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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

Democratic National Committee, DSCC, and Arizona Democratic Party,

Plaintiffs,

v.

Michele Reagan and Mark Brnovich,

Defendants.

No. CV-16-01065-PHX-DLR

**ORDER**



Following a ten-day bench trial, the Court found that H.B. 2023, which places limits on who may collect a voter's early mail ballot, and Arizona's policy to not count provisional ballots cast by voters in the wrong precinct do not violate the United States Constitution or § 2 of the Voting Rights Act of 1965 ("VRA"). (Doc. 416.) During a May 14, 2018 telephonic conference, Plaintiffs orally moved the Court to enjoin the challenged elections practices pending resolution of their appeal of the decision. The Court denied Plaintiffs' request to enjoin Arizona's enforcement of the precinct-based system and stated its reasons on the record, but ordered briefing on the propriety of enjoining H.B. 2023 pending resolution of the appeal. Having reviewed the parties' briefs (Docs. 422, 425), the Court denies Plaintiffs' motion.

## I. Legal Standard

"The standard for evaluating an injunction pending appeal is similar to that employed by district courts in whether to grant a preliminary injunction." *Feldman v.*

*Ariz. Sec. of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) (en banc), *stayed by* 137 S. Ct. 446. "A plaintiff seeking a preliminary injunction 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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). These elements may be balanced on a sliding scale, whereby a stronger showing of one element may offset a weaker showing of another. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1134-35 (9th Cir. 2011). The sliding-scale approach, however, does not relieve the movant of the burden to satisfy all four prongs for the issuance of a preliminary injunction. *Id.* at 1135. Rather, "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest."[1] *Id.* In addition to these principles, courts should be extremely cautious about issuing preliminary injunctions that alter the status quo. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). Preliminary injunctions altering the status quo generally "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases[.]" *Id.* (internal quotations and citation omitted).



**II. Discussion**

Because "[t]he issue of likelihood of success on the merits has subsumed within it the other relevant factors," the Court will focus predominately on this issue. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 702 (N.D. Ohio 2006). Assessing the likelihood that

[1] The parties cite pre-*Winters* cases for the propositions that, under the traditional preliminary injunction test, the movant need only show a possibility rather than a likelihood of irreparable harm, and that under the sliding-scale approach the Court considers the combination of either a likelihood of success on the merits and irreparable injury, or the existence of serious questions going to the merits and a balance of hardships that tips strongly in the movant's favor. (Docs. 422 at 2; 425 at 3.) In the post-*Winters* case of *Alliance*, however, the Ninth Circuit clarified the following: (1) under the traditional preliminary injunction test, the movant must establish that irreparable harm is likely, not just possible; (2) the sliding-scale approach survives *Winters*; and (3) even under the sliding-scale approach, the movant must make a sufficient showing on all four prongs of the traditional test. 632 F.3d at 1132, 1134-35.

Plaintiffs will succeed on their appeal requires consideration of the applicable standards of appellate review. Following a bench trial, the Court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. *Lentini v. Cal. Ctr. for the Arts, Escondido*, 370 F.3d 837, 843 (9th Cir. 2004). Accordingly, Plaintiffs must show either that (1) the Court's factual findings likely are clearly erroneous or that the Court likely based its decision on an erroneous view of the law, or (2) there are serious questions concerning these same matters.

To ensure expeditious resolution of Plaintiffs' motion, the Court asked Plaintiffs to limit their discussion to their three best arguments for success on appeal.[2] (Doc. 423 at 19.) Plaintiffs contend that the Court erred in determining that H.B. 2023 (1) imposes an inconvenience, but no more than a minimal burden, on the franchise and (2) does not disparately burden the electoral opportunities of minority voters as compared to their non-minority counterparts. They also contend that they likely will succeed on the merits of their appeal because a majority of the Ninth Circuit en banc panel voted to grant such an injunction during the preliminary appellate phase of this case. (Doc. 422 at 3-8.)



Plaintiffs' first two arguments concern the Court's factual findings rather than its view of the law. *See Gonzales v. Arizona*, 677 F.3d 883, 406 (9th Cir. 2012) ("We . . . review for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2."); *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1123 (9th Cir. 2016) ("[T]he severity of the burden . . . is a factual, not a legal, question."). Plaintiffs therefore must show that these findings likely are clearly erroneous. They have not done so.

First, the Court's finding that "voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of

[2] Plaintiffs' description of the Court's request is somewhat inaccurate in that they claim the Court instructed them to present "only three of the reasons they are likely to succeed on appeal[.]" (Doc. 422 at 3 n.1). The Court did not request any three arguments. The Court asked Plaintiffs to brief what they consider to be their *best* three arguments, operating under the presumption that if Plaintiffs' best three arguments are not availing, then it is unlikely that other arguments they might make on appeal would carry the day.

circumstances that Arizona law adequately accommodates in other ways" is probably not clearly erroneous. No voter testified that H.B. 2023 would make voting significantly more difficult. In fact, all but one of the voters who testified about the impacts of H.B. 2023 successfully voted in the 2016 general election, after the law took effect. Marva Gilbreath, the only voter who did not cast a ballot during that election, testified that she has access to a mailbox but simply forgot to timely mail her ballot. Remembering relevant election deadlines, however, is not a severe burden; it is an ordinary part of any form of voting, be it absentee or in-person. Plaintiffs cannot credibly contend that H.B. 2023 severely burdens voters like Gilbreath simply because such voters must remember when to mail their ballots. A contrary finding would call into question the constitutionality of voter registration deadlines, in-person polling location closing times, and other types of election regulations that require voters to take action by a certain time.

