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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
CONSOLIDATED REPLY TO
RESPONSES IN SUPPORT OF HIS
MOTION TO DISMISS AND
RESPONSE TO UNITED STATES’
STATEMENT OF INTEREST**

TABLE OF CONTENTS

1

2 **INTRODUCTION** 1

3 **ARGUMENT** 3

4 I. Plaintiffs’ Opposition Mischaracterizes The Motion-To-Dismiss Standard 3

5 A. Plaintiffs’ Burden In Pleading Is Governed By Their Ultimate

6 Burden Of Proof And Is Not Some Independently Watered Down

7 Standard..... 3

8 B. The Facial/As-Applied Distinction Applies At The MTD Phase 6

9 II. Plaintiffs Lack Standing To Assert Their Intentional Discrimination

10 Challenge To SB 1003 And Any As-Applied Challenges 7

11 A. Plaintiffs’ Intentional Discrimination SB 1003 Claim Is Not

12 Redressable 7

13 1. Pre-Existing, Unchallenged Laws Preclude Post-Election

14 Curing Of Non-Signatures 7

15 2. Plaintiffs’ Arguments Rely On Egregious Misrepresentations

16 8

17 3. This Court Lacks Jurisdiction To Create New Legislation.... 9

18 B. Plaintiffs Lack Standing To Assert Any As-Applied Claims 10

19 III. Plaintiffs’ *Anderson-Burdick* Challenge To SB 1003 Fails 10

20 A. The Burden Is Minimal At Most, Both Under *Hobbs I & II* and on a

21 Clean Precedential Slate..... 11

22 IV. Plaintiffs’ *Anderson-Burdick* Challenge To SB 1485 Fails 17

23 A. The Burden Imposed By The Periodic Voting Requirement Is

24 Minimal 17

25 V. Plaintiffs’ Intentional Discrimination Claims Fail 24

26 A. Most of Plaintiffs’ Key Allegations Are Conclusory..... 24

27 B. Plaintiffs’ Nonconclusory Allegations Fail To Plausibly Allege

28 Intentional Discrimination 25

1 1. Disparate Impacts..... 26
2 2. Legislative Statements 27
3 3. Departures From Practice..... 28
4 4. History..... 28
5 C. Plaintiffs Have Not Pled Sufficient Facts to Overcome the
6 Presumption of Good Faith Or The More Likely Explanations For
7 The Challenged Provisions 29
8 D. The State Does Not Oppose Leave To Amend 29
9 VI. Democratic Intervenors’ Independent Arguments Are Irrelevant..... 29
10 VII. The United States’ Arguments Lack Merit 30
11 **CONCLUSION**..... 32

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12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Abbott v. Perez,
 138 S. Ct. 2305 (2018)..... 4, 5, 32

Allen v. Wright,
 468 U.S. 737 (1984) 10

ACLU v. Holder,
 673 F.3d 245 (4th Cir. 2011) 7

Arizona Democratic Party v. Hobbs (“Hobbs I”),
 976 F.3d 1081 (9th Cir. 2020) 11

Arizona Democratic Party v. Hobbs (“Hobbs II”),
 18 F.4th 1179 (9th Cir. 2021) 2, 3, 8, 9, 11, 12, 13, 15, 20, 21

Arizona Green Party v. Reagan,
 838 F.3d 983 (9th Cir. 2016) 20

Ashcroft v. Iqbal,
 556 U.S. 662 (2009) 1, 3, 4, 5, 6, 22, 24, 25, 26, 27, 32

Bell Atl. Corp. v. Twombly,
 550 U.S. 544 (2007) 1, 25

Brnovich v. DNC,
 141 S. Ct. 2321 (2021)..... 1, 5, 14, 19, 26, 27, 28

Broadrick v. Oklahoma,
 413 U.S. 601 (1973) 7

California v. DHS,
 476 F. Supp. 3d 994 (N.D. Cal. 2020)..... 27

Cato v. United States,
 70 F.3d 1103 (9th Cir. 1995) 10

1 *Citizens United v. FEC,*
 2 558 U.S. 310 (2010) 7
 3 *Common Cause/Ga. v. Billups,*
 4 554 F.3d 1340 (11th Cir. 2009) 23
 5 *Crawford v. Marion County Election Bd.,*
 6 553 U.S. 181 (2008) 19
 7 *Dutil v. Murphy,*
 8 550 F.3d 154 (1st Cir. 2008)..... 7
 9 *Dudum v. Arntz,*
 10 640 F.3d 1098 (9th Cir. 2011) 14
 11 *Edmonds v. Compagnie Generale Transatlantique,*
 12 443 U.S. 256 (1979) 31
 13 *Enter. Leasing Co. v. ADOR,*
 14 211 P.3d 1 (Ariz. Ct. App. 2008)..... 8
 15 *Frank v. Walker,*
 16 768 F.3d 744 (7th Cir. 2014)
 17 *Fusilier v. Landry,*
 18 963 F.3d 447 (5th Cir. 2020) 29
 19 *Georgia Cemetery Ass’n, Inc. v. Cox,*
 20 353 F.3d 1319 (11th Cir. 2003) 7
 21 *Greater Birmingham Ministries v. Merrill,*
 22 284 F. Supp. 3d 1253 (N.D. Ala 2018)..... 32
 23 *Greater Birmingham Ministries v. Sec’y of State for State of Ala.,*
 24 992 F.3d 1299 (11th Cir. 2021) 28
 25 *Hotel & Motel Ass’n of Oakland v. Oakland,*
 26 344 F.3d 959 (9th Cir. 2003) 7
 27
 28

1 *Husted v. A. Philip Randolph Institute,*
 2 138 S. Ct. 1833 22
 3 *J & J Sports Prods., Inc. v. Martinez,*
 4 No. 11-00676, 2011 WL 4375019 (E.D. Cal. Sept. 19, 2011) 7
 5 *James Madison Ltd. by Hecht v. Ludwig,*
 6 82 F.3d 1085 (D.C. Cir. 1996)..... 7
 7 *La Clinica De La Raza v. Trump,*
 8 477 F. Supp. 3d 951 (N.D. Cal. 2020)..... 27
 9 *Lazy Y Ranch Ltd. v. Behrens,*
 10 546 F.3d 580 (9th Cir. 2008) 21
 11 *Lee v. Va. State Bd. of Elections,*
 12 843 F.3d 592 (4th Cir. 2016) 32
 13 *Lemons v. Bradbury,*
 14 538 F.3d 1098 (9th Cir. 2008) 11, 21
 15 *Lujan v. Defs. of Wildlife,*
 16 504 U.S. 555 (1992) 10
 17 *Mays v. LaRose,*
 18 951 F.3d 775 (6th Cir. 2020) 19, 23
 19 *Mecinas v. Hobbs,*
 20 468 F. Supp. 3d 1186 (D. Ariz. 2020) 15
 21 *Mi Familia Vota v. Hobbs,*
 22 977 F.3d 948 (9th Cir. 2020) 14
 23 *Miller v. Johnson,*
 24 515 U.S. 900 (1995) 4, 29
 25 *Morrison v. Peterson,*
 26 809 F.3d 1059 (9th Cir. 2015) 6
 27
 28

1 *N.C. State Conference of the NAACP v. McCrory*,

2 831 F.3d 204 (4th Cir. 2016) 32

3 *Nichols v. Harris*,

4 17 F. Supp. 3d 989 (C.D. Cal. 2014) 7

5 *Ophca LLC v. City of Berkeley*,

6 No. 16-3046, 2016 WL 6679560 (N.D. Cal. Nov. 14, 2016) 7

7 *Prete v. Bradbury*,

8 438 F.3d 949 (9th Cir. 2006) 2, 14

9 *Purcell v. Gonzalez*,

10 549 U.S. 1 (2006) 22

11 *Regents of the Univ. of California v. DHS*,

12 140 S. Ct. 1891 (2020)..... 3, 25, 26, 27, 28

13 *Regents of the Univ. of California v. DHS*,

14 908 F.3d 476 (9th Cir. 2018) 25

15 *Rent Stabilization Ass’n of City of New York v. Dinkins*,

16 5 F.3d 591 (2d Cir. 1993) 7

17 *Rosenblatt v. City of Santa Monica*,

18 940 F.3d 439, 442 (9th Cir. 2019) 7

19 *Saldana v. Occidental Petroleum Corp.*,

20 774 F.3d 544 (9th Cir. 2014) 21

21 *Short v. Brown*,

22 893 F.3d 671 (9th Cir. 2018) 2, 15, 18, 20

23 *Timmons v. Twin Cities Area New Party*,

24 520 U.S. 351 (1997) 14, 22

25 *United States v. Salerno*,

26 481 U.S. 739 (1987) 6, 17, 24

27

28

1 *Village. Of Arlington Heights v. Metro. Hous. Dev. Co.,*
2 429 U.S. 252 (1977)..... 26, 28, 31
3 *Wasco Prod., Inc. v. Southwall Techs, Inc.,*
4 435 F.3d 989 (9th Cir. 2006) 18
5 *Washington State Grange v. Washington State Republican Party,*
6 552 U.S. 442 (2008) 23
7 *Winter v. NRDC,*
8 555 U.S. 7 (2008) 19

