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17 **UNITED STATES DISTRICT COURT**

18 **DISTRICT OF ARIZONA**

19 Mi Familia Vota, et al.,

20 Plaintiffs,

21 vs.

22 Katie Hobbs, et al.,

23 Defendants.

Case No: 2:21-cv-01423-DWL

**ATTORNEY GENERAL'S REPLY TO
RESPONSE IN SUPPORT OF HIS
RULE 54(B) MOTION TO ENTER
JUDGMENT ON DISMISSED CLAIMS**

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INTRODUCTION

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2 Plaintiffs' 54(b) opposition lays bare the calculating cynicism underlying Plaintiffs'
3 claims. Despite their lofty, high-minded rhetoric about vindicating all voters' rights,
4 Plaintiffs are remarkably blasé about *ensuring* that the alleged harms they purportedly seek
5 to end actually come to pass with near-absolute certainty. And for perhaps half a decade
6 or more, all to gain the most minute of tactical advantages here. Indeed, although the State
7 specifically identified these precise concerns in its motion (at 2, 8-9), Plaintiffs never even
8 attempt to answer them. But what then could they say?

9 Plaintiffs, for example, claim that SB 1003 and its Poll-Close Deadline illegally
10 disenfranchise voters *in every election*, thereby inflicting irreparable harm. But Plaintiffs'
11 position would *ensure* that such harms continue to be inflicted for *multiple election cycles*
12 over many years. Nor do Plaintiffs deny that withholding 54(b) relief would produce this
13 very effect. *Compare* Mot. at 8-9 *with* Opp. at 7-10 (non-denial).

14 If Plaintiffs truly believed the Poll-Close Deadline inflicted the substantial,
15 unconstitutional harms that they allege, Plaintiffs should be jumping at the opportunity for
16 earlier appellate review since it would offer a chance to prevent those harms *several*
17 elections earlier. Instead, they strenuously resist any path that might realistically permit
18 final resolution of the validity of the State's Poll-Close Deadline any time in the first half
19 of this decade. And that finality *should already have existed* following the Ninth Circuit's
20 decision in *Arizona Democratic Party v. Hobbs* ("ADP"), 18 F.4th 1179 (9th Cir. 2021),
21 and Intervenor-Plaintiffs' refusal to seek either rehearing or Supreme Court review of it.

22 Plaintiffs apparently believe that Rule 54(b) permits them to subject the Poll-Close
23 Deadline to interminable re-litigation for many more years (and perhaps many more suits)
24 to come. Yet Plaintiffs completely ignore the State's well-grounded concerns about re-
25 litigation, and tellingly do not *acknowledge or cite* ADP *even once* in their opposition.
26 Those interests alone amply provide cause to enter a Rule 54(b) judgment.

27 Much of Plaintiffs' opposition seems to be premised on a purported presumption
28 against granting a prevailing parties' request under Rule 54(b). But Plaintiffs cite no court

1 in the Ninth Circuit applying any such presumption, and Plaintiffs’ mischaracterization of
2 this Court’s decision in *Gonzalez v. US Human Rights Network*, No. CV-20-757, 2021 WL
3 1312553 at *1 (D. Ariz. Apr. 8, 2021) (Lanza, J.), as recognizing that purported
4 presumption is particularly untenable. Nor is any such presumption consistent with Rule
5 54(b)’s text.

6 Stripped of their reliance on a non-existent presumption, Plaintiffs’ remaining
7 arguments readily fail. Plaintiffs cannot categorically avoid Rule 54(b) and this Court’s
8 extended amendment deadline through talismanic invocation that they “reserve the right
9 to amend.” To the State’s knowledge, no court has *ever* held as much, and Plaintiffs
10 tellingly never cite a single one that has. No do Plaintiffs deny that the non-signature-
11 curing claims are completely severable from the remaining claim.

12 As to the SB 1485/*Anderson-Burdick* claim, while there might be some modest
13 factual overlap, the Ninth Circuit has “upheld Rule 54(b) certification even though the
14 remaining claims would require proof of the same facts involved in the dismissed claims.”
15 *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Ultimately, “Rule 54(b)
16 certification is proper if it will aid ‘expeditious decision’ of the case.” *Id.* at 797.
17 Certification of the *Anderson-Burdick* claim will do so here. But even if this Court is
18 disinclined to enter 54(b) judgment on this claim, it should do so for the Poll-Close-
19 Deadline claims, which present a paradigmatic case for 54(b) certification.

