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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Arizona Democratic Party, et al., Plaintiffs, v. Michele Reagan, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **STATE DEFENDANTS' AND INTERVENOR DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION OF HB 2023 PENDING APPEAL**

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INTRODUCTION

After a ten-day bench trial, this Court concluded that "Plaintiffs have not carried their burden to show that the challenged election practices severely and unjustifiably burden voting and associational rights, disparately impact minority voters such that they have less opportunity than their non-minority counterparts to meaningfully participate in the political process, or that Arizona was motivated by a desire to suppress minority turnout when it placed limits on who may collect early mail ballots." (Doc. 416, at 82 ("Order").) In a thorough, well-reasoned opinion, "[b]ased on a careful review of the evidence and governing case law," this "Court conclude[d] that the challenged provisions contravene neither the Constitution nor the VRA." (*Id.*) Accordingly, this Court "f[ound] against Plaintiffs and in favor of Defendants on all claims." (*Id.* at 2.)

Plaintiffs nonetheless ask this Court to enjoin H.B. 2023. (Doc. 422 ("Motion").) The desired relief is nothing short of this Court's self-reversal. The Motion asks this Court to enjoin a law that it ruled was constitutional and enforceable only two weeks ago. Moreover, unlike an injunction that returns the parties to the status quo while the litigation proceeds, this injunction would alter the status quo. It would deprive the State of its ability to enforce H.B. 2023 which, but for a 22-hour period in 2016, has been enforceable throughout the full course of this nearly three-year litigation. Injunctions pending appeal are extraordinary remedies that should be granted sparingly. Injunctions, like this one, that alter the status quo, are particularly disfavored and should only issue when "the merits of the case are not doubtful." *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017). Here, this Court just ruled *against* Plaintiffs on the merits. To say their case is "doubtful" is an understatement, and their request for an injunction to alter the status quo should therefore be denied.

LEGAL STANDARD

A. Standard for Obtaining Injunctions Pending Appeal.

"In deciding whether to grant an injunction pending appeal, the court balances the plaintiff's likelihood of success against the relative hardship to the parties." *Se. Alaska*

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Conservation Council v. U.S. Army Corps of Engineers, 472 F.3d 1097, 1100 (9th Cir. 2006) (internal quotations omitted). The Ninth Circuit recognizes "two different sets of criteria" for such relief that actually constitute three separate, possible tests: a "traditional test," and two versions of an "alternative test." *Id.*

> Under the "traditional test," the moving party must show: (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). The "alternative test" requires that the moving party demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. . . . These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. They are not separate tests but rather outer reaches of a single continuum.

Id. (citations omitted).[1]

B. Injunctions That Alter the Status Quo Are Disfavored.

"The status quo means the last, uncontested status which preceded the pending controversy." *N.D. ex rel. Parents v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010) (internal quotations omitted). Injunctions that alter the status quo are disfavored. *Stanley v. Univ. of S. Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994). Here, Plaintiffs ask for an injunction preventing the enforcement of H.B. 2023; but that will alter—not preserve—the status quo. "[T]he district court should deny such relief unless the facts and law clearly favor the moving party." *Id.* (internal quotation marks omitted).

ARGUMENT

"An injunction pending appeal is an extraordinary remedy that should be granted sparingly." *Ctr. for Biological Diversity v. Salazar*, No. CV-09-8207-PCT-DGC, 2010

[1] State and Intervenor Defendants assert that *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) and its progeny, which hold that the Ninth Circuit's alternative, "serious questions" test remains viable, conflicts with the Supreme Court's decision in *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008), which clarified the standard for granting injunctive relief. The State and Intervenor Defendants hereby preserve this issue for appeal.