9
10 **STATUTES**

11 A.R.S. §16-550..... 8
12 A.R.S. §16-552..... 8
13 A.R.S. §16-548..... 8
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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INTRODUCTION

1
2 Plaintiffs' suit is fundamentally miscast. It is overwhelmingly fixated on disparate
3 *impacts*. But Plaintiffs have no apparent interest in asserting the *one* type of claim that is
4 *specifically* designed to address disparate impacts: *i.e.*, a results-test claim under Section
5 2 of the Voting Rights Act. Apparently still smarting from their resounding defeat in
6 *Brnovich v. DNC*, 141 S. Ct. 2321 (2021)—and overlooking that *Brnovich* also involved
7 an entirely independent intentional-discrimination holding, *id.* at 2348-50—Plaintiffs have
8 refused to assert the sole type of claim to which disparate impacts are specifically directed.

9 Instead, Plaintiffs assert only *Anderson-Burdick* and intentional-discrimination
10 claims for which disparate impacts are *at most* indirectly relevant. The former focus on the
11 magnitude of the burdens and the governmental interests while the latter are premised on
12 *intent* to discriminate, not disparate impacts. That is unlike a results-test §2 claim, which
13 expressly mandates consideration of the “size of any disparities in a rule’s impact on
14 members of different racial or ethnic groups[.]” *Id.* at 2339.

15 In essence, Plaintiffs’ Complaint is little more than a hammer, and Plaintiffs spend
16 23 pages pounding away at everything *except nails*. That accomplishes little despite the
17 sheer amount of blunt force that Plaintiffs apply.

18 In addition to being aimed at the wrong sorts of claims, Plaintiffs’ arguments are
19 trained at the wrong era of jurisprudence. Plaintiffs’ repeated pleas (at 12, 14, 15, 16) that
20 they must be given an opportunity to present evidence before dismissal echo the “prove no
21 set of facts” standard of *Conley v. Gibson*, 355 U.S. 41, 45-47 (1957). That has not been
22 good law for more than decade since *Twombly* and *Iqbal* were decided. It is now well-
23 established that the Federal Rules “do[] not unlock the doors of discovery for a plaintiff
24 armed with nothing more than conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79
25 (2009). And here Plaintiffs offer little more than that—and often less: many of Plaintiffs
26 conclusory allegations also contradict controlling precedent and come nowhere near
27 crossing ““the line from conceivable to plausible.”” *Id.* at 683 (quoting *Bell Atl. Corp. v.*
28 *Twombly*, 550 U.S. 544, 570 (2007)). And while Plaintiffs suggest *Twombly*’s and *Iqbal*’s

1 application of substantive presumptions at the pleading phase does not apply here,
2 Plaintiffs forget that *Iqbal* itself was (as here) a case involving claims of “purposeful
3 discrimination.” *Id.*

4 As to the applicable burdens, Plaintiffs conflate the magnitude of their antipathy for
5 the requirements at issue with the actual burden of complying with them. Here those
6 burdens are *trivial* at most. As to the lack of post-election curing of non-signatures, the
7 Ninth Circuit has held outright it is only a “*minimal burden* on the voter[s for them] to sign
8 the affidavit or to correct a missing signature by election day.” *Arizona Democratic Party*
9 *v. Hobbs* (“*Hobbs II*”), 18 F.4th 1179, 1181 (9th Cir. 2021) (emphasis added). Plaintiffs’
10 claim here involves a burden that is not merely similar, but in fact *literally identical*. *Hobbs*
11 *II*’s holding is thus binding here, and Plaintiffs provide no valid basis for distinguishing it.

12 As to the Periodic Voting Requirement, it can be satisfied/avoided by (1) voting
13 once every four years, (2) responding to a notice, or (3) filling out a EVL request form
14 every four years. The Ninth Circuit has already resolved that the magnitude of the burden
15 of filling out a request form for a mail-in ballot for a *single* election (*i.e.*, not one form for
16 *four entire years* of elections): “To the extent that having to register to receive a mailed
17 ballot could be viewed as a burden, *it is an extremely small one*, and certainly not one that
18 demands serious constitutional scrutiny.” *Short v. Brown*, 893 F.3d 671, 677 (9th Cir.
19 2018) (emphasis added). And while Plaintiffs protest (at 15) that they must be given “an
20 opportunity to put on evidence,” they fail to state what they could put into evidence which
21 would change this picture. Indeed, it is their failure to *allege* plausibly anything more than
22 a minimal burden is thus fatal under Rule 12(b)(6). Moreover, Plaintiffs’ conclusory
23 insistence that trivial burdens are in fact “severe” underscores both (1) how completely
24 they infantilize their own voters and (2) their brazen willingness to make arguments that
25 patently contravene controlling precedent.

26 Because the burden for both Poll-Close Deadline and Periodic Voting Requirement
27 are both minimal, this Court’s inquiry “is limited to whether the chosen method is
28 reasonably related to [an] important regulatory interest.” *Prete v. Bradbury*, 438 F.3d 949,

1 971 (9th Cir. 2006). The Ninth Circuit has already performed that analysis as to the Poll-
 2 Close Deadline and held it was constitutional. *Hobbs II*, 18 F.4th at 1190-94. Moreover,
 3 Plaintiffs neither appear to challenge that SB 1003 is constitutional if it imposes only a
 4 minimal burden, nor do they address two of State’s supporting interests *at all*. As to the
 5 Periodic Voting Requirement, Plaintiffs do not meaningfully address the State’s interest
 6 in avoiding the *uncontested* costs of printing and mailing ballots, which easily suffices.

7 Nor have Plaintiffs adequately alleged intentional discrimination claims here. Most
 8 of Plaintiffs’ allegations are conclusory statements bereft of specifics, which thus must be
 9 discounted under *Iqbal*. What little is left consists of largely disparate impact allegations,
 10 a single unrelated statement from a legislator, and the generic reference to Arizona history.
 11 That does not suffice under *Iqbal* and *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct.
 12 1891 (2020). Moreover, Plaintiffs necessarily rely on “cat’s paw” theory and have not
 13 explained how their allegations are more substantial than the Le Faro video evidence in
 14 *Brnovich*—which did not suffice. Nor have Plaintiffs provided sufficient allegations to
 15 overcome the presumption of good faith here.¹

16 ARGUMENT

17 I. Plaintiffs’ Opposition Mischaracterizes The Motion-To-Dismiss Standard

18 Plaintiffs’ opposition relies heavily on their contention that the claims at issue here
 19 are essentially impossible to resolve on a motion to dismiss, and further that the substantive
 20 burdens that Plaintiffs must satisfy with evidence (*e.g.*, overcoming presumption of good
 21 faith) are irrelevant at the pleading stage. Plaintiffs are wrong.

22 A. Plaintiffs’ Burden In Pleading Is Governed By Their Ultimate Burden 23 Of Proof And Is Not Some Independently Watered Down Standard

24 Plaintiffs’ arguments all assume that this Court must apply a watered-down
 25 pleading standard to their claims. But the Federal Rules are applied equally “in all civil
 26 actions,” no matter the claim alleged or the plaintiff alleging it. *Iqbal*, 556 U.S. at 684. In
 27 all cases, whether a plaintiff’s “well-pleaded factual allegations’ ... ‘plausibly suggest an

28 ¹ Defendants have conferred with Defendant-Intervenors. They “join this brief in full, except they take no position on whether Plaintiffs and Plaintiff-Intervenors have Article III standing to raise facial challenges.”

