was in effect for all but the first three days of early voting for
17 the Primary Election—meaning “the approximately 80% of voters” on the Permanent
18 Early Voting List received their ballots and, if they so desired, voted and lawfully
19 submitted them to be counted under the sensible limitations imposed by H.B. 2023.⁴ At
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22 ³ *See* Ariz. State Senate, Final Revised Fact Sheet for H.B. 2023, as enacted, dated March
23 22, 2016, at 2, available at <https://apps.azleg.gov/BillStatus/GetDocumentPdf/440478>
24 (stating that H.B. 2023 would be effective on the general effective date). The general
25 effective date is the ninety-first day after the Legislature adjourns *sine die*. Ariz. Const.
26 art. 4, part 1, § 1, cl. 3; *see also* <http://www.azleg.gov/general-effective-dates/> (listing
27 August 6, 2016, as the general effective date for laws enacted via the Second Regular
28 Session of the Fifty-second Legislature).

⁴ As the Court noted, under H.B. 2023—now A.R.S. § 16-1005(H), (I)—“voters may return their own ballots, either in person or by mail, or they may entrust their ballots to family members, household members, or caregivers.” (Doc. 204, at 16).

1 no time did Plaintiffs request emergency relief or an expedited ruling from the Court
2 based on irreparable harm occurring during the early voting period. Instead, Plaintiffs
3 focus yet again in their Motion on predecessor enactments to H.B. 2023 to attempt to
4 show discriminatory intent or effect. Plaintiffs' belated attempt continues to fail.

5 Plaintiffs spend just one paragraph on facts actually relevant to the sections of
6 A.R.S. § 16-1005 added by H.B. 2023. (*See* Doc. 210, at 4-5). There was no “intense
7 public backlash” or any threatened referendum of H.B. 2023 itself.⁵ And, as to the
8 testimony of the Executive Director of the Arizona Democratic Party (the “ADP”), the
9 one Plaintiff that the Court found had standing to challenge the validity of H.B. 2023,
10 Plaintiffs try to discount her sworn testimony and admissions as something on which the
11 Court “misplaced” its reliance. (Doc. 210, at 6).

12 If there were actually “substantial evidence that thousands of voters—including
13 specifically Plaintiffs' core constituencies and registered Democrats—rely” on practices
14 limited by H.B. 2023, then Plaintiffs would have presented such evidence at some point
15 in the record of their P.I. Motion, the ADP Executive Director would have testified to it,
16 or Plaintiffs would have gathered such evidence before and during the Primary Election
17 that took place on August 30, 2016,⁶ and immediately brought it before the Court. Those
18 things have not occurred because such evidence does not exist. Plaintiffs have made and
19 can make no showing of immediate, irreparable harm warranting this Court's stay of its
20 own Order and belated entry of an injunction barring enforcement of H.B. 2023, which is
21 now law.
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24 ⁵ Unlike repealed H.B. 2305, which amended several election laws, including those
25 relating to the process of getting initiatives on the ballot, H.B. 2023 added only the
26 provisions at issue in this lawsuit.

27 ⁶ As the Court recognized in its Order (Doc. 204 at 10, n.3), it is not the State's burden to
28 collect this evidence for Plaintiffs, who profess to know “thousands of voters” who rely
on practices now limited by H.B. 2023 to vote.

1 **II. PLAINTIFFS MAKE NO SHOWING OF HARM, LET ALONE**
2 **IMMEDIATE IRREPARABLE HARM, ABSENT A STAY AND**
3 **INJUNCTION.**

4 Plaintiffs assert that H.B. 2023 will cause them and “thousands of other Arizona
5 voters” to be irreparably harmed by restrictions on “fundamental voting rights.” (Doc.
6 210, at 6). Plaintiffs, however, have not identified a single Arizona voter facing a serious
7 restriction on his or her right to vote due to H.B. 2023. Instead, Plaintiffs point to the
8 thousands of ballots that they and other voter engagement groups have collected in
9 previous elections, arguing that voters “rely” on those ballot collection efforts, and H.B.
10 2023 “bans them from voting by their preferred method.” (*Id.* at 6-7). Past use of a
11 convenient method of delivering an early ballot to the county recorder, however, does not
12 constitute reliance, nor can it prove that voters who have used ballot collectors in the past
13 will face any serious hurdle to voting in the future. As the Court correctly recognized,
14 H.B. 2023 “does not eliminate or restrict any method of voting.” (Doc. 204, at 16).