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WL 3190628, at *1 (D. Ariz. Aug. 12, 2010) (internal quotation marks omitted). This is especially true where, as here, the Court just ruled that the challenged law is constitutional and previously rejected a motion for preliminary injunction. *See Wisc. Right to Life, Inc. v. Fed. Election Comm'n*, 542 U.S. 1305, 1305–06 (2004) (explaining that "[a]n injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional, and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction") (citation omitted). Regardless, Plaintiffs cannot now make any of the requisite showings for an injunction.

I. Plaintiffs Cannot Demonstrate Any Level of Likely Merits Success or Irreparable Harm As Required by the Traditional Test and the First Version of the Alternative Test for Injunctive Relief.

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This Court found that each of Plaintiffs' claims related to H.B. 2023 failed because H.B. 2023 did not impose a severe burden on voting. Plaintiffs therefore cannot demonstrate that they enjoy "likely" or "probable" merits success on appeal. *See Se. Alaska Conservation Council*, 472 F.3d at 1100. Nor can they demonstrate that they will "suffer irreparable harm" or even "the possibility of irreparable harm" if an injunction does not issue. *Id.* Accordingly, Plaintiffs cannot satisfy either the traditional test or the first version of the alternative test for injunctive relief.

A. Plaintiffs' First and Fourteenth Amendment Claims.

The Court noted that "[o]n its face, H.B. 2023 is generally applicable and does not increase the ordinary burdens traditionally associated with voting[,]" and whatever burden exists is "less severe than the burden on in-person voters[.]" (Order at 22-23.) Further, the Court noted that the minimal burden imposed by H.B. 2023 is less severe than the burden on voting that the Supreme Court found constitutional in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). (Order at 24.) The Court found that "[v]oting early by mail in Arizona is far easier than traditional, in-person voting on Election Day, and if laws that do not 'represent a significant increase over the usual

1 burdens of voting' do not severely burden the franchise, . . . it is illogical to conclude
2 that H.B. 2023 imposes a severe burden on Arizona voters." (Order at 24-25 (*quoting*
3 *Crawford*, 553 U.S. at 198).)

4 In order to prevail on their Fourteenth Amendment claim, at trial or on appeal,
5 Plaintiffs "must present sufficient evidence to enable the court to quantify the magnitude
6 of the burden imposed on the subgroup" that Plaintiffs claim is unconstitutionally
7 burdened by H.B. 2023. (*Id.* at 25 (*citing Pub. Integrity All., Inc. v. City of Tu*cson, 836
8 F.3d 1019, 1024 n.2 (9th Cir. 2016), *cert. denied sub nom. Pub. Integrity All., Inc. v. City*
9 *of Tuczon, Ariz.*, 137 S. Ct. 1331 (2017).) But Plaintiffs presented "insufficient evidence
10 from which to measure the burdens on discrete subsets of voters." (Order at 26.) As a
11 result, "[t]he Court cannot quantify with any degree of certainty the number of registered
12 voters who, in past elections, returned early mail ballots with the assistance of ballot
13 collectors who do not fall within H.B. 2023's exceptions[,]" and "cannot determine how
14 frequently voters will be impacted by H.B. 2023's limitations." (*Id.*)

15 The evidence presented at trial tells the story of voters who find it convenient to
16 have their ballot collected, not voters whose ability to vote is severely burdened by H.B.
17 2023. The Court carefully considered this evidence and summarized it as follows:

18 - "The evidence available largely shows that voters who have used ballot
19 collection services in the past have done so out of convenience or personal preference, or
20 because of circumstances that Arizona law adequately accommodates in other ways."
21 (*Id.* at 26; *see also id.* at 31 (noting that "[t]he evidence that was adduced at trial,
22 however, indicates that, for many, ballot collection is used out of convenience and not
23 because the alternatives are particularly difficult").)

24 - "The testimony of individual voters who have used ballot collection
25 services in past elections largely confirms that H.B. 2023 does not impose significant
26 burdens." (*Id.* at 28.)

27 - The only voter who testified that she did not vote in the 2016 General
28 Election, purportedly because of H.B. 2023, "has access to a mailbox; she simply must

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remember to timely mail her ballot." (*Id*. at 30.)