1 entitlement to a relief’ ... necessarily turns on the substantive standard that applies to the
2 plaintiffs’ claims.” *Int’l Refugee Assistance Proj. v. Trump*, 961 F.3d 635, 648 (4th Cir.
3 2020). Plaintiffs’ allegations thus are not subject to a relaxed pleading standard; their
4 *pleading* burdens is governed by their ultimate burden of *proof*. *Id.* at 685 (declining
5 “invitation to relax the pleading requirements”). Accordingly, they bear the burden of
6 pleading specific facts that both “overcom[e] the presumption of good faith” and “proving
7 discriminatory intent.” *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

8 Contrary to Plaintiffs’ repeated contentions, courts routinely dismiss both
9 *Anderson-Burdick* and intentional discrimination cases at the pleading stage. For example,
10 in *Rubin v. City of Santa Monica*, the Ninth Circuit affirmed the dismissal of an *Anderson-*
11 *Burdick* challenge to a ballot regulation. 308 F.3d 1008 (9th Cir. 2002). And courts
12 routinely dismiss intentional discrimination claims too, such as in *Regents*. Indeed, *Iqbal*
13 itself was a complaint against the Government that failed to plausibly allege discriminatory
14 intent. *Iqbal*, 556 U.S. at 680-87. Plaintiffs simply cannot “insulate their claims from
15 dismissal by contending that [courts] should not determine the ‘sensitive inquiry’ into
16 racial animus at the motion to dismiss stage.” *Robinson v. Md. Dep’t of the Env’t*, 2014
17 WL 2038022, at *11 (D. Md. May 16, 2014). In sum, “there is nothing remarkable about
18 granting a motion to dismiss in an election-law case if careful consideration of the
19 complaint shows that the plaintiff has not stated a claim.” *Stone v. Bd. of Election*
20 *Comm’rs*, 750 F.3d 678, 686 (7th Cir. 2014) (collecting cases). That is just so here.

21 Plaintiffs (at 10-11) and the Government (at 14-15) insist that the presumption of
22 good faith does not apply at the pleading stage. But as the Court explained in *Miller v.*
23 *Johnson*, the legal “principles” governing intentional discrimination claims—including
24 “the presumption of good faith that must be accorded legislative enactments”—affect more
25 than “the plaintiff’s burden of proof at trial.” 515 U.S. 900, 916 (1995). That presumption
26 *also applies* “when assessing ... the adequacy of a plaintiff’s showing at the various stages
27 of litigation,” including when “determining whether to permit discovery” under Rule
28 12(b). *Id.* at 916-17. In fact, *Iqbal* itself applied an analogous presumption at the pleading

1 stage. 556 U.S. at 685-86. The presumption is necessary, because the pleading rules do not
2 allow plaintiffs alleging “discriminatory intent on the part of [a] legislature” to conduct “a
3 fishing expedition for unspecified evidence.” *Wesley v. Collins*, 791 F.2d 1255, 1262-63
4 (6th Cir. 1986).

5 Several of the negative inferences that Plaintiffs try to draw are impermissible in
6 light of the presumption of good faith. For example, Plaintiffs assert (at 7-8) that
7 statements that having nothing to do with race were evidence of a discriminatory purpose,
8 that (at 8-9) “the timing of the legislature’s new-found concern for limiting early voting
9 points to an invidious purpose,” and that (at 9) past discrimination demonstrates present
10 animus. But the Court has been clear that the presumption of good faith is not displaced
11 by precisely these types of allegations of “past discrimination” or insinuations about “the
12 brevity of the legislative process.” *Abbott*, 138 S. Ct. at 2324-25, 2328-29.

13 Like the presumption of good faith, this Court also must consider the Supreme
14 Court’s rejection of the “cat’s paw” theory at this stage. *Brnovich* could not be clearer that
15 “[t]he ‘cat’s paw’ theory has *no application* to legislative bodies.” 141 S. Ct. at 2350
16 (emphasis added). As a matter of law, then, one statement by one legislator cannot be used
17 to impute discriminatory purpose to the entire legislature. Contrary to Plaintiffs’
18 contention (at 11), Defendants do not argue that courts “should disregard the allegations
19 of contemporaneous statements by legislators regarding the laws.” Defendants argue that
20 *Plaintiffs’* allegations—which impute animus from *one* statement from *one* Representative
21 to the *entire* Arizona legislature—are impermissible and implausible under *Brnovich*. The
22 “legislators who vote to adopt a bill are not the agents of the bill’s sponsor or proponents.”
23 *Id.* It is “insulting,” inaccurate, and impermissible to argue otherwise. *Id.* Moreover,
24 Plaintiffs’ sly use of the plural “statements” where their Complaint has only *one such*
25 *statement* quoted (at ¶67) underscores the gulf between how Plaintiffs’ brief portrays their
26 Complaint and the reality of what is alleged.

27 Assessed under the appropriate standard, little is left of Plaintiffs’ complaint except
28 “‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678; *see*

1 MTD at 11-15. Plaintiffs’ only response is a bare recitation of the *Arlington Heights*
2 factors. For example, they flatly declare (at 7 (quoting Compl. ¶67)) that SB 1485 and SB
3 1003 were enacted for “the purpose of disproportionately impacting voters of color and
4 suppressing voter turnout.” Yet this allegation is merely a “formulaic recitation of the
5 elements” of their cause of action. *Iqbal*, 556 U.S. at 678. And Plaintiffs present no
6 plausible factual support for such “labels and conclusions,” *id.*, beyond a legislative
7 statement that has nothing to do with racial discrimination. Indeed, as Defendants
8 explained (at 14), these statements have an “obvious alternative explanation”—discussing
9 the lack of informed voters. *Id.* at 682; *see also id.* (“[T]he purposeful, invidious
10 discrimination respondent asks us to infer, discrimination is not a plausible conclusion.”).
11 Plaintiffs admit (at 6) that their allegations merely “touch on each of the *Arlington Heights*
12 factors.” The problem for Plaintiffs is that the Federal Rules require more.

13 **B. The Facial/As-Applied Distinction Applies At The MTD Phase**

14 Plaintiffs appear to contend (at 20 n.12) that federal courts may not consider
15 whether plaintiffs have satisfied *Salerno* at the pleading stage. The Ninth Circuit has
16 directly held otherwise in binding precedents.

17 The Ninth Circuit’s decision in *Morrison v. Peterson*, 809 F.3d 1059 (9th Cir. 2015)
18 is instructive—and ultimately controlling—here. As to Morrison’s facial claims the Ninth
19 Circuit explained that “Because Morrison raises a facial challenge ... he must ‘establish
20 that no set of circumstances exists under which the Act would be valid.’” *Id.* at 1068
21 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). It then determined that
22 Morrison had failed to satisfy the governing requirements and therefore affirmed dismissal
23 of his facial claims *on the pleadings*. *Id.* at 1068-70.

24 Similarly, in *Rosenblatt v. City of Santa Monica*, the Ninth Circuit similarly upheld
25 dismissal of a facial claim on the pleadings based on the *Salerno* standard. 940 F.3d 439,
26 442 (9th Cir. 2019). In *Rosenblatt* further made clear that *Salerno* applies and has effect
27 even at the pleading stage. *Id.* at 444. *See also Young v. Hawaii*, 992 F.3d 765, 779 (9th
28 Cir. 2021) (en banc) (affirming dismissal of an as-applied challenge on pleadings).

1 Moreover, numerous other circuit courts and district courts within the Ninth Circuit have
 2 similarly applied *Salerno* at the pleading stage to dismiss facial claims/affirms dismissals
 3 of facial claims.²

4 Plaintiffs have pointed (at 20 n.12) to *Citizens United v. FEC*, 558 U.S. 310 (2010)
 5 to argue that the facial/as-applied distinction is irrelevant at the pleading stage. But
 6 *Citizens United* is inapposite. That case involved a First Amendment claim. *Id.* at 340-
 7 41. In that context—unlike the constitutional/statutory claims here—a facial claim can be
 8 based on overbreadth. *Hotel & Motel Ass’n of Oakland v. Oakland*, 344 F.3d 959, 971-72
 9 (9th Cir. 2003). For a facial overbreadth challenge, a plaintiff can prevail on a facial claim
 10 by proving “overbreadth ... *judged in relation to the statute’s plainly legitimate sweep.*”
 11 *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added).

12 An overbreadth claim is thus far less susceptible to dismissal on the pleadings
 13 because subsequent factual development may make or break it. But where *Salerno*
 14 governs, the existence of even *one* constitutional application of a statute fatally finishes a
 15 facial challenge. That is just so here.