20 ARGUMENT

21 I. PLAINTIFFS RELY ON NON-EXISTENT PRESUMPTIONS AND 22 REQUIREMENTS OF SHOWING HARM

23 Plaintiffs’ principal argument appears to that Rule 54(b) recognizes a presumption
24 against granting relief under its auspices when it is sought by a prevailing party. Plaintiffs
25 thus contend that, as prevailing party, the State “does not properly invoke Rule 54(b)” and
26 that Rule 54(b) imposes a “*near-impossible burden* [on] a prevailing party.” *Opp.* at 1, 7
27 (emphasis added). Plaintiffs further contend that, as a result of this purported presumption
28 and “near-impossible burden,” the State’s burden “is to show that [it] would be *harmed*”

1 absent Rule 54(b) relief. Opp. at 7 (emphasis added); *accord id.* at 10 (arguing State failed
2 to meet “burden to show that the State will *be harmed.*” (emphasis added)).

3 This purported “would be harmed” requirement is a wishcasted creation of
4 Plaintiffs. It appears neither in Rule 54(b)’s actual text nor *any* of the case law quotations
5 that Plaintiffs provide. So too is Plaintiffs contention that the State faces a “near-
6 impossible burden” a pure invention of Plaintiffs unmoored from the case law and the
7 rule’s text.

8 Plaintiffs cite only two cases within the Ninth Circuit for this purported “near-
9 impossible burden” that requires an affirmative demonstration of “harm”: *Morrison-
10 Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981) and *Gonzalez*. But Plaintiffs’
11 cherry-picked “unfavorable ruling” quote from *Gonzalez* (Opp. at 1) merely describes one
12 of Rule 54(b)’s non-exclusive purposes and does not provide any such anti-prevailing-
13 party presumption. Indeed, that case actually involved a request by *prevailing parties* and
14 this Court *applied no such presumption*—let alone one so onerous as a “near-impossible
15 burden” standard; instead this Court considered the matter to be a “close call” without
16 requiring the prevailing parties to surmount any near-unsurmountable burden. 2021 WL
17 1312553 at *3-5. Similarly, this Court made clear that financial “harm” was but “[o]*ne*
18 *example of an equitable consideration* ‘that may inform a judge’s decision,’” rather than
19 a specific burden that the State was required to satisfy here. *Id.* at *2 (emphasis added).

20 *Morrison-Knudsen* is even further afield. It applied no such presumption at all, and
21 indeed does not even disclose *which side* (if any) sought 54(b) certification there—let
22 alone placing near-dispositive weight on whether the certification was sought by prevailing
23 or losing party. Moreover, the actual reasons that 54(b) relief was unwarranted in that case
24 centered on fact that the certified claims were counterclaims that were “inseverable, both
25 legally and factually, from claims that remained unadjudicated in the district court.” 655
26 F.2d at 965-66. No such circumstance exists here.

27 Aside from *Gonzalez* and *Morrison-Knudsen*, Plaintiffs cite nothing in the Ninth
28 Circuit or Rule 54(b)’s text that supports their purported presumption—let alone one so

1 stringent as to create a “near-impossible burden.” Indeed, Rule 54(b) only provides that
2 “the *court* may direct entry of final judgment” without even discussing parties seeking
3 such certification expressly—let alone making relief enormously more difficult for some
4 parties to seek it than others. Fed. R. Civ. P. 54(b) (emphasis added). Rule 54(b) thus vests
5 additional authority in district courts, and that authority is not diminished depending on
6 which party asks the court to exercise it.

7 In addition, Plaintiffs’ out-of-circuit authority is of ambiguous weight even in the
8 courts from which it comes. *See, e.g., United States v. All Assets Held in Acct. No.*
9 *XXXXXXXXXX*, 314 F.R.D. 12, 15 (D.D.C. 2015) (distinguishing and giving little weight to
10 *Stewart v. Gates*, 277 F.R.D. 33 (D.D.C. 2011) (cited *Opp.* at 1, 9)). Even worse,
11 *Exchange Nat. Bank of Chi. v. Daniels*, 763 F.2d 286 (7th Cir. 1985) is not even a Rule
12 54(b) case at all, and no 54(b) judgment was actually either sought or entered there. *Id.* at
13 288 (“The judgment [below] does not mention Fed.R.Civ.P. 54(b).”). A case not even
14 involving a Rule 54(b) judgment is a curious foundation upon which to build a purported
15 “near impossible burden” presumption under that rule. Yet that is just what Plaintiffs do.
16 *See Opp.* at 1, 9.