15 Plaintiffs criticize the Court for relying “solely” on the deposition testimony of
16 ADP Executive Director Sheila Healy in determining that there was no likelihood of
17 irreparable harm from enforcement of H.B. 2023. (Doc. 210, at 6). But the Court also
18 relied on the conclusion that “[b]ecause Plaintiffs are not likely to succeed on the merits
19 of their claims, they have not shown that H.B. 2023 will likely cause them irreparable
20 harm.” (Doc. 204, at 25 (citing *Hale v. Dep’t of Energy*, 806 F.2d 910, 918 (9th Cir.
21 1986))). Moreover, Plaintiffs’ attempt to distance themselves from Healy’s testimony by
22 asserting that she was testifying in her personal capacity cannot remedy their complete
23 failure to present evidence of who and how many people will be harmed irreparably by
24 enforcement of H.B. 2023.⁷

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27 ⁷ Despite Plaintiffs’ counsel’s statement during Healy’s deposition that she was testifying
28 in her personal capacity, Healy submitted a declaration in her official capacity as ADP
Executive Director that described at length the ADP’s activities and knowledge. (*See*

1 Early voting for the August 30, 2016 Primary Election began on August 3, 2016,
 2 and H.B. 2023 became effective on August 6, 2016. Nearly a million Arizonans cast
 3 ballots in the Primary Election, yet Plaintiffs have not located a single person who was
 4 unable to vote or was severely burdened in his or her ability to vote by H.B. 2023's
 5 limitation of the persons who could hand deliver early ballots to election officials. If no
 6 one was irreparably harmed in the Primary Election, it follows that continued
 7 enforcement of this reasonable voting regulation will not cause irreparable harm in the
 8 General Election.

9 **III. AS THE COURT PROPERLY FOUND, PLAINTIFFS ARE UNLIKELY TO**
 10 **SUCCEED ON THE MERITS OF THEIR CLAIMS.**

11 **A. For their § 2 Claim, Plaintiffs' Admitted Failure to Provide Any**
 12 **Quantitative Evidence Precluded a Finding that H.B. 2023 Was Likely**
 13 **to Have a Disparate Impact on Minorities.**

14 Plaintiffs do not challenge this Court's finding that they have "provide[d] no
 15 quantitative or statistical evidence comparing the proportion of minority versus white
 16 voters who rely on others to collect their early ballots." (Doc. 204, at 8). Given the
 17 complete lack of such evidence, this Court correctly held that "Plaintiffs are not likely to
 18 succeed on their § 2 claim because there is insufficient evidence of a statistically relevant
 19 disparity between minority as compared to white voters." (*Id.*)⁸

20 Plaintiffs contend this holding "created a new threshold test, never applied before
 21 by any court." (Doc. 210, at 7). Nothing could be further from the truth.

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 23 Doc. 100, at ¶¶ 2, 20; Ex. 1, Third Declaration of Karen J. Hartman-Tellez, Ex. A, Healy
 24 Dep. at 37:19-22). Healy's testimony that she "ha[d] no way of knowing if and how
 25 many voters could be impacted by [ADP's] inability to offer to mail their ballot for
 26 them," was a response to questions about the ADP's ballot collection activities described
 27 in her declaration. (Healy Dep. at 40:23-41:2; *see also id.* at 37:19-40:22).

28 ⁸ The Court did not require Plaintiffs to "definitively" prove a § 2 violation, as Plaintiffs
 contend. (Doc. 210, at 8 n.2). Plaintiffs simply ignore the Court's references to and
 application of the likelihood of success standard. (*See* Doc. 204, at 8, 14, 21-22).

1 This Court is far from the first to emphasize the importance of quantitative
2 evidence in showing the requisite disparate impact in § 2 vote-denial claims. *See One*
3 *Wisc. Inst., Inc. v. Thomsen*, 15-cv-324-jdp, 2016 WL 4059222, at *47 (W.D. Wis. July
4 29, 2016) (“[P]laintiffs’ evidence of a disparate burden substantially consists of anecdotes
5 and lay observations . . . This testimony does not establish a verifiable disparate effect,”
6 as required by § 2); *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *17 (5th Cir.
7 July 20, 2016). (“[C]ourts regularly utilize statistical analysis to discern whether a law
8 has a discriminatory impact.”). In *Gonzalez*, for instance, the Ninth Circuit quoted the
9 trial court’s conclusion that a challenged law did not violate § 2 when it did “not have a
10 *statistically significant* disparate impact on Latino voters.” *Gonzalez v. Arizona*, 677 F.3d
11 383, 406 (9th Cir. 2012) (en banc) (emphasis added; internal quotations and citation
12 omitted).