16 **II. Plaintiffs Lack Standing To Assert Their Intentional Discrimination** 17 **Challenge To SB 1003 And Any As-Applied Challenges**

18 **A. Plaintiffs’ Intentional Discrimination SB 1003 Claim Is Not** **Redressable**

19 **1. Pre-Existing, Unchallenged Laws Preclude Post-Election Curing** 20 **Of Non-Signatures**

21 Signatures on early ballot affidavits have been required since 1918, and until very
 22 recently, without challenge. *See* 1918 Ariz. Session Laws Ch. 11 §7 (H.B. 3) (“[i]f the
 23 voter has signed the affidavit... the Board shall deposit [it] in a suitable sealed ballot

24 _____
 25 ² *Rent Stabilization Ass’n v. Dinkins*, 5 F.3d 591, 594-95 (2d Cir. 1993) (affirming
 26 *Salerno*-based dismissal on pleadings); *Georgia Cemetery Ass’n, Inc. v. Cox*, 353 F.3d
 27 1319, 1322-23 (11th Cir. 2003) (same); *Dutil v. Murphy*, 550 F.3d 154, 162 (1st Cir. 2008)
 28 (same); *ACLU v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011) (same); *James Madison Ltd.*
by Hecht v. Ludwig, 82 F.3d 1085, 1101 (D.C. Cir. 1996) (leave to add facial claim was
 futile); *J & J Sports Prods., Inc. v. Martinez*, No. 11-00676, 2011 WL 4375019, at *3 (E.D.
 Cal. Sept. 19, 2011) (dismissing facial claim on the pleadings under *Salerno*); *Ophca LLC*
v. City of Berkeley, No. 16-3046, 2016 WL 6679560, at *45 (N.D. Cal. Nov. 14, 2016)
 (same); *Nichols v. Harris*, 17 F. Supp. 3d 989, 1009, 1011 (C.D. Cal. 2014) (same).

1 box.”). In fact, the *Hobbs II* court recognized that “in the nearly century of early voting in
 2 Arizona, no county recorder ever has allowed a voter to correct a ballot with a missing
 3 signature after election day” and that “Arizona always has imposed the election-day
 4 deadline on voters to submit a signed ballot.” 18 F.4th at 1183.

5 Plaintiffs’ contrary contentions fail. In addition to A.R.S. §16-550 (requiring only
 6 “completed affidavit[s]” to be held unopened until delivered to the election board), A.R.S.
 7 §16-548(A) (requiring voters to “make and sign the affidavit” that “must be received... no
 8 later than 7:00pm on election day”) and §16-552(B) (preventing early election boards from
 9 counting a ballot if the affidavit is insufficient) provide further evidence that pre-SB 1003
 10 Arizona law was settled that ballots must be poll-close time to be counted.

11 Plaintiffs also argue (at 23) that SB 1003 shows that preexisting law did not
 12 preclude post-election curing under “basic rules of statutory construction,” presumably
 13 meaning the canon of avoiding surplusage. But SB 1003 *expressly* stated that it was merely
 14 clarifying existing law. SB 1003 §3. The canon of avoiding surplusage thus yields to the
 15 Legislature’s express statement that it did not intend to alter existing law, but rather merely
 16 clarify what it has always been. And contrary to Plaintiffs’ contention (at 23 n.15), the
 17 Legislature *can* clarify what prior law has been retroactively. *Enter. Leasing Co. v. ADOR*,
 18 211 P.3d 1, 4 ¶ 12 (Ariz. Ct. App. 2008). SB 1003 thus further supports Plaintiffs’
 19 redressability arguments.

20 **2. Plaintiffs’ Arguments Rely On Egregious Misrepresentations**

21 To bolster their redressability arguments, Plaintiffs rely (at 23) on the purported
 22 “2021 Election Procedures Manual” that is a “legally binding document under Arizona
 23 law,” and “effective Dec. 31, 2021.” Each of these contentions is flatly false.

24 As Plaintiffs well know from both their statements in their Opposition (23 n.16)
 25 and Complaint (Compl. at 19 n.21), however, a draft Election Procedural Manual (“EPM”)
 26 can only become effective if approved by the Attorney General and the Governor. *See*
 27 A.R.S. 16-452(B). As Democratic Intervenors accurately state in their Complaint (at ¶54),
 28 “the EPM requires the Attorney General’s approval to go into effect.” *Hobbs II* reiterates

1 this point. 18 F.4th at 1184 (“[B]oth the Governor and the Attorney General must approve
2 it.”).

3 But the putative EPM that Plaintiffs cite was a mere *draft* that the Attorney General
4 refused to approve *precisely* because it misstated Arizona law.³ It was thus not the 2021
5 EPM (which does not actually exist) and was neither a “legally binding ... under Arizona
6 law” nor “effective Dec. 31, 2021.” Plaintiffs’ representations to this Court are thus
7 outrageously false.

8 Moreover, applying Plaintiffs’ view that EPMs clarify statutory law, the 2019
9 EPM—the last version actually approved and still in effect—expressly disallowed post-
10 election curing. Plaintiffs themselves note as much (at 23 n.15), though they blame that
11 manual’s explicit disallowance of post-election curing on “the Secretary acquiesc[ing] to
12 the Attorney General’s view to meet the statutory deadline to finalize the 2019 EPM.”

13 3. This Court Lacks Jurisdiction To Create New Legislation

14 Plaintiffs do not deny that Arizona law has *never* permitted post-election curing of
15 non-signatures and make no attempt to reconcile that fact with the Ninth Circuit’s holding
16 that the “absence of a law ... has never been held to constitute a ‘substantive result’ subject
17 to judicial review” since “structural constitutional limits prevent federal courts from
18 ordering government officials to enact or implement a bill.” *M.S. v. Brown*, 902 F.3d 1076,
19 1087 (9th Cir. 2018). Indeed, Plaintiffs do not address *M.S. at all*. Because this Court could
20 strike down *every* Arizona statute ever enacted and no post-election cure period would
21 ever be created, Plaintiffs have not established redressability.

22 Instead, Plaintiffs attempt to rescue redressability by recasting (at 21) their injury
23 as “being subject to a racially discriminatory law *inherently*” injures them. But this is not
24 the injury alleged in their Complaint, which focused their on purported need to “divert
25 money, personnel, time and resources away.” *See* Compl. at 17-20. Plaintiffs cannot not
26 rely on *unalleged* stigmatic injury to survive a motion to dismiss.

27 ³ *See, e.g.*, [https://www.azcentral.com/story/news/politics/arizona/2021/12/24/brnovich-
28 hobbs-dispute-sidelines-new-elections-manual-arizona/9010881002/;](https://www.azcentral.com/story/news/politics/arizona/2021/12/24/brnovich-hobbs-dispute-sidelines-new-elections-manual-arizona/9010881002/)
[https://www.thecentersquare.com/arizona/arizona-election-bible-stalls-as-ducey-refuses-
to-sign-unfinished-work/article_5eced55c-6e3f-11ec-8731-efc705b9a540.html](https://www.thecentersquare.com/arizona/arizona-election-bible-stalls-as-ducey-refuses-to-sign-unfinished-work/article_5eced55c-6e3f-11ec-8731-efc705b9a540.html).

1 But even if they could, Courts have uniformly held that this kind of stigmatic injury
2 only exists where a plaintiff is “personally subject to discriminatory treatment.” *Allen v.*
3 *Wright*, 468 U.S. 737, 757 n.22 (1984). *See also Cato v. United States*, 70 F.3d 1103,
4 1109–10 (9th Cir. 1995) (no standing “to litigate claims based on the stigmatizing injury
5 to all African Americans caused by racial discrimination.”). This is based on the
6 fundamental Article III requirement that injuries be both concrete and
7 particularized. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d
8 351 (1992). Here, Plaintiffs do not—and could not—allege that they personally are subject
9 to discriminatory treatment *because of* SB 1003. Even if SB 1003 were enjoined, Plaintiffs
10 still would not be able to cure non-signatures after when polls close (and thus would not
11 obtain redress). Nor is the purported injury fairly traceable to SB 1003, since Arizona law
12 sans SB 1003 still does not provide them the post-election cure opportunity they seek. And
13 to the extent they rely on the alleged bare discriminatory intent alone, that is “abstract
14 stigmatic injury” that is not cognizable. *Allen*, 468 U.S. at 755.

15 **B. Plaintiffs Lack Standing To Assert Any As-Applied Claims**

16 As the State explained previously (MTD at 10), Plaintiffs lack standing to assert as-
17 applied challenges. Plaintiffs’ only response (at 20 n.12) is to deny that the facial-vs-as-
18 applied distinction applies at the pleading stage. It does. *Supra* Section I.B. Because
19 Plaintiffs offer no allegations that could establish standing for as-applied challenges, and
20 because “standing is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996),
21 any as-applied challenges by Plaintiffs must be dismissed under Rule 12(b)(1).

22 **III. Plaintiffs’ *Anderson-Burdick* Challenge To SB 1003 Fails**

23 The Ninth Circuit’s decision in *Hobbs II* fully resolves Plaintiffs’ *Anderson-*
24 *Burdick* claim against the Poll-Close Deadline. That decision addressed an *identical*
25 *burden*, held it was “at most, a minimal burden,” and then held that the State’s interest in
26 reducing administrative burdens was sufficient to sustain it. Moreover, Plaintiffs simply
27 ignore entirely the State’s other justifications, which also require dismissal here.