17 Moreover, even if such a presumption actually exists, it could be readily overcome
18 here for at least three reasons here, which Plaintiffs ignore.

19 *First*, the State specifically identified Plaintiffs’ attempted re-litigation of *ADP*—a
20 challenge to an *identical electoral practice*—as supplying reason to enter 54(b) judgment.
21 *See Mot.* at 1, 7-8. Plaintiffs have no response, and thus advance no argument under which
22 their purported presumption could survive this conceded-by-silence rationale.

23 *Second*, while Plaintiffs never deny that equitable considerations are properly part
24 of this Court’s inquiry (*Mot.* at 3-4), they make no attempt to answer the State’s argument
25 that their strategy here is distinctly inequitable, *see Mot.* at 8-9. Instead, they double down
26 on it: going so far as to characterize being given the opportunity to vindicate (in their view)
27 voters’ rights several years and many elections earlier as somehow being a “Hobson’s
28 choice.” *Opp.* at 1. But under Plaintiffs’ rhetoric here, it should be no choice at all.

1 Plaintiffs’ opposition thus effectively concedes that their opposition is inequitable
2 and that this factor properly militates in favor of entering judgment under Rule 54(b).

3 *Third*, Plaintiffs ignore the unique electoral context here. Elections have to be run
4 frequently—or else democracy literally dies—and they involve a multitude of practical
5 challenges: “running a statewide election is a complicated endeavor.” *DNC v. Wisconsin*
6 *State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). That puts a substantial
7 premium on “the rules of the road [being] *clear and settled*.” *Id.* (emphasis added). These
8 concerns particularly weigh against issuing injunctions close to elections. *Id.* at 30-31
9 (collecting cases). But they also necessarily militate against leaving recurrent issues
10 needlessly unresolved for multiple election cycles, such as permitting Plaintiffs’ claims
11 about the legitimacy of the States’ electoral procedures to fester for a half-decade or more.
12 Such frozen conflicts undermine the certainty that conducting elections requires.

13 Moreover, the potential revival of Plaintiffs’ claims could easily come at a time
14 when it presents *Purcell* problems. Again. Intervenor-Plaintiffs’ dilatory conduct has
15 already resulted in one injunction that had to be stayed in part due to its *Purcell* violation,
16 *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1086-87 (9th Cir. 2020), before being
17 reversed outright on the merits in *ADP*. Delaying final resolution of Plaintiffs’ Poll-Close-
18 Deadline claims needlessly risks a recurrence. In contrast, entering Rule 54(b) judgment
19 now would allow those claims to be resolved on appeal in an orderly manner without a
20 pending injunction (should Plaintiffs elect to appeal at all).

21 **II. THIS COURT SHOULD ENTER FINAL JUDGMENT ON THE NON-** 22 **SIGNATURE CURING CLAIMS**

23 The question of whether Rule 54(b) relief is warranted for the Poll-Close-Deadline
24 claims is neither close nor difficult, and both the finality and “no just reason to delay”
25 requirements are readily satisfied for them.

26 **A. This Court’s Resolution Of The SB 1003 Claims Is Final**

27 Plaintiffs do not deny that this Court’s June 24, 2022 order completely resolves the
28 Poll-Close-Deadline claims and leaves *nothing* left to decide on them. It is thus an

1 “ultimate disposition of an individual claim entered in the course of a multiple claims
2 action.” *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980) (citations
3 omitted). Nor do Plaintiffs deny they intentionally and explicitly refused to amend their
4 Complaints by this Court’s extended July 29 deadline to do so.

5 Plaintiffs nonetheless claim that they—apparently the first amongst federal court
6 litigants—have discovered an escape hatch to Rule 54(b): they could simply declare that
7 they “reserve their right to seek leave of Court to amend their complaint at a later date.”
8 Doc. 168. It does not appear, however, that *any federal court ever* has accepted such a bare
9 reservation as categorically defeating Rule 54(b), and Plaintiffs certainly do not cite a
10 single court doing so. There is no reason for this Court to be the first.

11 Plaintiffs cite Ninth Circuit case law requiring that plaintiffs “*affirmatively alert* the
12 district court that [they] intend[] to rest on [their] complaint” for finality to exist absent a
13 Rule 54(b) judgment. Opp. at 4 (quoting *Unified Data Servs., LLC v. FTC*, 39 F.4th 1200,
14 1206 (9th Cir. 2022) (emphasis added)). But even accepting *arguendo* that premise as
15 requirement for a Rule 54(b) judgment, they fail to explain why their July 29 filing is not
16 just such an “affirmative alert.” Through that filing, Plaintiffs affirmatively provided
17 notice that they “will not amend their complaint at this time.” Doc. 168.