13 This Court also correctly recognized the necessity of quantitative evidence in
14 proving disparate impact in other contexts, such as claims arising under the Fair Housing
15 Act, Age Discrimination in Employment Act, Equal Pay Act, Title VII, or 42 U.S.C.
16 § 1983. (Doc. 204, at 9 (citing numerous cases)). Plaintiffs do not address *any* of these
17 authorities, much less explain why their rationale should not apply to cases arising under
18 the VRA. Nor do Plaintiffs cite *any* case in which a disparate impact was proven, in the
19 § 2 context or otherwise, without quantitative evidence. Plaintiffs instead offer brand
20 new unsubstantiated arguments in a belated attempt to justify their admitted failure to
21 provide any quantitative evidence to support their § 2 claim. They provide no reason for
22 not raising these arguments until now. Regardless, none of the new arguments justify the
23 extraordinary relief Plaintiffs seek.

24 *First*, Plaintiffs contend that in § 2 *vote-dilution* cases, some courts have not
25 required quantitative evidence to demonstrate vote-dilution. (*See* Doc. 210, at 8-9). None
26 of the three vote-dilution cases cited by Plaintiffs are relevant to a disparate impact
27 analysis in the vote-denial context. Two cases discussed the type of evidence that can
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1 establish that a particular minority candidate is minority-preferred. *See Jenkins v. Red*
2 *Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993); *Sanchez v. State*
3 *of Colo.*, 97 F.3d 1303, 1320-21 (10th Cir. 1996). The third addressed, in *dicta*, how to
4 prove the political cohesiveness of a minority group and racial bloc voting. *See Cuthair v.*
5 *Montezuma-Cortez, Colo. Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998)
6 (noting that “an adequate statistical analysis was presented in this case”).⁹

7 *Second*, Plaintiffs assert that the Court failed to consider the “totality of the
8 circumstances” in assessing whether a disparate impact from H.B. 2023 was likely. (*See*
9 *Doc. 210 at 8-9*). The argument fails on the facts and the law. As a factual matter, the
10 Court’s Order reflects a careful review of the complete record, which did not include any
11 comparative evidence to show that H.B. 2023 was likely to have a disparate impact on
12 minorities as compared to whites, much less any statistically significant impact. This
13 analysis was consistent with *Gonzalez*, where the Ninth Circuit held that the presence of
14 some Senate Factors could not save a § 2 claim when plaintiffs failed to prove that the
15 voter ID law at issue resulted in Hispanic voters having less opportunity to vote as
16 compared to white voters. *See Gonzalez*, 677 F.3d at 407. Moreover, as a legal matter,
17 and as this Court has noted,¹⁰ the totality of the circumstances analysis, “potentially
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21 ⁹ Plaintiffs contend that when § 5 preclearance requirements were used, the DOJ did not
22 require covered jurisdictions to provide statistical evidence. (*See Doc. 210, at 9*). But that
23 preclearance scheme, invalidated by the Supreme Court in *Shelby County v. Holder*, 133
24 S. Ct. 2612 (2013), has little to no relevance to the disparate impact analysis here. Given
25 the tens of thousands of preclearance submissions that DOJ previously received under
26 § 5, covered jurisdictions could not have realistically been expected to provide statistical
evidence and/or expert analysis for every single voting practice submitted for
preclearance. By contrast, where plaintiffs file a lawsuit challenging a specific election
practice as contrary to § 2, quantitative evidence is expected and provided as a matter of
course. *See Veasey*, 2016 WL 3923868, at *17.

27 ¹⁰ (*Doc. 204, at 8*) (“The court need not reach the *Gingles* factors and totality-of-the-
28 circumstances inquiry, however, unless the plaintiff proves the existence of a relevant

1 informed by the ‘Senate Factors,’” only “comes into play” *after* the first element of a § 2
2 claim (disparate impact) has been established. *Ohio Democratic Party v. Husted*, No. 16-
3 3561, 2016 WL 4437605, at *13 (6th Cir. Aug. 23, 2016); *see also Veasey v. Abbott*, No.
4 14-41127, 2016 WL 3923868, at * 17 (5th Cir. July 20, 2016).¹¹