28

1 **A. The Burden Is Minimal At Most, Both Under *Hobbs I & II* and on a**
2 **Clean Precedential Slate**

3 The Ninth Circuit’s decision in *Hobbs II* controls the applicable burden question
4 here. That decision considered an *identical burden: i.e.*, that imposed by the State’s
5 signature requirement combined curing opportunities limited by the Poll-Close Deadline.
6 SB 1003 merely codifies that pre-existing practice.

7 The Ninth Circuit’s description of the *Hobbs II* burden is equally applicable here:
8 it was only a “minimal burden on the voter to sign the affidavit or to correct a missing
9 signature by election day.” *Hobbs II*, 18 F.4th at 1181. Indeed, *Hobbs II* viewed the burden
10 as being *no more* than minimal, and perhaps less: “The election-day deadline for
11 submitting a completed ballot imposes, *at most*, a minimal burden.” *Id.* at 1887 (emphasis
12 added). This tracks the Ninth Circuit’s prior holding in *Hobbs I* that the Poll-Close
13 Deadline “imposes, *at most*, a ‘minimal’ burden.” *Arizona Democratic Party v. Hobbs*
14 (*“Hobbs I”*), 976 F.3d 1081, 1085 (9th Cir. 2020) (emphasis added).

15 Even aside from *Hobbs I* and *II*, the burden is self-evidently minimal. Although
16 Plaintiffs acknowledge that the State “incorporate[d] by reference [its] arguments from the
17 then-pending appeal in *Hobbs [II]*,” MTD Opp. at 19, Plaintiffs do not make *any* attempt
18 to answer those incorporated arguments. Instead, Plaintiffs train their fire *exclusively* on
19 the *Hobbs II* decision alone. *See* MTD Opp. at 19-20.

20 The State’s incorporated opening brief offered *seven* distinct reasons why the
21 applicable burden was minimal and cited two controlling precedents that supported that
22 argument. *See* Opening Brief (Doc. 58-2) at 35-40 (citing *Rosario v. Rockefeller*, 410 U.S.
23 752 (1973) and *Lemons v. Bradbury*, 538 F.3d 1098 (9th Cir. 2008)). Plaintiffs completely
24 ignore *Rosario*, and only note in a footnote (at 16 n.10) that *Lemons* was decided on
25 summary judgment (without addressing its actual holdings). And they address only one of
26 the *seven* reasons given by the State (*i.e.*, the facial neutrality in light of disparate impacts,
27 MTD Opp. at 19—which fails for the reasons discussed next).

28 Tellingly missing from Plaintiffs’ brief is any real engagement with these reasons

1 about the truly trivial burden here: *i.e.*, “a voter need only sign once, where prominently
2 indicated, sometime within roughly a month.” Doc. 58-2 at 37. And they may do so either
3 the first time when returning their ballot, or subsequently by curing a non-signature as long
4 as they do so by when polls close. Common sense is sufficient to evaluate that burden as
5 minimal at most.

6 **B. Plaintiffs Have Provided No Valid Basis For Distinguishing *Hobbs II***

7 Plaintiffs offer a few scant bases for distinguishing *Hobbs II* (at 19-20): purported
8 disparate impacts, cumulative burden, and evidence from the 2020 election. Those skeletal
9 contentions fail for five reasons.

10 *First*, Plaintiffs lack standing to assert any as-applied challenges, as set forth above
11 and previously. *Supra* 8; MTD at 10. Thus, while Plaintiffs may have standing to bring a
12 facial challenge, they lack standing to contend that the Poll-Close Deadline is particularly
13 burdensome as applied to particular groups where (1) they have not joined any such
14 affected voters or (2) alleged any concrete examples of such purported deprivations that
15 could support as-applied challenges. Similarly, Plaintiffs cannot rely on
16 allegations/evidence from the 2020 elections where they do not allege any specific
17 deprivations from that election or join any voters affected in that election cycle.

18 Plaintiffs’ reliance on allegedly disproportionate impacts thus fails where they
19 neither have standing to raise such as-applied contentions nor have alleged any such
20 particularized deprivations. Moreover, Plaintiffs’ pleading omissions highlight the
21 implausibility here: if the Poll-Close Deadline truly does affect minority voters
22 significantly and disproportionately, why haven’t Plaintiffs joined or identified a single
23 such voter?

24 *Second*, the allegations of Plaintiffs’ Complaint are insufficient to distinguish
25 *Hobbs II*. In particular, in *Hobbs II* “Plaintiffs have not alleged that the burden of signing
26 [as opposed to curing] the affidavit falls disproportionately on a discrete [racial] group of
27 voters.” 18 F.4th at 1190. Similarly, in *Hobbs II* as here, “Plaintiffs do not argue that
28 forgetfulness ‘is a proxy for some other form of discrimination—that it is a racial or

1 political gerrymander disguised as a [neutral] distinction.” *Id.* (citation omitted). And
2 voters would only ever need a cure period—whether limited to pre-poll close or not—if
3 they experience such “forgetfulness” that is not even *alleged* to be a racially
4 disproportionate characteristic. To the contrary, “forgetfulness is an involuntary state that
5 any voter might reasonably experience.” *Id.* (cleaned up).

6 Thus, for the *vast* majority of voters—more than 99%, *id.* at 1190—signing their
7 ballot is the beginning and *end* of the applicable burden, and that burden is not even *alleged*
8 to be disparate between racial groups. Thus, to the extent that *any* burdens are unequal,
9 those putative disparate impacts affect only the tiniest sliver of voters. And that is
10 essentially all that Plaintiffs allege. *See* MTD Opp. at 19 (citing Compl. ¶¶90-94 as setting
11 forth discriminatory impacts). Paragraphs 90-94 of the Complaint allege only disparate
12 impacts as to the cure opportunities—not the signature requirement (which, if complied
13 with, obviates any need to cure) except for two inapposite exceptions.⁴ Compl. ¶¶90-94.

14 *Third*, even if there are racial disparities, the relevant burdens here are so low that
15 they remain “minimal” even if doubled or tripled for particular individuals or groups. The
16 need for any cure opportunity can be eliminated *entirely* simply by signing once where
17 prominently indicated. As authentication methods go for mail-in ballots, it is doubtful that
18 this burden can go any lower without being zero—or eliminating any pretense of
19 authentication altogether. Plaintiffs certainly cite no State whose authentication
20 requirement is less burdensome. The opportunity for curing (which many states completely
21 deny their voters)—even if not as generous as Plaintiffs prefer—only serves to ameliorate

22
23 ⁴ Plaintiffs allege (at ¶93) that “[l]ack of language access substantially increases the
24 likelihood that voters will miss the signature requirement.” That contention fails because:
25 (1) it is not redressable, as Plaintiffs do not challenge the languages that ballots are printed
in and (2) Plaintiffs do not challenge the signature requirement itself, which will
continue to exist even if all relief that Plaintiffs seek is granted.

26 Plaintiffs similarly allege (at ¶94) that “Voters who are unable to provide a physical
27 signature, or whose marks are not recognized as a signature, risk having their ballots
discarded without sufficient time to cure their ballots.” But Plaintiffs do not challenge the
signature requirement itself, nor do they assert a claim under the Americans with
28 Disabilities Act. Moreover, Plaintiffs ignore that Arizona law permits disabled voters to
allow others to sign for them. *See Hobbs II*, 18 F.4th at 1182 (ballot affidavit); A.R.S. §16-
547. Nor do Plaintiffs identify any inadequacies with this accommodation.

1 further what is already one of the smallest burdens that exists in voting.

2 Notably, “differences in employment, wealth, and education may make it virtually
3 impossible for a State to devise rules that do not have some disparate impact.” *Brnovich*,
4 141 S. Ct. at 2343. If Plaintiffs’ bare allegations of disparate impacts here can serve to
5 transform minimal burdens into severe ones, then *Anderson-Burdick* doctrine will be
6 upended. After all, “States may, and inevitably must, enact reasonable regulations of
7 parties, elections, and ballots to reduce election- and campaign-related disorder.” *Prete*,
8 438 F.3d at 961 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358
9 (1997)). And “every voting rule imposes a burden of some sort.” *Brnovich*, 141 S. Ct. at
10 2338. If these ubiquitous “burden[s] of some sort,” combined with the omnipresent and
11 nigh-impossible-to-avoid fact of those burdens being imperfectly shared by all, are
12 sufficient to trigger strict scrutiny, then virtually every voting rule will be subject to it. But
13 that simply is not the law: “voting regulations are rarely subjected to strict scrutiny.”
14 *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011).

15 *Fourth*, Plaintiffs’ reliance (at 19-20) on putative “cumulative” burdens is
16 misplaced. As an initial matter, Plaintiffs do not cite a single case in support of their
17 cumulative-burden argument. Nor are the burdens here in fact meaningfully cumulative.
18 This is not, for example, a challenge to a state having too few polling places combined
19 with short hours that cumulatively make it hard to vote. Instead, one law applies to
20 obtaining ballot while the other addresses the separate process of casting a vote.

