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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona Democratic Party, et al.,

Plaintiffs,

v.

Michele Reagan, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR AN INJUNCTION OF HB 2023 PENDING APPEAL

INTRODUCTION

This case presents an unusually strong basis for a finding that a party is likely to succeed on appeal: a majority of the en banc Court of Appeals found, at an earlier stage of the case, that Plaintiffs were likely to succeed on the merits on a less robust record than the one presented at trial. Because this case involves the fundamental right to vote, it also involves a clear risk of irreparable harm. Meanwhile, the State of Arizona's (the "State") interest in effectuating the law at issue is negligible, at best. This Court should therefore enjoin HB2023 pending the resolution of the appeal of this case.

LEGAL STANDARD

In considering whether to grant an injunction pending appeal, the standard for preliminary injunctive relief applies. *See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Plaintiffs must demonstrate either (1) "a probability of success on the merits and the possibility of irreparable injury," or (2) "that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (citations omitted); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest"); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) ("serious questions" test survives *Winter*).

ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are likely to succeed on the merits for several reasons. Indeed, the record here is similar to—but stronger than—the record that the en banc Ninth Circuit found sufficient to establish a likelihood of success on the merits on Plaintiffs' *Anderson-Burdick* and Voting Rights Act ("VRA") claims at the preliminary-injunction ("PI") phase of this case. Plaintiffs are also likely to establish that this Court's *Anderson-Burdick* analysis was flawed as a matter of law in part because it understated the burden that

HB2023 imposes on voting rights, and that the Court's VRA analysis was incorrect because it did not account for the evidence demonstrating that the voters who used ballot collection were *overwhelmingly* minority voters.[1]

First, Plaintiffs are likely to succeed on their *Anderson-Burdick* and VRA claims because they have established the same key facts on which the en banc Ninth Circuit previously relied in concluding that Plaintiffs were likely to succeed on the merits. In his panel dissent at the PI phase (which was later largely adopted by the en banc court in issuing an injunction), Chief Judge Thomas explained that "[t]he record demonstrated that, in many rural areas with a high proportion of minority voters, home mail delivery was not available, and it was extremely difficult to travel to a post office." *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1088 (9th Cir.) (Thomas, J., dissenting), *reh'g en banc granted*, 841 F.3d 791 (9th Cir. 2016).[2] At trial, the evidence proved the same point. *See, e.g.*, 10/3 Tr. 39:20-41:2, 44:17-45:8, 46:14-23, 53:17-54:11 (Fernandez) (San Luis has no home mail delivery and 12,498 P.O. boxes, no mass transit, and low car ownership; there are only two locations at which ballots can be mailed or dropped off and, because the post office is across the highway from the residential area, residents frequently rely upon friends, neighbors and family to pick up mail); Ex. 25-028 ("There are over 15,000 people in the city of Somerton, and none of them—not one of them has a mailbox where the mail is delivered to their homes.").

The trial record also shows, as Chief Judge Thomas found at the PI phase, that residents of the Tohono O'odham Nation and the Cocopah Nation have no home mail delivery and generally lack ready access to a post office. *Compare Feldman*, 840 F.3d at 1088, *with* 10/3 Tr. 55:5-7, 55:17-19 (Fernandez) (no home mail delivery on Cocopah Nation or Tohono O'odham Nation); 10/3 Tr. 57:19-58:10 (Fernandez) (Tohono O'odham

[1] Pursuant to this Court's instruction during the May 14, 2018 telephonic hearing, Plaintiffs are presenting only three of the reasons they are likely to succeed on appeal, and the arguments in this filing focus in part on topics discussed during the May 14 hearing. Plaintiffs do not waive any arguments as to their likelihood of success on the merits, and they expressly reserve the right to make additional arguments to the Ninth Circuit.

[2] All citations herein to *Feldman* are citations to Chief Judge Thomas's dissent.

postmaster reported that some residents pick up mail every two or three weeks because the post office is not located in a central area, and that "people would bring … groups of ballots in and drop them off"); Ex. 17-061 (Cocopah Nation "another example" of tribal area where "mailbox service is very far away" and "many community members help each other" by collecting ballots). *See generally Feldman*, 840 F.3d at 1088 ("The evidence in this case shows that restrictions on ballot collection affect the Tohono O'odham tribe significantly."); *id.* at 1093 ("The record evidence was plain and uncontroverted: H.B. 2023 places a disproportionate burden on the voting opportunities of members of the Tohono O'odham tribe in comparison with the population of white voters.").