5 *Third*, Plaintiffs contend that this Court’s analysis “flies directly in the face” of the
6 “broad remedial purpose” of § 2. (Doc. 210 at 8 (quoting *Chisom v. Roemer*, 501 U.S.
7 380, 403 (1991)). The *Chisom* Court made this statement, however, in holding that § 2
8 applied to a vote-dilution claim relating to state judicial elections. *See Chisom*, 501 U.S.
9 at 403-04. The Supreme Court *never* suggested that the requisite disparate impact can be
10 established without *any* hard numbers. Nor does § 2’s remedial purpose negate the fact
11 that a § 2 claim has two elements, the first of which requires a “comparative exercise” of
12 the actual quantitative impact of the challenged practice on minority and white voters.
13 (See Doc. 204, at 9 (“Disparate impact analysis necessarily is a comparative exercise.”)).

14 The Motion also repeats an argument that this Court previously rejected—*i.e.*, that
15 Plaintiffs should be excused from producing the quantitative evidence necessary to show
16 disparate impact because the State does not track data on delivery of early ballots. This
17 argument fails as well. As this Court recognized, Plaintiffs could not explain in prior
18 briefing or at oral argument (and still cannot explain) why Defendants should bear the
19 burden to provide data for Plaintiffs’ § 2 claim. (Doc. 204, at 10 n. 3).

22 disparity between minority and white voters at step one.”); (*see also* Tr. of Proceedings
23 dated 9/2/16, at 17) (statements by the Court regarding the “second step” of the analysis).

24 ¹¹ Plaintiffs suggest that *Veasey* held that there is some lesser threshold for quantitative
25 evidence in § 2 claims involving “pre-election challenges to voting laws.” (Doc. 210, at
26 10). That is not correct. Although *Veasey* did not require voter turnout data, *Veasey*, 2016
27 WL 3923868 at **29-30, the plaintiffs presented other statistical data, including expert
28 analyses, on the number of minorities who lacked the necessary photo ID for voting. *See*
id. at 21-22. By contrast, Plaintiffs here have presented *no statistical evidence* on the
number of minority or white voters who rely on others to collect their early ballot.

1 Plaintiffs further ignore that in the absence of state-provided data, they had various
2 options to procure the necessary quantitative evidence on the comparative impact of H.B.
3 2023. The ADP asserts that it has been involved in collecting early ballots, (Doc. 157, ¶
4 4), yet provides no reason why it did not track data on these collection efforts. The ADP
5 either knew or should have known of the importance of such data in potential litigation—
6 as Plaintiffs recognize, the Legislature has considered bills with ballot collection
7 provisions as early as 2011. (*See* Doc. 210, at 3). Alternatively, Plaintiffs could have
8 engaged an expert to conduct a survey to determine the number of Arizona voters who
9 rely on others to collect their early ballot, as well as those voters’ “racial and ethnic
10 composition.” (Doc. 204, at 9). Plaintiffs cannot, however, “avoid their burden of proof
11 simply because surveying the relevant population might be difficult.” (*Id.*, at 10 n.3).

12 Standing alone, Plaintiffs’ failure to provide quantitative evidence relating to the
13 impacts of H.B. 2023 necessitated the denial of their preliminary injunction motion.

14 **B. Even if Quantitative Evidence Was Not Required, Plaintiffs Failed to**
15 **Provide Sufficient Evidence of a Likelihood of Disparate Impact.**

16 This Court’s conclusion that Plaintiffs failed to show a likelihood of success on
17 their § 2 claim did not rely entirely on the absence of quantitative evidence. The Court
18 also correctly held that “[a]ssuming, *arguendo*, that a § 2 violation could be proved using
19 non-quantitative evidence, Plaintiffs’ evidence is not compelling.” (Doc. 204 at 10).¹²

20 Plaintiffs characterize the Court’s alternative analysis as “also deeply flawed.”
21 (Doc. 210 at 10). But in discussing these supposed flaws, Plaintiffs simply rehash the
22 same evidence already deemed insufficient. *See Lands Council v. Packard*, 391 F. Supp.
23 2d 869, 871 (D. Idaho 2005) (denying motion for injunction pending appeal when
24 plaintiffs simply “restated the arguments previously raised in support of their motion for
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27 ¹² This alternative holding further shows that, contrary to Plaintiffs’ argument, this Court
28 *did* consider the “totality of the circumstances.”