21 Plaintiffs’ “cumulative burden” approach could rapidly collapse *Anderson-Burdick*
22 doctrine into absurdity as *every* requirement would soon be subject to strict scrutiny.
23 Consider, for example, all the minimal burdens that are unchallenged in this suit—though
24 many have been challenged elsewhere by one or more Plaintiffs here—that must be
25 surmounted. To vote by mail, a voter must: (1) Register to vote; (2) Be registered
26 sufficiently in advance of an election;⁵ (3) Complete a form requesting inclusion on an

27 ⁵ Two of Plaintiffs here filed an *Anderson-Burdick* challenge to the deadline to register to
28 vote 29 days before the 2020 election in *Mi Familia Vota v. Hobbs*, 977 F.3d 948 (9th Cir.
2020). Although this Court granted a preliminary injunction, the Ninth Circuit stayed that
injunction pending appeal and the action was eventually dismissed. *Id.*

1 EVL or a single mail-in ballot; (4) Sign that form; (5) Sign the ballot affidavit at some
 2 point; (6) Spot their preferred candidate on the ballot under whatever ballot order
 3 candidates are listed;⁶ (7) Cast no more than the allowable votes for each office
 4 (8) Complete a line next to the desired candidate rather than circling the name; (9) Place
 5 their ballot in a mailbox, dedicated drop box, or return it to a polling station; and (10) Do
 6 so with sufficient time for the ballot to arrive by when polls close.⁷

7 All of these individual burdens are minimal. But if Plaintiffs can simply assert a
 8 “cumulative burden” claim by adding together all of the usual burdens of voting to obtain
 9 strict-scrutiny review, every *Anderson-Burdick* claim will soon become an
 10 omnibus/cumulative-burden challenge to the entire voting system, and few “cumulative”
 11 burdens won’t be severe (at least under Plaintiffs’ estimation of what burdens are severe).
 12 A court would then presumably have to determine whether Arizona’s “cumulative state
 13 interests” (whatever that means) are narrowly tailored to its cumulative set of voting
 14 regulations (whatever that means). Plaintiffs’ logic quickly breaks down.

15 Moreover, even if Plaintiffs could simply add the two burdens challenged here, in
 16 this case that is only a (1) “at most, minimal” burden,⁸ combined with a (2) less-than-
 17 “extremely small” burden that might not even be capable of being “viewed as a burden”
 18 at all.⁹ That combination of burdens still is nowhere near severe. Indeed, that aggregated
 19 burden may not even be a “minimal” burden itself since both individual components
 20 potentially fall *below* that “minimal” threshold. But even if the cumulative aspect were
 21 sufficient to strike the “at most” qualifier from the *Hobbs II* “at most, minimal” burden
 22 holding—leaving it just “minimal”—that would still do Plaintiffs little good.

23 *Fifth*, Plaintiffs’ reliance on the 2020 election voting evidence is similarly
 24

25 ⁶ One of Intervenor-Plaintiffs here filed an *Anderson-Burdick* challenge to the order in
 26 which candidates appear, which this Court dismissed. *See Mecinas v. Hobbs*, 468 F. Supp.
 3d 1186, 1193 (D. Ariz. 2020). An appeal is pending in the Ninth Circuit.

27 ⁷ The requirement that the ballots arrive by poll-close time on election day was challenged
 28 under an *Anderson-Burdick* theory in *Voto Latino Foundation v. Hobbs*, No. 19-CV-5685-
 DWL. That case was dismissed pursuant to a settlement agreed to by Secretary Hobbs.

⁸ *Hobbs II*, 18 F.4th at 1186.

⁹ *Short*, 893 F.3d at 677; *infra* Section IV.A.

1 unavailing, particularly as it is not supported by any specific allegations in the Complaint.
2 While Plaintiffs need not “offer ‘evidence’ at the motion-to-dismiss stage,” MTD Opp. at
3 20, they do need to offer *specific factual allegations*. While Plaintiffs point (at 20) to
4 paragraphs 64-68, none of those paragraphs offers anything from the 2020 election that
5 supports a contention that the burden was greater than that considered in *Hobbs II*.

6 Those paragraphs do not, for example, allege that the rate of ballots being
7 disqualified for non-signature was higher in 2020, or that curing was uniquely harder (it
8 wasn’t; for the first time, county officials had a mandatory duty to assist in curing). Compl.
9 ¶¶64-68. Instead, those paragraphs are largely filled with Plaintiffs’ political missives
10 about the 2020 audit, disparate impact allegations, a conclusory discriminatory purpose
11 allegation (¶67), and a vague statement by a single legislator (¶67).

12 Nothing about those paragraphs has anything to do with the 2020 election showing
13 that the *actual* burden of the Poll-Close Deadline was greater than that considered in *Hobbs*
14 *II*. And outside of those paragraphs, Plaintiffs have affirmatively alleged that the 2020
15 election was “an election with historic voter turnout.” Doc. 66 at 4.

16 To state what should be obvious: record number of voters casting ballots in 2020 is
17 *not* evidence of election laws being more burdensome than previously understood.
18 Plaintiffs’ belief that historically *high* turnout somehow proves that Arizona has made it
19 uniquely burdensome to vote lacks any semblance of logical soundness.

20 Moreover, while Plaintiffs profess (at 20) that they “intend to introduce evidence
21 based on how the cure period was actually implemented in the 2020 election,” they have
22 not offered a *single* allegation to that effect. Plaintiffs cannot circumvent Rule 12(b)(6)
23 merely by promising evidence in the future. Their Complaint must stand or fall based on
24 the *allegations* they offer *now*, not the evidence they merely *intend* to offer in the future.

25 * * * * *

26 For all of these reasons, *Hobbs II*’s “at most, minimal” burden holding analyzing
27 an *identical* burden to that presented here is binding in this Court and Plaintiffs have
28 offered no basis to overcome or distinguish that controlling precedent.

1 **C. Plaintiffs Effectively Concede That SB 1003 Is Constitutional Under**
2 ***Hobbs II* If The Applicable Burden Is Minimal**

3 Although Plaintiffs attempt to distinguish *Hobbs II*'s holding that the burden
4 imposed by the Poll-Close Deadline is at most minimal, they do not appear to challenge
5 *Hobbs II*'s holding that the State's interest in reducing administrative burdens is sufficient
6 to sustain the Poll-Close Deadline where the burden on voting is minimal. *See* MTD Opp.
7 at 19-20. Plaintiffs have therefore forfeited any argument that they can prevail on their
8 *Anderson-Burdick* challenge to SB 1003 if the burden is minimal. And *Hobbs II* compels
9 a conclusion that it is.

10 Plaintiffs have also not responded to the State's interest in securing its electoral
11 systems and promoting orderly elections. This Court expressly incorporated the State's
12 arguments from its Ninth Circuit briefs by reference. Doc. 75 at 5. And those briefs
13 expressly raise those interests. Doc. 58-2 at 43-55; 58-6 at 25-28. Plaintiffs' failure to
14 respond to those interests concedes that they also sustain the Poll-Close Deadline.

15 **D. Plaintiffs Have Not Pled a Viable Facial Claim**

16 Plaintiffs notably do not deny that their claims are facial in nature, and while
17 Plaintiffs argue (at 18-19) that the facial-vs-as-applied distinction does not apply at the
18 pleading stage, they are mistaken. *See supra* Section I.B.

19 Plaintiffs never even *attempt* to answer the State's incorporated arguments that
20 "there are obvious circumstances where Plaintiffs' theories fail even under their own
21 terms," such as "when a voter receives notice of an absent signature three weeks before
22 the election." Doc. 58-2 at 58-59. Plaintiffs' silence concedes the existence of a "set of
23 circumstances exists under which the [Poll-Close Deadline] would be valid." *Salerno*, 481
24 U.S. at 745. That in turn concedes that their facial-only claims necessarily fail and should
25 be dismissed.

26 **IV. Plaintiffs' *Anderson-Burdick* Challenge To SB 1485 Fails**

27 **A. The Burden Imposed By The Periodic Voting Requirement Is Minimal**

28 Even under the facts as alleged by Plaintiffs, the burden imposed by the Periodic

1 Voting Requirement is minimal. Plaintiffs do not deny that the Periodic Voting
2 Requirement can be satisfied either by voting once every four years *or* responding to a
3 notice *or* reapplying for the EVL. And the Ninth Circuit has already squarely addressed
4 and definitively resolved the magnitude of the burden of filling out a form to request a
5 mail-in ballot: “To the extent that having to register to receive a mailed ballot could be
6 viewed as a burden, it is an *extremely small one*, and certainly not one that demands serious
7 constitutional scrutiny.” *Short*, 893 F.3d at 677 (emphasis added).