18 In any event, both *Unified Data Services* and *WMX Techs., Inc. v. Miller*, 104 F.3d
19 1133 (9th Cir. 1997) (en banc) (Opp. at 4-5) were cases in which a Rule 54(b) certification
20 *was not sought*. There was thus an issue as to whether the district courts had “made their
21 intentions in that regard both plain and explicit.” *Miller*, 104 F.3d at 1136. Thus, “a further
22 step [needed to] be taken to ‘fix an unequivocal terminal date for appealability.’” *Id.* at
23 1137. But entering a Rule 54(b) judgment here would do just that, and by doing so this
24 Court would eliminate any conceivable ambiguity about its intentions of the sort that gave
25 rise to *Miller’s* and *Unified Data Services’* concerns.

26 More generally, Plaintiffs misapprehend this Court’s case management authority.
27 Plaintiffs’ “reservation” is seemingly premised on the view that *they*—not this Court—
28 have the power to set the deadline for complaint amendments. Under that view, their
declaration that “reserve their right to seek leave of Court to amend their complaint at a

1 later date,” Doc. 168, *categorically* precludes finality such that this Court is entirely
2 without power to enter a Rule 54(b) judgment. But that is not the law. And if there were
3 such a “we reserve the right” exception to finality under Rule 54(b), Plaintiffs would not
4 be the first to “discover” it here.

5 In particular, Plaintiffs ignore this Court’s December 15, 2021 case management
6 order. That order specifically provided that “No motions to ... amend pleadings... shall be
7 filed.” Doc. 85 at 1. This Court’s allowance until July 29, 2022 to amend the complaints
8 was a limited exception to this general order—and one that Plaintiffs disavowed. Absent
9 that disclaimed allowance of leave, Plaintiffs’ dismissed claims became final by operation
10 of law under this Court’s case management order alone, and Plaintiffs do not even attempt
11 to show why that is not so.

12 A simple analogy to criminal appellate procedure further demonstrates the error in
13 Plaintiffs’ logic. If a defendant fails to file a notice of appeal challenging his conviction by
14 the time set by rule (which can be modified by the court, Fed. R. App. P. 4(b)(4)), his
15 conviction becomes final and direct review is ended. He cannot avoid finality by a
16 unilateral declaration that he “reserves the right” to file a notice of appeal at an unspecified
17 future time. So it is here too.

18 **B. There Is “No Just Reason To Delay” Entering Judgment On The Non-
19 Signature Curing Claims**

20 Plaintiffs’ only “just reason for delay” arguments relating to SB 1003/Poll-Close-
21 Deadline claims are based on their purported presumption against prevailing parties
22 seeking Rule 54(b) relief, refuted above. *Supra* §I. Contrary to Plaintiffs’ claims that the
23 State must show that it “would be harmed” to obtain Rule 54(b) relief, Opp. at 7, 10, this
24 Court has made perfectly clear that “harm” is just “[o]ne example of an equitable
25 consideration ‘that may inform a judge’s decision.’” *Gonzalez*, 2021 WL 1312553 at *2
26 (emphasis added). The State thus need not establish harm as some *sine qua non*
27 requirement for obtaining Rule 54(b) relief, when it actually is just “one example” of a
28 factor that might motivate courts to grant it. In any event, given the need for certainty in

1 conducting elections, Plaintiffs’ proposal to deny any finality and certainty to their Poll-
2 Close-Deadline claims for another half decade or more is “harm” by any measure.

3 Plaintiffs also point generically to ongoing discovery (at 5-6). But discovery into
4 the Poll-Close Deadline is now improper since those claims are unequivocally dismissed,
5 and there is no reason to believe that discovery into the remaining Periodic Voting
6 Requirement claim would produce any basis for revising Plaintiffs’ dismissed Poll-Close
7 Deadline claims.

8 Finally, as discussed above, Plaintiffs simply do not address the State’s arguments
9 concerning equitable considerations and the re-litigation concerns raised by bringing Poll-
10 Close-Deadline claims post-*ADP*. Those conceded grounds further militate in favor of
11 granting the State’s Rule 54(b) request on the Poll-Close-Deadline claims.