1 temporary restraining order and/or preliminary injunction” and “declin[ing] the invitation
2 to revisit those same issues”). In so doing, Plaintiffs do not challenge (or even address)
3 many of the findings that supported the Court’s alternative analysis, such as its
4 conclusions that (1) Plaintiffs’ “declarants predominately are Democratic partisans and
5 members of organizations that admittedly target their GOTV efforts at minority
6 communities,” (Doc. 204, at 10), (2) “groups from all ideological backgrounds use ballot
7 collection,” (*id.*, at 10 n. 4) (quoting Doc. 86, ¶ 18), (3) Plaintiffs provided no evidence
8 “that minority voters are more likely to be elderly or homebound, to prefer to wait until
9 Election Day to cast consequential votes, or to forget to mail their ballots,” (Doc. 204, at
10 11), and (4) while some rural communities in Arizona are largely Hispanic, other rural
11 communities are predominantly white. (*Id.*) Plaintiffs’ selective discussion of the
12 evidence provides no basis for this Court to reconsider its well-reasoned opinion.

13 Plaintiffs also suggest that this Court “erred in failing to consider” socioeconomic
14 disparities in its disparate impact analysis. (Doc. 210, at 11). They cite no authority,
15 however, stating that socioeconomic disparities are enough to establish a violation of § 2.
16 Indeed, if that were the case, any election regulation may be subject to § 2 attack on the
17 grounds that the regulation makes it slightly more inconvenient for individuals on the
18 lower end of the socioeconomic scale to vote. *See Burdick v. Takushi*, 504 U.S. 428
19 (1992) (“Election laws will invariably impose some burden upon individual voters.”); *see*
20 *also Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (“[I]t would be implausible to
21 read § 2 as sweeping away almost all registration and voting rules.”).¹³

22 Even if Plaintiffs had shown that H.B. 2023 disparately impacts minority voters
23 (and they have not), H.B. 2023’s limited restrictions on who may collect an early ballot
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26 ¹³ Plaintiffs cite *North Carolina State Conference of NAACP v. McCrory*, No. 16-1498,
27 2016 WL 4053033, at *2-4 (4th. Cir. July 29, 2016), but that case involved analysis of
28 whether laws had been enacted with a racial discriminatory *intent*, not discriminatory
effect.

1 does not “result[] in a denial or abridgement” of the opportunity to vote, as § 2 requires.
2 52 U.S.C. § 10301(a). Minimal inconveniences on voting do not violate § 2. *See Lee v.*
3 *Va. State Bd. of Elections*, 2015 WL 9274922, at *9 (E.D. Va. 2015); *see also Frank*, 768
4 F.3d at 753 (photo ID requirement that did not make it “needlessly hard” to vote did not
5 violate § 2). Because H.B. 2023 only imposes minor burdens, § 2 simply does not apply.
6 (*See Doc. 204*, at 16-19).

7 **C. Plaintiffs Have Also Failed to Establish a Likelihood of Success on the**
8 **Second Element of a § 2 Claim.**

9 Because Plaintiffs failed to show a likelihood of success on the first step of a § 2
10 claim, this Court had no need to assess the second step. (*See Doc. 204*, at 14). Had the
11 Court reached the second step, Plaintiffs would have failed at that stage too.

12 The second step of the § 2 analysis “asks . . . whether the challenged voting
13 standard or practice causes the discriminatory impact as it interacts with social and
14 historical conditions” that have produced discrimination against minorities. (*Doc. 204*, at
15 8) (quoting *Husted*, 2016 WL 4437605, at *14 (alterations omitted)). Here, the Motion
16 focuses on social and historical conditions by providing yet another summary of Senate
17 Factor evidence.¹⁴ But, once again, Plaintiffs fail to show how these conditions interact
18 with H.B. 2023 to produce a disparate impact. For example, Plaintiffs “highlight[] the
19 challenges faced by voters” in largely Hispanic communities near the Mexican border,
20 (*Doc. 204*, at 11), but they do not provide any evidence to show that the voting
21 challenges in these communities is the result of discrimination instead of geography. In
22 the absence of such evidence, Plaintiffs are not likely to succeed at the second step of a
23 § 2 analysis.

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27 ¹⁴ The Defendants have previously detailed the many defects in Plaintiffs’ selective
28 evidence on the Senate Factors. (*See Doc. 152*, at 7-8; *Doc. 153*, at 7-10).