8 The ability to comply with the Periodic Voting Requirement by filling out a form
9 thus necessarily means that the applicable burden is thus “an extremely small one” (if one
10 at all). Indeed, the burden will be *even less* for two reasons that Plaintiffs ignore: (1) Unlike
11 in *Short*, where the plaintiffs needed to complete a request form for *each election*, here one
12 form is good for *all elections* for at least *four years* and (2) under SB1485, that form will
13 be sent to voters, rather than the voters needing to obtain it themselves. In addition, the
14 alternative compliance methods simply by voting once every four years or filling out
15 another EVL request form further lessen the applicable burden.

16 Plaintiffs offer two responses to *Short*. Both fail. First, Plaintiffs argue (at 15) that
17 *Short* arose “following the denial of a preliminary injunction, where the plaintiffs had an
18 opportunity to put on evidence.” But Plaintiffs have not offered even *allegations* that
19 would establish that responding to the SB 1485 notices is somehow more burdensome than
20 filling out the form in *Short*, thus requiring dismissal of their claim. “Simply put, summary
21 judgment is not a procedural second chance to flesh out inadequate pleadings.” *Wasco*
22 *Prod., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006).

23 Second, Plaintiffs argue (at 15) that “the law challenged in *Short* made it easier for
24 some to vote,” while SB 1485 does not. But *Anderson-Burdick* doctrine is concerned with
25 the *actual* burden on voting, not the first derivative of it. And accepting Plaintiffs’ rationale
26 would essentially transform *Anderson-Burdick* doctrine into some never-before-seen
27 analog of the anti-retrogression requirement of Section 5 of the Voting Rights Act (which
28 Congress enacted precisely because the Constitution did not impose one on its own).

1 Plaintiffs’ proposed one-way ratchet simply is not how *Anderson-Burdick* doctrine
2 operates. Indeed, the effects of that standard would be perverse: it would *punish* States for
3 adopting more generous voting measures by subjecting their future actions to judicial
4 micro-management and second-guessing, which their less-generous sister states would not
5 suffer. *Anderson-Burdick* does not constitutionalize the “no good deed goes unpunished”
6 aphorism. *Winter v. NRDC*, 555 U.S. 7, 31 (2008).

7 Nor did *Short* hold that the *direction* of the burden transformed a minimal burden
8 into a moderate one; it only accurately *described* what had occurred in *Obama for America*
9 *v. Husted*, 697 F.3d 423 (6th Cir. 2012). That *description* in *Short* is not a holding.

10 Similarly, Plaintiffs’ attempt (at 15) to distinguish *Crawford v. Marion County*
11 *Election Bd.*, 553 U.S. 181 (2008) because that case arose “after discovery.” But the
12 burdens at issue there were patently greater than those that Plaintiffs have *alleged* here:
13 *i.e.*, ““inconvenience of making a trip to the BMV, gathering the required documents, and
14 posing for a photograph.” *Id.* at 198. Plaintiffs never explain how they have *plausibly*
15 *alleged* that simply completing a form or voting once every four years could *ever*
16 *plausibly* be considered more burdensome than the burden in *Crawford*.

17 The truly miniscule magnitude of the burden here becomes even more apparent
18 when placed in context, both historically and as compared to other States’ current
19 practices. Historically, there has been no constitutional right to vote by mail *at all*. *See*
20 MTD at 16. Indeed, “[a]s of January 1980, only three States permitted no-excuse absentee
21 voting,” *Brnovich*, 141 S. Ct. at 2339, and none had permanent voting by mail. It is against
22 that historical backdrop, in which it was widely understood that ““there is no constitutional
23 right to an absentee ballot” at all, *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020), that
24 Plaintiffs’ claim arises. Given that the Constitution has never been understood to require
25 no-excuse voting by mail generally, it strains credulity that the State’s modest conditioning
26 of *permanent*, no-excuse balloting with the Periodic Voting Requirement imposes a
27 “severe burden.” Whatever burden that requirement imposes, it is manifestly less than that
28 of 47 states for the entirety of the 1868-1980 period that did not permit no-excuse mail-in

1 balloting *at all*, all without hint from any court that such “burden” violated the
2 Constitution. While Plaintiffs’ views about mail-in balloting this last decade have evolved,
3 the text of the First and Fourteenth Amendments has not.

4 Similarly, Plaintiffs do not dispute that at least 40 states do not have an EVL or
5 fully mail-in balloting system. MTD at 16. Nor do they dispute that 30 states do not have
6 an EVL for *anyone*. MTD at 1; Appendix. But Plaintiffs offer only a *single sentence* about
7 those other states, contending (at 15-16) that *Arizona Green Party v. Reagan*, 838 F.3d
8 983 (9th Cir. 2016), “disposes of the argument that Arizona’s voting laws are in certain
9 ways supposedly ‘more generous’ than the laws of other states.” But *Reagan* does no such
10 thing. True, it rejects inapposite comparisons based on “‘strained analogies’ to past cases.”
11 *Id.* at 990 (cleaned up). But this case presents a direct apples-to-apples comparison, where
12 some states (like Arizona) have EVLs open to all voters and the vast majority do not.

13 In any event, *Hobbs II* makes plain that such contextual comparisons between states
14 *are* appropriate. In supporting its conclusion that the Poll-Close Deadline imposed only a
15 minimal burden, the Ninth Circuit specifically reasoned that its conclusion was supported
16 by the fact that Arizona was “in the middle of the spectrum” for missing signature curing.
17 18 F.4th at 1188. Plaintiffs do not even attempt to respond to this aspect of *Hobbs II*. And
18 unlike that case, Arizona is not even arguably even “in the middle of the spectrum” vis-à-
19 vis early voting lists. It is undeniably more generous than at least 30 states with no such
20 lists, and almost certainly more generous than the 10 states that deny participation in EVLs
21 to all except those over 64 and/or with disabilities. That comparative generosity is a
22 relevant factor under controlling authority, and Plaintiffs’ one-sentence hand waiving it
23 off (at 15-16) does not satisfy their burden under Rules 8 and 12(b)(6).

24 For all these reasons, the burden imposed by the Periodic Voting Requirement is
25 minimal at most, and likely even smaller than “extremely small.” *Short*, 893 F.3d at 677.

26 **B. The State’s Interests Sustain SB 1485**

27 The State has two interests that both independently sustain the Periodic Voting
28 Requirement under *Anderson-Burdick*, particularly as the burden is minimal: the State’s

1 interests (1) in reducing administrative burdens and (2) securing its elections.

2 **1. Administrative Burdens**

3 Although Plaintiffs plainly have little regard for it (at 16-17), “the State has an
4 important regulatory interest in reducing the administrative burden[s]” on its electoral
5 systems. *Hobbs II*, 18 F.4th at 1181; *accord Lemons*, 538 F.3d at 1104-05 (reducing
6 “administrative burden” is an important state interest). Plaintiffs also failed to raise any
7 timely objection to the State’s request for this Court to take judicial notice, which this
8 Court thus granted as unopposed. *See* Doc. 89. This Court can therefore consider it in
9 resolving the State’s Rule 12(b) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89
10 (9th Cir. 2001). Moreover, this Court “need not accept as true allegations contradicting
11 documents ... that are properly subject to judicial notice.” *Lazy Y Ranch Ltd. v. Behrens*,
12 546 F.3d 580, 588 (9th Cir. 2008); *accord Saldaña v. Occidental Petroleum Corp.*, 774
13 F.3d 544, 551 (9th Cir. 2014) (same) (collecting cases).

14 The report that this Court took judicial notice of establishes that it costs “roughly
15 \$2-3 per ballot” in printing and postage costs. MTD at 19-20. The costs at issue are thus
16 substantial, and dwarf the applicable administrative burdens in *Hobbs II*, 18 F.4th at
17 1192—the avoidance of which was sufficient to sustain the Poll Close Deadline. Against
18 this clear evidence, Plaintiffs offer three cursory objections. All fail.

19 *First*, Plaintiffs suggest (at 16-17) that the State’s interest is somehow “remote” or
20 “vague.” Not so. Plaintiffs themselves allege that the Periodic Voting Requirement could
21 affect “125,000 to 150,000” voters. Compl. ¶76. Accepting that allegation as true, the costs
22 to Maricopa County alone would be between \$250,000 and \$450,000 *per election*, or
23 \$500,000 to \$900,000 for federal primary and general elections each cycle, on top of local
24 and special elections. That is neither remote nor vague, but rather concrete and substantial.