With respect to urban areas, Chief Judge Thomas wrote at the PI phase that "record evidence demonstrated that the burden of [HB2023] affected minority voters the most because of socioeconomic factors." *Feldman*, 840 F.3d at 1088. He explained that "many minority urban voters lived in places with insecure mail delivery; that many minority urban voters were dependent upon public transportation, which made election day in-person voting difficult; that many minority voters worked several jobs, making it difficult to take time off work to vote in person; and that many infirm minority voters did not have access to caregivers or family who could transmit ballots." *Id.* at 1088-89. Likewise, the evidence at trial demonstrated that minority voters in urban areas disproportionately utilized ballot collection—and will be disproportionately burdened by HB2023—because of these socioeconomic factors.[3]

[3] *See, e.g.*, 10/5 Tr. 636:19-637:23 (Quezada) (lack of outgoing mailboxes at apartment complexes was one of "main reasons" voters requested ballot collection in heavily Latino Phoenix neighborhood); 10/6 Tr. 952:4-17 (Gallego) (voters in low-income South Phoenix neighborhood "often very happy" to hand ballot to a collector and "not have to worry about leaving it out in the mailbox where something might happen … mail gets lost fairly frequently"); Ex. 91-042 (Lichtman) (compared to white Arizonans, Hispanics are 35% less likely to have access to a vehicle, while African Americans and Native Americans are approximately three times less likely); 10/6 Tr. 948:22-951:7 (Gallego) (in her heavily minority district, "a lot of people []don't own a car at all"; with public transportation, "it is tough to get around"); Ex. 97-058-60 (Rodden) (rates of disability among Native Americans are high, with "17 percent of Native Americans [] disabled in Apache County, 22 percent in Navajo County, and 30 percent in Coconino County."); 10/6 Tr. 952:18-953:15 (Gallego) (explaining that burden on voters with mobility challenges is severe; "it's a sad situation, but we have people who really have

The evidence also showed that minority voters in urban areas in Arizona generally "encountered significant burdens in exercising their right to vote." *Feldman*, 840 F.3d at 1093. At both the PI phase and at trial, the evidence showed that "[t]he reduced number of polling places meant that voters had to wait hours in line to cast ballots"; "[l]ow income voters had difficulty getting to the polls because of their dependence on public transportation"; and [v]oters who were not fluent in English had difficulty determining where to vote." *Id.*; *see also, e.g.*, 10/13 Tr. 1896:11 (Spencer) (during 2016 presidential preference election, "the lines to vote on Election Day at times exceeded five hours."); 10/5 Tr. 644:1-647:18 (voters frequently confused about where to vote, and confusion exacerbated by errors in Spanish-language election materials, including listing the incorrect election date in a Spanish-language informational mailing); 10/4 Tr. 421:1-424:10 (Larios) (confusion about where to vote and distrust of official information inhibits voter education); 10/5 Tr. 628:25-630:20 (Quezada) ("I come across many voters who don't have access to any vehicles at all and who rely entirely on public transportation."). As Chief Judge Thomas concluded, "[s]tatistical evidence is not needed to see that without ballot collecting, these voters will have less opportunity than other members of the electorate to participate in the political process." *Feldman*, 840 F.3d at 1093-94.