The evidence presented demonstrated that "H.B. 2023 no more than minimally burdens Plaintiffs' First and Fourteenth Amendment rights." (*Id*. at 33.) To survive constitutional scrutiny, the State only needed to show that H.B. 2023 serves important regulatory interests. (*Id*.) The State presented evidence that H.B. 2023 served the interests of preventing absentee ballot fraud, as well as improving and maintaining the public's confidence in Arizona's elections procedures. (*Id*.) Such interests "are facially important state regulatory interests." (*Id*. at 33-34 (*citing Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).) The Court then held that "H.B. 2023 is one reasonable way to advance what are otherwise important state regulatory interests[,]" and so "does not violate the First and Fourteenth Amendments." (*Id*. at 39.)

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Plaintiffs made no showing that H.B. 2023 imposed anything more than a "minimal[] burden[]" upon Plaintiffs' First and Fourteenth Amendment rights, (*id*. at 33,) a burden no greater than "the ordinary burdens traditionally associated with voting." (*Id*. at 22-23.) The State demonstrated important interests furthered by H.B. 2023. (*Id*. at 33-34.) Given these findings, Plaintiffs do not enjoy likely or even probable merits success on appeal. Nor can Plaintiffs demonstrate any possibility of irreparable harm. They therefore do not meet the requirements for injunctive relief under either the traditional test or the first version of the alternative test. *See Se. Alaska Conservation Council*, 472 F.3d at 1100.

B. Plaintiffs' Voting Rights Act Claim.

This Court correctly recognized that "not every disparity between minority and non-minority voters is cognizable under the VRA." (Order at 54.) Rather, claims are only cognizable when two things are true. First, the disparity must be "meaningful enough to work 'an inequality in the opportunities enjoyed by [minority as compared to non-minority] voters to elect their preferred representatives.'" (*Id*. (*quoting Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).) Second, the challenged voting practice must actually impose a discriminatory burden, and not merely result in a disproportionate

1 impact[.]" (*Id.* (internal quotations and citations omitted).)

2 After carefully considering the evidence, the Court found that Plaintiffs' Section 2
3 claims failed because "Plaintiffs' circumstantial and anecdotal evidence is insufficient to
4 establish a cognizable disparity under § 2." (*Id.* at 58.) Rather, "the anecdotal estimates
5 from individual ballot collectors indicate that a relatively small number of voters have
6 used ballot collection services in past elections." (*Id.* at 63.) Not a single voter testified
7 that they found it significantly more difficult to vote because of H.B. 2023. (*Id.*) The
8 Court correctly recognized that "it is unlikely that H.B. 2023's limitations on who may
9 collect an early ballot cause a meaningful inequality in the electoral opportunities of
10 minorities as compared to nonminorities" because the evidence showed that "the vast
11 majority of Arizonans, minority and non-minority alike, vote without the assistance of
12 third-parties who would not fall within H.B. 2023's exceptions[.]" (*Id.*) This ultimate
13 finding regarding causation is entitled to deference on appeal. *Gonzalez v. Arizona*, 677
14 F.3d 383, 406 (9th Cir. 2012) (en banc) (reviewing for clear error "the district court's
15 findings of fact, including its ultimate finding whether, under the totality of the
16 circumstances, the challenged practice violates § 2") (citations omitted).