12 **III. THIS COURT SHOULD ALSO ENTER JUDGMENT ON PLAINTIFFS’**
13 ***ANDERSON-BURDICK* CHALLENGE TO THE PERIODIC VOTING**
14 **REQUIREMENT**

15 Plaintiffs’ reliance on an anti-prevailing-party presumption and “we reserve the
16 right to amend” objections to finality fail for the reasons explained above. *Supra* §§ I, II.A.
17 The remaining question then is whether there is a “just reason to delay” entry of judgment
18 on Plaintiff. There isn’t.

19 Plaintiffs point (at 10-12) to the potential factual overlap between their dismissed
20 *Anderson-Burdick* challenge to SB 1485 and their non-dismissed intentional-
21 discrimination challenge to it. But the Ninth Circuit has made plain that Rule 54(b)
22 certification can be appropriate “even though the remaining claims would require proof of
23 the same facts involved in the dismissed claims.” *Texaco*, 939 F.2d at 798. Plaintiffs,
24 however, simply ignore *Texaco*—never even citing it once.

25 While Plaintiffs point (at 5-6) to ongoing discovery, such discovery should not
26 affect this Court’s holding and future amendment based on such conjectural discovery
27 productions is likely futile. As this Court properly held, the applicable burden imposed by
28 the Poll-Close Deadline is “minimal” under *Short v. Brown*, 893 F.3d 671, 677 (9th Cir.
2018). *Mi Familia Vota v. Hobbs*, No. CV-21-01423, 2022 WL 2290559, at *19-20 (D.

1 Ariz. June 24, 2022). It is virtually impossible that anything produced in discovery could
2 change that result since the objective burden here is *even less* than in *Short*.

3 Similarly, this Court resolved whether the State’s interests sustained SB 1485 by
4 use of judicially noticeable documents and facts. *Id.* at *21-22. By definition, judicially
5 noticeable facts are those “whose accuracy cannot reasonably be questioned.” Fed. R.
6 Evid. 201(b)(2). It is exceedingly unlikely that discovery will turn up any evidence for
7 Plaintiffs to dispute facts “whose accuracy cannot reasonably be questioned.” *Id.*

8 Given *Short* and the facts already judicially noticed by this Court, there is very little
9 overlap of genuinely disputable salient facts between the dismissed SB 1485 claim and the
10 remaining one, and “no just reason” to delay entry of judgment on the former.

11 Plaintiffs also mischaracterize (at 11-12) the State as contending that objective facts
12 are irrelevant to the intentional-discrimination challenge. But although that claim might
13 involve objective subsidiary facts, the ultimate inquiry is *subjective*: if the Legislature’s
14 subjective intent was lawful, it ultimately is irrelevant what the underlying objective facts
15 are for that claim.

16 True, such subsidiary objective facts move the needle where subjective intent is
17 unclear. But given how this Court resolved the *Anderson-Burdick* claim, it is exceedingly
18 unlikely that anything that this Court decides for the intentional-discrimination claim could
19 upset its prior *Anderson-Burdick* decision. *Short* controls the burden issue, and this Court’s
20 acceptance of the State’s interest in reducing costs based on judicially noticeable facts
21 eliminates any meaningful factual overlap that might preclude Rule 54(b) certification.¹

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23
24 ¹ Plaintiffs’ reliance (at 12) on *League of Women Voters of Florida, Inc. v. Lee*, No. 21-
25 cv-186, 2022 WL 610400 (N.D. Fla. Jan. 4, 2022) is unavailing. That court subsequently
26 clarified that “*Anderson-Burdick* is different from *Arlington Heights* in that this Court *need*
27 *not determine what the Legislature’s underlying intent was when it passed the law.*”
28 *League of Women Voters of Fla., Inc. v. Lee*, __ F. Supp. 3d __, 2022 WL 969538, at *96
(N.D. Fla. Mar. 31, 2022) (emphasis added). In any event, that decision was stayed by the
Eleventh Circuit, which faulted its analysis in several respects. *See League of Women*
Voters of Fla., Inc. v. Fla. Sec’y of State, 32 F.4th 1363, 1371 (11th Cir. 2022)—
subsequent history that Plaintiffs neither disclose nor address.

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CONCLUSION

At a bare minimum, this Court should enter Rule 54(b) judgment as to the Poll-Close-Deadline claims. Although a closer call, this Court should also enter 54(b) judgment as to Plaintiffs’ *Anderson-Burdick* challenge to the Periodic Voting Requirement.

Respectfully submitted this 8th day of September, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2022, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign
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