Further, the evidence at trial went beyond that presented at the PI phase. It shows that "[o]n the Navajo Reservation, most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families." Op. 61; *see also* 10/4 Tr. 174:16-179:21 (Gorman). Dr. Rodden also did an analysis of "mailability"

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chronic pain and who … don't leave their homes or who struggle to get up" and, on one occasion, "a voter crawled to answer the door"). *See generally* 10/6 Tr. 895:11-897:18, 899:13-20 (Gillespie) (primary reasons for use of ballot collection were inability to get time off of work to drop ballot off; lack of reliable transportation; mobility impairments; lack of secure outgoing mail service; and rumors of voter intimidation at polling places); 10/4 Tr. 419:25-12 (Larios) (low-income voters who are working "don't oftentimes have the option of when to take time off … and they were oftentimes working nights - and so that was often a prohibitive factor for them going to the polls and turning in their ballot"); 10/3 Tr. 116:6-7 (Correa) (needed to take time off work to vote).

outside of Maricopa and Pima counties and found that "around 86 percent of non-Hispanic whites have home mail service, but only 80 percent of Hispanics do, and only 18 percent of Native Americans have such access." Op. 7-8 (internal quotation marks omitted). In addition, while this Court indicated at the PI phase that the record did not contain much evidence regarding the use of ballot collection by white voters, *see Feldman v. Ariz. Sec'y of State's Office*, 208 F. Supp. 3d 1074, 1084-85 (D. Ariz.), *aff'd*, 840 F.3d 1057 (9th Cir.), *reh'g en banc granted*, 841 F.3d 791 (9th Cir. 2016), the trial record clearly shows that voters in predominantly white neighborhoods have had less need for or interest in ballot collection. *See infra* page 8.

In short, there is substantial overlap between the evidence that the en banc Ninth Circuit found persuasive at the PI phase and the record the Ninth Circuit will be reviewing on appeal. The main difference is that the evidence the Plaintiffs presented at trial was *stronger* than the evidence presented at the PI phase. Plaintiffs therefore have a high likelihood of succeeding on their *Anderson-Burdick* and VRA claims on appeal.

Second, Plaintiffs are likely to succeed on their *Anderson-Burdick* claim on appeal because the Court erred in concluding that "[t]he evidence available largely shows that voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways." Op. 26. In *North Carolina State Conference of NAACP v. McCrory*, where the district court "concluded its analysis by remarking that [challenged restrictions on voting] simply eliminated a system 'preferred' by African Americans as 'more convenient,'" the Fourth Circuit explained that several "socioeconomic disparities establish[ed] that no mere 'preference' led African Americans to disproportionately use" the methods of registration and voting that had been curbed or eliminated; "for many African Americans, [those methods of registration and voting] are a necessity." 831 F.3d 204, 232-33 (4th Cir. 2016).

The same basic conclusion—that the eliminated method of voting was not simply a "convenience"—is unavoidable here, where the record demonstrates that Arizona voters

used ballot collection *not* because of some unusual personal preference but because other options for voting were either unduly burdensome or simply unavailable. For example, Leah Gillespie, who testified that she personally observed that 1,200 to 1,500 ballots were collected by the Maricopa County Democratic Party (which would not have been all of the ballots the organization collected), said those ballots were collected even though volunteers had been trained to attempt to find others (besides Maricopa County Democratic Party volunteers) who could deliver a ballot for a voter: "[W]e do everything we can to have someone else take it into the polls if at all possible. It's extra work. … If there's no other option for a voter, we take in the ballot." 10/6 Tr. 900:22-902:7, 907:12-23.[4] Carolyn Glover testified that, after HB2023 was in effect, some residents at her senior apartment complex had caregivers turn in their ballots, *but others were not able to vote because they did not have anyone to collect their ballots*. 10/3 Tr. 228:20-230:1; *see also* 10/5 Tr. 639:12-642:16 (Quezada) (his campaign continued to receive requests for ballot collection after HB2023 was enacted and, while his campaign attempted to provide rides to voters, it did not have the resources to provide rides to all who requested assistance and could not provide rides to bedridden voters or voters who needed specialized medical transport); Pstross Dep. 51:5-23 (after HB2023, spoke to voters in the hospital or who otherwise were unable to travel and could not contact the recorder's office for assistance because the phone line was busy; Pstross was unable to help them because of HB2023).