17 The Court concluded that "H.B. 2023 does not deny minority voters meaningful
18 access to the political process simply because the law makes it slightly more difficult or
19 inconvenient for a small, yet unquantified subset of voters to return their early ballots."
20 (*Id.*) Accordingly, the Court held that Plaintiffs "have not carried their burden" to show
21 that H.B. 2023 created an inequality in opportunities for minority-race voters to elect
22 their preferred representatives, and therefore their claim was not cognizable. (*Id.*)[2]
23

24 [2] Because Plaintiffs failed to establish that H.B. 2023 caused an inequality in
25 opportunities for minority-race voters, the Court did not need to consider the Senate
Factors to determine whether H.B. 2023 resulted in a discriminatory burden. The Court
26 did so anyway and found that "Plaintiffs' causation theory is too tenuous to support their
VRA claim because, taken to its logical conclusion, virtually any aspect of a state's
27 election regime would be suspect as nearly all costs of voting fall heavier on
socioeconomically disadvantaged voters." (Order at 75.) Such a result would be
28 "inconsistent with the Ninth Circuit's repeated emphasis on the importance of a 'causal

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Plaintiffs' challenge to H.B. 2023 is not cognizable under the VRA, so they do not enjoy any degree of likely success on appeal. Nor can Plaintiffs demonstrate any measure of irreparable harm absent an injunction. They cannot meet the requirements for an injunction pending appeal under either the traditional test or the first version of the alternative test. *See Se. Alaska Conservation Council*, 472 F.3d at 1100.

II. Plaintiffs Cannot Demonstrate That the Balance of Hardships Tips Sharply in Favor of Enjoining H.B. 2023 As Required by the Second Version of the Alternative Test.

The second version of the alternative test for injunctions pending appeal requires Plaintiffs to show that "serious questions are raised and the balance of hardships tips sharply in [their] favor." *Id.* Plaintiffs cannot make this showing.

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A. The Record Does Not Support Plaintiffs' Allegations of Harm.

Plaintiffs argue that "Arizona voters likely will be irreparably harmed" because "a number of voters will face significant burdens in casting their ballot for the 2018 general election if HB2023 remains in effect." (Motion at 9.) But that simply is not the case. *See supra* at Part I. This Court concluded, based on the same testimony that Plaintiffs identified, that "H.B. 2023 has no impact on the vast majority of Arizona voters, and the Court lacks sufficient evidence to assess whether the law imposes a more severe burden for discrete subsets of voters." (Order at 31.) This Court found that "the evidence . . . indicates that, for many, ballot collection is used out of convenience and not because the alternatives are particularly difficult." (*Id.*) The law does not permit Plaintiffs to demonstrate harm simply by rejecting this Court's conclusions out-of-hand.

B. Enjoining Enforcement of H.B. 2023 Will Hamper Orderly Administration of Arizona Elections.

The Defendants presented evidence that H.B. 2023 furthers important state

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connection between the challenged voting practice and a prohibited discriminatory result.'" (*Id.* (*quoting Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).) Accordingly, "the Court conclude[d] that Plaintiffs have not carried their burden at either step of the § 2 results test." *Id.*

interests, namely, preventing absentee ballot fraud and maintaining public confidence in Arizona's elections. (Order at 33.) Granting Plaintiffs' request for an injunction will undermine those important interests.

Additionally, there is sufficient evidence of other harms that H.B. 2023 prevents to warrant its enforcement pending appeal.[3] First, courts recognize that States have an interest in enforcement of their duly enacted laws and the integrity of their election processes. Second, banning ballot collection prevents candidates, campaigns, and parties from engaging in certain practices that are harmful to their opponents and the fair and orderly administration of elections. Third, banning ballot collection prevents harm to voters that could occur if a ballot collector fails to deliver ballots due to illness, inattention, accident, or intentional malfeasance.

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Plaintiffs seek an injunction against an election law, and the "State indisputably has a compelling interest in preserving the integrity of its election process." *See Purcell,* 549 U.S. at 4*; Crawford,* 553 U.S. at 203. The Ninth Circuit has held that the "law recognizes that election cases are different from ordinary injunction cases," because "hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003). "Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the [state law]." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Here, the public interest and balance of equities tip strongly in the State's favor. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."); (*see also* Trial Tr. at 1966:23-1967:24 (testimony of State Election Director regarding