1 **D. Plaintiffs Are Unlikely to Succeed on the Merits of Their First and**
2 **Fourteenth Amendment Claims.**

3 Defendants acknowledge that handing an early ballot to a person who comes to a
4 voter’s home and offers to deliver it to elections officials may be marginally more
5 convenient than putting that ballot in a mailbox or dropping it off at a polling place on
6 Election Day. But the constitutional standard is not one of convenience—the law must
7 actually burden the right to vote to run the risk of violating the Fourteenth Amendment.
8 *See Ohio Democratic Party*, 2016 WL 4437605, at *6 (stating that elimination of a week
9 during which one could both register and vote early at the same time “can hardly be
10 deemed to impose a true ‘burden’ on any person’s right to vote,” and that “[a]t worst, it
11 represents a withdrawal or contraction of just one of many conveniences that have
12 generously facilitated voting participation”). Nor does elimination of this convenience
13 prevent Plaintiffs from engaging in all of the expressive and associational activities that
14 they conducted before H.B. 2023. The evidence that Plaintiffs presented in support of
15 their P.I. Motion—the same evidence on which they rely in the Motion—simply does not
16 support a finding that H.B. 2023 meaningfully burdens the right to vote. This Court
17 properly concluded that Plaintiffs were unlikely to succeed on the merits of their First and
18 Fourteenth Amendment claims. (Doc. 204, at 21, 23). Nothing that they have argued in
19 their Motion demonstrates a need for the extraordinary relief of an injunction pending
20 appeal—which, because early voting commences in less than two weeks, would have
21 precisely the same effect as the preliminary injunction that this Court denied.

22 1. **Because Plaintiffs Offer No Evidence that H.B. 2023 Burdens**
23 **Voters, the State’s Important Regulatory Interests Support Its**
24 **Constitutionality.**

25 As this Court recognized, it must apply the *Anderson-Burdick* test to Plaintiffs’
26 claim that H.B. 2023 burdens the Fourteenth Amendment right to equal protection —*i.e.*,
27 the Court must “weigh the nature and magnitude of the burden imposed by the law
28 against the state’s interests in and justifications for it.” (Doc. 204, at 15 (citing *Nader v.*

1 *Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008))). The extent of the burden on the asserted
2 rights determines the level of scrutiny. Where the burden is not severe, courts “apply less
3 exacting review, and a State’s important regulatory interests will usually be enough to
4 justify reasonable, nondiscriminatory restrictions.” *Dudum v. Arntz*, 640 F.3d 1098, 1106
5 (9th Cir. 2011) (internal quotation marks omitted).

6 Plaintiffs have not shown that H.B. 2023 severely burdens the right to vote. *See*
7 *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1199 (Ill. Ct. App. 2005) (holding that the
8 burden from a law limiting the return of absentee ballots more strictly than H.B.2023 “is
9 slight and is nondiscriminatory”). Indeed, even after the Primary Election, Plaintiffs have
10 not identified a single voter whose ability to vote was burdened by H.B. 2023. (*See* Healy
11 Dep. at 40:25-41:3 (“I have no way of knowing if and how many voters could be
12 impacted by [the ADP’s] inability to mail their ballot for them.”); Deposition of Randy
13 Parraz, Doc. 153-1, Ex. 16, at 92:5 (“All voters can mail in their ballot.”)).

14 Moreover, Plaintiffs have not shown that H.B. 2023 burdens voters’ ability to vote
15 in person on Election Day or at an early voting site, to vote by mail, to vote by a special
16 election board, or by giving their ballot to a family member, household member,
17 caregiver, or election worker. Plaintiffs argue that these alternatives to ballot collection
18 are more burdensome, and that learning about these alternatives shortly before an election
19 is itself a burden. (Doc. 210, at 13-14). Surely, voters do not need to learn that they can
20 vote at a polling place near their home on Election Day, and Plaintiffs are well-positioned
21 to inform voters of the other methods of voting. Indeed, Plaintiffs’ claims about this new
22 type of burden are purely speculative, as they have not identified a single voter who will
23 incur a substantial obstacle to voting in November due to H.B. 2023. In addition, while
24 Plaintiffs highlight the fact that H.B. 2023 is a criminal law, they gloss over the fact that
25 the penalty is faced by the ballot collector, not the voter. (*See id.*, at 13); A.R.S. § 16-
26 1005(H). Furthermore, counties may still count a ballot even if it is returned in violation
27 of H.B. 2023. *Compare* Cal. Elecs. Code § 3017(d) (mandating that ballots returned by
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1 an unauthorized person not be counted).¹⁵