The testimony of voters who relied on ballot collection illustrates this point as well. Daniel Magos testified that on one occasion, he was dealing with flooding at his home and was only able to vote because of ballot collection. 10/3 Tr. 239:16-241:3. Marva Gilbreath

[4] *See also* 10/5 Tr. 674:7-18 (Quezada) (most of the time, voters who asked for ballot collection did not have a family member who could help); Op. 26 (Larios described "special challenges for communities that lack easy access to outgoing mail services; the elderly, homebound, and disabled voters; socioeconomically disadvantaged voters who lack reliable transportation; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process and therefore do not vote without assistance or tend to miss critical deadlines"); 10/6 Tr. 900:12-19 (Gillespie) (Q: "…did you ever encounter anyone who wouldn't have been able to turn in a ballot without your assistance?" A. "Yes. Absolutely. People said 'Thank you. I have no other way to get this in.'").

testified that she and her daughter both have health and mobility issues and that, prior to HB2023, a friend collected their ballots. 10/3 Tr. 130:5-132:10. After HB2023 was enacted, Gilbreath moved to a new neighborhood, did not know where her polling place was, did not have a family member who could turn her ballot in, and did not know who to call to help; *she did not vote in the 2016 general election*, though she said that the option of giving her ballot to a ballot collector would have made it possible for her to vote. 10/3 Tr. 133:2-136:1.

To be sure, Arizona provides for special election boards and curbside voting, Op. 27,[5] but there is no evidence in the record showing that these policies *in practice* have or will meaningfully offset HB2023's burdens on voting. Indeed, "relatively few voters are aware" of the special election board process. Op. 27; *see also* Vasquez Dep. 34:14-17 (unaware of special election boards); 10/3 Tr. 233:3-6 (Glover) (same); 10/3 Tr. 249:24-250:1 (Magos) (same); 10/4 Tr. 338:21-339:4 (Fulton) (same); 10/6 Tr. 963:19-23 (Gallego) ("I consider myself to be very engaged in campaigns and politics. I had never heard of the special election board until preparing for this trial."). A special election board is also only available to voters who are "confined" because of "a continuing illness or disability," Ex. 369-003; it has to be requested by 5 p.m. on the second Friday before an election (unless a voter becomes ill or disabled after that day), *id.*; and there is no evidence in the record indicating that Arizona election officials have the resources needed to make a special election board available to thousands (or even hundreds) of voters. Curbside voting, for its part, does not help those who do not have a means of traveling to a polling place. *See, e.g.*, 10/3 Tr. 233:7-23 (Glover); *see also* Healy Dep. 95:3-15 (witnessed polling location where curbside voting would not have been possible because

[5] Arizona also "requires employers to give an employee time off to vote if the employee is scheduled to work a shift on Election Day that provides fewer than three consecutive hours between either the opening of the polls and the beginning of the shift, or the end of the shift and the closing of the polls," Op. 27, but the record does not indicate that any meaningful number of voters have used this right (or would be willing to assert it). Further, this provision likely would not help most voters who are unable to vote in person because they work multiple jobs, and this policy of course only relates to one of the reasons that HB2023 makes voting more difficult for some voters.

parking lot was so full that police were telling voters to drive on). Thus, the fact that these alternative means of voting exist does not offset the burdens resulting from HB2023; these burdens outweigh the weak justifications for that law; and Plaintiffs are likely to succeed in demonstrating on appeal that it fails the *Anderson-Burdick* test.