Plaintiffs highlight testimony from activists who collected ballots in prior elections and who claimed that many of the people they served would not have been able to vote without such assistance. But if an appreciable number of voters could not vote or would encounter substantial difficulties voting without the assistance of now-prohibited ballot collectors, it is reasonable to expect that at least one such voter would have been presented to testify at trial. Plaintiffs initiated this action in April 2016, yet by the time of the October 2017 bench trial they still were unable to produce a single voter to testify that H.B. 2023's limitations on who may collect an early mail ballot would make voting significantly more difficult for her.

The Court also found that Arizona's provision of special election boards and curbside voting, and its mandate that employers give employees time off to vote, adequately mitigate several of the circumstances that make voting in all its forms more difficult for certain subsets of voters. Plaintiffs contend that relatively few voters are aware or take advantage of these alternatives, but there is no evidence that Arizona has done anything to hide these options from voters. Moreover, nothing about H.B. 2023 prevents Plaintiffs and other political and civic activists from educating voters about the

panoply of voting options and accommodations available to them. Though H.B. 2023's limitations on ballot collection might have removed a more efficient way for political and civic activists to improve political participation, it does not follow that the law has imposed a severe burden on the rights of individual voters.

Indeed, a contrary finding would be irreconcilable both with the opinions of a majority of justices in *Crawford v. Martion County Election Board*, 553 U.S. 181 (2008), and with the principle that there is no blanket constitutional or federal statutory right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm'rs of Chic.*, 394 U.S. 802, 807-08 (1969); *see also Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."). As the Court previously explained, H.B. 2023 requires only that early mail voters travel to a mail box, post office, early ballot drop box, any polling place or vote center (without waiting in line), or authorized election official's office, either personally or with the assistance of a statutorily authorized proxy, at some point during a 27-day early voting period. This burden is less severe than the burden imposed by the voter identification law upheld in *Crawford*. Further, the travel H.B. 2023 requires of voters is undeniably less burdensome then the travel and time commitment required for in-person voting. Plaintiffs have never explained how the travel associated with returning an early mail ballot can constitutionally compel Arizona to permit early mail ballot collection when the more onerous burdens associated with in-person voting do not constitutionally compel states to offer early mail voting in the first place.



Next, the Court probably did not understate the extent to which ballot collection was disparately used by minority voters. The Court noted that the lack of quantitative or statistical evidence makes it impossible to gauge with any degree of certainty the number of voters who would be affected by H.B. 2023 or the approximate proportion that are minorities, but nonetheless found that ballot collection services were used more by

minority voters than non-minority voters. The Court found, however, that H.B. 2023 did not work a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities both because even under generous assumptions the vast majority of all early mail voters returned their ballots without such assistance, and because H.B. 2023 imposes, at most, a disparate inconvenience on voters. Stated differently, though it might be true that H.B. 2023 eliminated a voting convenience that was used more by minority voters, it does not follow that what all voters—minority and non-minority alike—must do to vote early by mail causes an inequality in the opportunities enjoyed by minority voters to elect their preferred representatives. A contrary finding would strongly suggest that states are required to offer early voting alternatives if it is shown that minority voters have more difficulty voting in person due to socioeconomic disadvantages. Such an outcome is irreconcilable with the authorities discussed above, which this Court is not free to ignore.

Lastly, although the en banc panel's willingness to grant an injunction pending appeal lends some support to Plaintiffs' current request, neither the en banc panel's order nor the dissenting opinion from the three-judge panel's decision discussed *Crawford* or otherwise explained how the success of Plaintiffs' claims can be reconciled with that case. *See Feldman*, 843 F.3d at 412 (O'Scannlain, J. dissenting) ("The majority does not even try to argue that H.B. 2023 imposes more of a burden on voters than the Indiana law, instead it just does not cite *Crawford*."). In our hierarchical judicial system, this Court is not free to ignore decisions of the Supreme Court, and for reasons discussed both here and in the Court's May 10, 2018 order, the Court sees no principled reason to conclude that H.B. 2023 imposes more severe burdens than the voter identification law upheld in *Crawford*, nor have Plaintiffs attempted to bridge this disconnect.

For all these reasons, the Court finds that Plaintiffs are not likely to succeed on the merits of their appeal. Because Plaintiffs are not likely to succeed on the merits of their appeal, they necessarily have not shown a likelihood of irreparable harm or a sharply favorable tip in the balance of hardships, especially considering their requested relief

would upend rather than preserve the status quo. *See Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986). Moreover, some authorities suggest that a state "suffers a form of irreparable injury" whenever it "is enjoined from effectuating statutes enacted by representatives of its people[.]" *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017). Accordingly, because Plaintiffs are not likely to succeed in demonstrating on appeal that H.B. 2023 severely or disparately burdens voting rights, the balance of hardships and public interest weigh against preliminary injunctive relief.

**IT IS ORDERED** that Plaintiffs' motion for an injunction pending appeal (Doc. 422) is **DENIED**.

Dated this 25th day of May, 2018.



Douglas L. Rayes
United States District Judge