2 In sum, H.B. 2023 removes one convenience from voters who had previously been
3 targeted by ballot collectors.¹⁶ See *Ohio Democratic Party*, 2016 WL 4437605, at *6. In
4 contrast, courts have considered far more extensive restrictions to be only minimal
5 burdens. For example, Arizona’s requirement of documentary evidence of citizenship in
6 order to register to vote is not a severe burden, even though a person without such
7 evidence cannot register to vote in state elections. See *Gonzalez v. Arizona*, 485 F.3d
8 1041, 1049 (9th Cir. 2007). The Supreme Court has held that voter ID requirements
9 impose only a minimal burden, even when they require gathering records and traveling to
10 government offices to obtain identification. *Crawford v. Marion Cty. Election Bd.*, 553
11 U.S. 181, 198 (2008) (stating that the steps necessary to obtain a photo identification
12 card, including travel to a government office, “surely do[] not qualify as a substantial
13 burden on the right to vote”).

14 Plaintiffs complain that the Court applied the wrong standard to their Fourteenth
15 Amendment claim—that it used rational basis review to deny a preliminary injunction.
16 (Doc. 210, at 15). By seizing on one word in the Court’s 27-page Order, the Plaintiffs
17 ignore the full picture of the Court’s analysis, in which it determined that “[b]ecause H.B.
18 2023 imposes only minimal burdens, Arizona must show only that it serves important
19 regulatory interests.” (Doc. 204, at 19 (citing *Wash. State Grange v. Wash. State*
20 *Republican Party*, 552 U.S. 442, 452 (2008))). Thus, the Court did not shift the burden to
21 the Plaintiffs to demonstrate that there was no rational basis for H.B. 2023. And it relied
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24 ¹⁵ It does not appear that Plaintiffs have ever challenged California’s more restrictive
25 ballot collection prohibition. Such selective litigation is telling regarding Plaintiffs’
26 motives in Arizona, where they do not hold the political advantage that they have in
27 California.

28 ¹⁶ Notably, the “burden” imposed by H.B. 2023 is only new for those who were targeted
by ballot collectors in the past. Most Arizonans who vote by mail have delivered their
ballots to elections officials without ballot collection for many years.

1 on state interests that the Supreme Court has repeatedly recognized as the type of
2 important regulatory interests that justify the minimal burden that H.B. 2023 may impose
3 on voters. *See Crawford*, 553 U.S. at 195 (combatting election fraud); *Purcell v.*
4 *Gonzalez*, 549 U.S. 1, 4 (2006) (preserving public confidence in the electoral process).

5 2. Ballot Collection Alone Is Not Expressive Activity Protected by the
6 First Amendment.

7 With no new evidence, Plaintiffs reiterate their argument that H.B. 2023 burdens
8 their associational rights. (Doc. 210, at 14). The *Anderson-Burdick* test applies to this
9 claim as well. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).
10 Plaintiffs assert that the Court “undervalued the expressive significance of participation
11 in, and the assistance of others in participating in, the political process.” (Doc. 210, at
12 14). In fact, the Court properly disentangled Plaintiffs’ expressive and associational
13 conduct from the ministerial act of delivering ballots. (Doc. 204, at 22 (citing *Voting for*
14 *Am. v. Steen*, 732 F.3d 382, 389, 392 (5th Cir. 2013))). As Plaintiffs’ witnesses
15 acknowledged, H.B. 2023 does not limit their expressive activity. (Healy Dep. at 99:19-
16 103:13; Parraz Dep., Doc. 153-1, Ex. 16, at 123:14-127:12) It will not prevent them from
17 engaging with voters to discuss candidates and issues, to inform them about the process
18 of voting early or on election day, and to encourage them to vote. (*Id.*) The only thing
19 that H.B. 2023 will prevent Plaintiffs from doing is collecting voters’ voted ballots. Like
20 the voter registration laws at issue in *Voting for America*, H.B. 2023 “do[es] not in any
21 way restrict or regulate who can advocate pro-vot[ing] messages, the manner in which
22 they may do so, or any communicative conduct. [It] merely regulate[s] the receipt and
23 delivery of completed [ballots], two non-expressive activities.” 732 F.3d at 391
24 (footnotes omitted).

25 Even if the Court were to conclude that ballot collection is inextricably intertwined
26 with Plaintiffs’ associational and speech-related activities, H.B. 2023 does not severely
27 burden those activities. *See Timmons*, 520 U.S. at 358 (applying *Burdick* test to a claim
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1 that state election law violated First Amendment associational rights). As noted above,
2 Plaintiffs are not seriously limited in their ability to engage with voters and encourage
3 them to vote for the candidates that Plaintiffs support. As the burden on Plaintiffs' First
4 Amendment rights is not severe, if it exists at all, the State's interests in deterring fraud
5 related to early ballots are more than enough to justify H.B. 2023 and the Court properly
6 concluded that Plaintiffs are not likely to succeed on their First Amendment claim. (*See*
7 *Doc. 204, at 23*).