Third, Plaintiffs are likely to succeed on their VRA claim on appeal because the Court erred by understating the extent to which ballot collection was disparately used by minority voters. *See* Op. 62. The record is replete with evidence about the use of ballot collection, and about the conditions (such as limited access to outgoing mail) that made ballot collection particularly important, in predominantly minority communities. *See* 10/3 Tr. 39:20-41:8, 43:4-9, 44:9-45:8 (Fernandez); 10/3 Tr. 173:18-179:21 (Gorman); 10/4 Tr. 313:8-319:6, 320:7-325:14, 324:1-12, 322:24-323:13 (Fulton); 10/4 Tr. 417:6-17, 466:10-16 (Larios); 10/5 Tr. 632:19-633:4, 658:19-659:16 (Quezada); 10/6 Tr. 899:13-900:20, 902:2-7, 931:21-932:15 (Gillespie); 10/6 Tr. 954:2-8, 954:9-11, 961:22-963:23 (Gallego); 10/10 Tr. 1070:16-1071:9 (Gallardo); 10/10 Tr. 1169:7-1171:3 (Arias); 10/13 Tr. 1772:10-1795:8 (Ugenti-Rita); Ex. 19 at 8-25, 34-37, 41-43, 52-56; Ex. 90-006. Moreover, several witnesses testified that there was much less need for or interest in ballot collection in predominantly white neighborhoods. 10/5 Tr. 635:13-636:12, 642:17-643:25 (Quezada); 10/6 Tr. 898:5-25, 899:21-900:11 (Gillespie); 10/10 Tr. 1170:5-12 (Arias); 10/6 Tr. 953:16-20 (Gallego); 10/4 Tr. 430:8-431:9 (Larios); *see also* 10/13 Tr. 1792:2-19 (Ugenti-Rita) (Q: "you never heard any [legislative] testimony from community groups about predominately white areas that lacked home mail delivery service? A. No."). The record therefore shows that the voters who utilized ballot collection were *overwhelmingly* minority voters. In turn, the Court should have found that HB2023 disparately burdens the opportunities of minority voters to vote and Plaintiffs are likely to succeed on the merits of their VRA claim.

B. Plaintiffs and Arizona Voters Face Irreparable Harm

Absent an injunction pending appeal, Plaintiffs, their members and supporters, and Arizona voters will likely be irreparably harmed. "Courts routinely deem restrictions on

fundamental voting rights irreparable injury" because "once [an] election occurs, there can be no do-over and no redress." *League of Women Voters of N. Car. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *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). Further, a case that raises "serious questions" or "colorable" claims as to constitutional rights also necessarily involves the risk of irreparable injury. *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002); *see also Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

Here, as set forth above, a number of voters will face significant burdens in casting their ballot for the 2018 general election if HB2023 remains in effect,[6] and the voters who will be impacted will overwhelmingly be minority voters. Some voters likely will not cast a ballot at all. *See* 10/3 Tr. 228:20-230:1 (Glover); 10/3 Tr. 133:2-136:1 (Gilbreath). In addition, individuals and organizations that assist voters will need either to divert resources so they can provide transportation to voters who need it or to decline to provide the assistance those voters need to submit their ballots. *See generally* 10/5 Tr. 650:20-651:9 (Quezada); Op. 16 ("H.B. 2023's limitations will require Democratic organizations, such as the ADP, to retool their GOTV strategies and divert more resources to ensure that low-efficacy voters are returning their early mail ballots."). Accordingly, this factor weighs in favor of the issuance of an injunction pending appeal.

C. The Balance of the Equities and Public Interest Support an Injunction

The balance of the equities and the public interest also support Plaintiffs' requested relief. In contrast to the irreparable harm faced by Plaintiffs and Arizona voters, *see generally Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) ("The public interest and the balance of the equities favor prevent[ing] the violation of a party's

[6] Given the proximity of the 2018 general election, the time it takes to resolve an appeal on the merits, and the *Purcell* principle, there is a substantial risk that HB2023 will remain in effect for the 2018 general election unless an injunction pending appeal is granted.

constitutional rights.") (citation and quotation marks omitted), the State will not suffer any material harm if an injunction is issued. 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). In addition, the interest asserted by the State at the May 14 telephonic hearing—namely, its interest in effectuating its laws—is not even clearly a cognizable interest. While orders issued from chambers by individual justices have expressed the view that this is a recognizable harm, "[n]o opinion for the [Supreme Court] adopts this view," *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014), and it is not clear why a state has any interest in *effectuating* a law that is distinguishable from the interests (if any) that the law serves. Further, even if that interest is cognizable, it is particularly weak here given that the State will count ballots collected in violation of HB2023 and that it is not clear what, if anything, the State will do to enforce that law. Op. 37.

CONCLUSION

All four of the relevant factors weigh in favor of the issuance of an injunction pending appeal. Plaintiffs have demonstrated that there is "a probability of success on the merits and the possibility of irreparable injury" *and* "that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor." *Lopez*, 713 F.2d at 1435 (citations omitted). Accordingly, the Court should issue an order enjoining HB2023 until the appeal of this case is resolved.

Dated: May 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2018, 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/ Sarah R. Gonski