[3] Plaintiffs have moved the Ninth Circuit to expedite the appeal. If the appellate court grants that motion and concludes its work before early voting for the 2018 elections, changing the status quo now by issuing an injunction pending appeal will have no effect, except to confuse voters. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

1 enforcement of H.B. 2023 by county attorneys and Attorney General if they receive
2 information regarding unlawful ballot collection)).
3 Plaintiffs argue that "[t]he State has no interest in enforcing unconstitutional
4 laws." (Motion at 10.) This is another thinly veiled request for this Court to reverse
5 itself. But having carefully examined the law and the evidence presented at trial, this
6 Court found that H.B. 2023 is constitutional. Because the law is constitutional, the
7 Defendants have "a compelling interest" in being able to enforce it. *See, e.g.*, *Ctr. for*
8 *Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015) (recognizing that
9 attorneys general have a "compelling interest" in enforcing state law).
10 Moreover, Yuma County Recorder Robyn Stallworth Pouquette testified how
11 ballot collection contributes to a campaign practice that makes it more difficult for
12 counties to timely complete their ballot counting duties. Specifically, Pouquette testified
13 that candidates will collect ballots throughout the 27-day early voting period and hold
14 them for delivery to elections officials until election day. (Pouquette Dep. at 62:12-
15 63:17; 65:14-19.) This practice harms election administration in a few ways.
16 First, it reduces the time for election officials to do the signature matching to
17 verify early ballots before they can be counted and thereby prolongs the ballot counting
18 process. (*Id.* at 85:18-86:6.) Instead of having the entire early voting period in which to
19 conduct that verification and have the ballots ready for counting upon the closing of the
20 polls, election officials must verify large numbers of collected ballots after the election.
21 This slows down the ballot-counting process, which must be completed within the ten
22 days allotted before the final canvass. *See* A.R.S. § 16-645(B). Voters can lose
23 confidence in elections when the counting process drags on. *See*
24 https://kjzz.org/content/393702/more-400000-mail-ballots-still-uncounted-maricopa-
25 county.
26 Second, a voter who has given the voter's ballot to a ballot collector, who then
27 holds that ballot until election day, cannot verify with the County Recorder that the
28 ballot has been received. If the voter does not have contact information for the ballot

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collector, the voter is left to wonder whether her ballot will be counted. This practice can undermine public confidence in the election system.

Third, during the early voting period, candidates receive regular updates from county election officials regarding who has turned in an early ballot. (Pouquette Dep. at 62:18-63:17.) This allows candidates to focus their limited resources on voters who have not yet voted. (*See id.*) If ballot collectors supporting one candidate collect ballots but wait until election day to turn them in, the other candidates will not know that those voters have already voted, and will continue to direct their resources to influencing those voters. (*See id.*) Barring ballot collection puts a stop to such gamesmanship.

Finally, just as one voter may miss the chance to cast a ballot on election day due to an emergency, an unexpected illness, or simple forgetfulness, a ballot collector may have the same experience. (*Cf.* Order at 30 (noting that the only one of Plaintiffs' witnesses who did not vote in the 2016 general election did so because she forgot to mail her ballot in time).) The harm that occurs then is not one person missing a chance to vote, but possibly dozens of voters whose ballots are not delivered. So, while individual voters sometimes miss their opportunity to vote because ballots must be cast by 7:00 pm on election day, prohibiting ballot collection prevents the harm of ballot collectors failing to deliver multiple ballots. (Doc. 416, at 38 ("H.B. 2023 reasonably reduces opportunities for early ballots to be lost or destroyed.").)

Weighing the loss of one convenience—which this Court concluded was not a severe burden on the right to vote—against the harm to the administration of elections that an injunction against H.B. 2023 will cause, the balance of hardships tips heavily in the Defendants' favor. The Court has already concluded as much and should not reverse itself now.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for an Injunction of H.B. 2023 Pending Appeal should be denied.

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RESPECTFULLY SUBMITTED this 22nd day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2018, 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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