8 **IV. AS THE COURT PROPERLY FOUND, THE BALANCE OF HARDSHIPS**
9 **AND PUBLIC INTEREST WEIGH AGAINST PLAINTIFFS' RELIEF.**

10 Plaintiffs assert that this Court erred when it did not consider whether they had
11 raised "serious questions on the merits and [whether] the balance of hardships tips
12 sharply in their favor." (*Doc. 210, at 17*). As explained above, Plaintiffs have presented
13 no evidence of any voter who will be harmed by H.B. 2023. Plaintiffs have established
14 neither a serious question about the merits nor that the balance of hardships tips sharply
15 in their favor. Moreover, "'serious questions going to the merits' and a hardship balance
16 that tips sharply towards the plaintiff can support issuance of a preliminary injunction, *so*
17 *long as the plaintiff also shows that there is a likelihood of irreparable injury and that the*
18 *injunction is in the public interest.*" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
19 1127, 1132 (9th Cir. 2011) (emphasis added) (describing the continued validity of the
20 "serious questions" test after *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7 (2008)).
21 Because Plaintiffs have failed to make a showing on any of the prongs of the *Winter* test,
22 they are not entitled to an injunction pending appeal.

23 Here, the public interest and balance of equities tip strongly in the State's favor.
24 *Maryland v. King*, 133 S. Ct. 1, 3 (2012) ("[A]ny time a State is enjoined by a court from
25 effectuating statutes enacted by representatives of its people, it suffers a form of
26 irreparable injury.") Plaintiffs rely on public statements by county officials, and the lack
27 of an update to the Secretary of State's Election Procedures Manual to argue that the
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1 State has no interest in enforcing H.B. 2023. (Doc. 210, at 17). Because H.B. 2023 is a
2 criminal law, neither county nor state elections officials are responsible for its
3 enforcement. Instead, that task falls to the Attorney General, who intends to act on any
4 information he receives regarding violations of H.B. 2023. *See* A.R.S. § 16-1021.

5 Plaintiffs seek an injunction against an election law, and the “State indisputably
6 has a compelling interest in preserving the integrity of its election process.” *See Purcell*,
7 549 U.S. at 4; *Crawford*, 553 U.S. at 203. The Ninth Circuit has therefore held that the
8 “law recognizes that election cases are different form ordinary injunction cases,” because
9 “hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but
10 on all the citizens of [Arizona].” *Sw. Voter Registration Educ. Project v. Shelley*, 344
11 F.3d 914, 919 (9th Cir. 2003). “Given the deep public interest in honest and fair elections
12 and the numerous available options for the interested parties to continue to vigorously
13 participate in the election, the balance of interests falls resoundingly in favor of the public
14 interest.” *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012).

15 **V. CONCLUSION**

16 For the foregoing reasons, the State and Intervenor Defendants request that the
17 Court deny the relief sought by Plaintiffs’ Motion. No good cause or reason exists for a
18 stay of the Court’s Order and injunction of the ongoing implementation and enforcement
19 of H.B. 2023 pending resolution of Plaintiffs’ appeal. Moreover, no just terms might be
20 applied to protect the opposing parties’ rights to the ongoing implementation and
21 enforcement of this sensible state law while the appeal is resolved. *See* Fed. R. Civ. P.
22 62(c). Accordingly, Plaintiffs’ Motion should be denied.
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1 RESPECTFULLY SUBMITTED this 3rd day of October, 2016.

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3 MARK BRNOVICH
Attorney General

4 By: s/ Karen J. Hartman-Tellez
5 Kara Karlson
6 Karen J. Hartman-Tellez
7 Assistant Attorneys General
1275 West Washington Street
8 Phoenix, Arizona 85007
Attorneys for State Defendants

9 SNELL & WILMER LLP

10 By: s/ Sara J. Agne (w/ permission)
11 Brett W. Johnson
12 Sara J. Agne
13 Colin P. Adler
14 Joy L. Isaacs
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
15 Timothy A. La Sota
16 2198 E. Camelback Road, Suite 305
17 Phoenix, Arizona 85016

18 *Attorneys for Intervenor-Defendants*
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 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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