25 *Second*, seeking to downplay the effect of their forfeiture, Plaintiffs denigrate (at
26 17) the State’s evidence as a “single document the Attorney General submitted showing
27 the costs of printing, processing and sending *all* mail-in ballots for Maricopa County for
28 the November 2020 election.” But Plaintiffs never explain why that “single document”

1 does not establish exactly what the State contends that it does: that printing and postage
2 costs are roughly \$2-3 per ballot, particularly where that judicially noticed document
3 estimated turnout of 1.7-1.8 million voters by mail-in ballots. Doc. 68 Ex. 2 at 9, 43.
4 Particularly as “[e]laborate, empirical verification of weightiness is not required” under
5 *Anderson-Burdick, Timmons*, 520 U.S. at 352, nothing more was required for the State to
6 carry its burden. Under evidence that may properly be considered now, the State has amply
7 demonstrated that the administrative costs of printing and mailing ballots are substantial.

8 These costs are particularly substantial as Plaintiffs do not concede that the State
9 can *ever* remove a voter from the EVL for non-voting and non-response to notices. The
10 State’s interest thus spans potential *decades* of printing largely or completely unused
11 ballots for voters. The Constitution does not demand such waste.

12 *Third*, Plaintiffs briefly protest (at 16) that they “have not yet been able to test via
13 discovery” the State’s evidence. But Plaintiffs do not deny that judicially noticeable
14 documents can be properly considered at the pleading stage. And if those documents
15 satisfy the State’s burden now, there is no basis for Plaintiffs to obtain discovery on a
16 doomed claim. *See, e.g., Iqbal*, 556 U.S. at 678-79 (holding that the Federal Rules “do[]
17 not unlock the doors of discovery for a plaintiff” that cannot satisfy Rule 8).

18 **2. Securing Elections**

19 The State also “indisputably has a compelling interest in preserving the integrity of
20 its election process.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). That same *interest* was
21 specifically considered in *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018).
22 True, Plaintiffs are correct (at 17) that *Husted* “did not involve an *Anderson-Burdick* claim
23 or a motion to dismiss,” but the ultimate electoral-integrity interest of the State was
24 identical and Plaintiffs’ failure even to *allege* what the *Husted* plaintiffs had *proved*
25 requires dismissal. Moreover, the State’s interests are treated as a “legislative fact,” and
26 this Court “must accept findings by the Supreme Court” on the subject. *Frank v. Walker*,
27 768 F.3d 744, 750 (7th Cir. 2014). The Supreme Court’s legislative findings in *Husted*
28 about the election integrity concerns of maintaining up-to-date lists based on non-

1 voting/non-response to notices are thus binding here. In addition, the State’s actions here
2 are more narrowly tailored than in *Husted*, as the State merely removes voters from EVLs,
3 rather than removing their registrations entirely as Ohio had.

4 Moreover, while Plaintiffs assert (at 17) that they “have specifically asserted that
5 this justification is a pretext and lacks a rational basis,” those are simply conclusory
6 assertions of *legal conclusions* that need not be accepted as true. In any event, at best those
7 are merely allegations about the subjective actual motivations of legislators, which are
8 irrelevant for *Anderson-Burdick* purposes: States may rely on “post hoc rationalizations,”
9 can “come up with [their] justifications at any time,” and have no “limit[s]” on the type of
10 “record [they] can build in order to justify a burden placed on the right to vote.” *Mays*, 951
11 F.3d at 789. Indeed, States need not submit “any record evidence in support of” their
12 interests at all. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1353 (11th Cir. 2009). Thus
13 even if Plaintiffs had plausibly alleged bad subjective intent, *but see infra* Section V, that
14 would only go to their intentional discrimination claims.

15 **C. Plaintiffs Have Not Pled a Viable Facial Claim**

16 Even assuming *arguendo* that Plaintiffs had pled plausibly that some applications
17 of SB 1485 could potentially violate *Anderson-Burdick*, their claim still must be dismissed
18 as a facial-only claim that does not satisfy the *Salerno*/no-set-of-circumstances standard
19 for facial claims. As explained above, the facial-vs-as-applied distinction *does* apply at the
20 pleading stage. *Supra* Section I.B.

21 Moreover, contrary to Plaintiffs’ apparent contention. *Washington State Grange v.*
22 *Washington State Republican Party*, 552 U.S. 442 (2008) is not a one-off flash in the pan,
23 but rather merely the tip of the iceberg of cases applying *Salerno* to facial claims.
24 Plaintiffs’ devotion of an entire section (at 18-19) to distinguishing *Washington State*
25 *Grange on its facts* is thus a sideshow. It is Plaintiffs’ failure to satisfy *Salerno*/the no-set-
26 of-circumstances test that dooms their facial-only *Anderson-Burdick* claim now.

27 More fundamentally, Plaintiffs never answer the State’s argument that
28 circumstances *do* exist under which the Periodic Voting Requirement is constitutional.

1 Plaintiffs, for example, *never* address the State’s example of a voter that has “has not voted
2 in a single federal or municipal election since then [2007]—now at least 14 in all, and
3 perhaps as many as 30—and also does not respond to future notices and continues not to
4 vote.” MTD at 22.

5 Plaintiffs’ failure to offer *any* argument that removing that voter from the EVL
6 under SB 1485 violates *Anderson-Burdick*. And if that EVL removal is constitutional
7 (which Plaintiffs do not actually contest), it necessarily means that there is a “set of
8 circumstances exists under which [SB 1485] would be valid.” *Salerno*, 481 U.S. at 745.
9 That alone requires dismissal of Plaintiffs’ facial claim.

10 **V. Plaintiffs’ Intentional Discrimination Claims Fail**

11 Plaintiffs have failed to plead a plausible case of intentional discrimination for
12 either challenged provision. Most of their allegations are mere conclusory recitations of
13 the legal elements and do nothing to advance the ball. *See Iqbal*, 556 U.S. at 680. Vast
14 other swaths of their Complaint deal with irrelevancies, such as the 2020 audit. Compl.
15 ¶¶58-63. What remains is simply not sufficient: The Supreme Court made clear in *Regents*
16 that a Plaintiff cannot plead a plausible case of discriminatory intent, notwithstanding
17 *Arlington Heights*, simply by alleging discriminatory impact and combining that with
18 remote, unrelated statements and other similarly thin “circumstantial” evidence. 140 S. Ct.
19 at 1916. And that is all that Plaintiffs have done here.

20 **A. Most of Plaintiffs’ Key Allegations Are Conclusory**

21 As the Supreme Court did in *Iqbal*, the analysis begins by “identifying the
22 allegations in the complaint that are not entitled to the assumption of truth.” *Iqbal*, 556
23 U.S. at 680. In *Iqbal* the Court addressed a host of arguments which were mere “bare
24 assertions” and effectively “formulaic recitations” of discriminatory intent. For example,
25 the Court addressed—and discarded—*Iqbal*’s claims that the government “knew of,
26 condoned, and willfully and maliciously agreed to subject him” to confinement because of
27 his religion and/or race, and that defendant Ashcroft was the “architect” of this policy and
28 that defendant Mueller was “instrumental” in adopting it. *Id.* at 680-81.

1 Plaintiffs' Complaint here is similarly infirm. The central paragraph for Plaintiffs'
2 intentional discrimination claims is paragraph 67 (*see* MTD Opp. at 3, 7, 11, 14, 17), which
3 is replete with the same sort of "formulaic recitations" as in *Iqbal*: (1) "Arizona legislators
4 enacted the laws with full knowledge that they will burden voters of color and for the
5 purpose of disproportionately impacting voters of color and suppressing voter turnout,"
6 (2) proponents "made clear that reducing the number of citizens of color who vote is in
7 fact the purpose of these laws." Compl. ¶ 67. And the rest of that paragraph is either the
8 statements of the Acts' *opponents*, or a single statement of Representative Kavanaugh that
9 does not mention race at all, and is insufficient under *Brnovich*'s rejection of cat's paw
10 theory. *Supra* at 6. Other paragraphs that Plaintiffs rely upon are similarly conclusory
11 incantations of the elements. *See, e.g.*, Compl. ¶3 (cited at MTD 8, 9).

12 **B. Plaintiffs' Nonconclusory Allegations Fail To Plausibly Allege Intentional**
13 **Discrimination**

14 Once the conclusory statements are removed, the question for the Court then is
15 whether what is left is sufficient to "nudge [the Plaintiffs'] claim of purposeful
16 discrimination across the line from conceivable to plausible." *Id.* at 683 (cleaned up). But
17 the Plaintiffs' remaining allegations are, at best, merely consistent with their theory, rather
18 than establishing its plausibility. That is insufficient: "Where a complaint pleads facts that
19 are 'merely consistent with' [intentional discrimination], it 'stops short of the line between
20 possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting
21 *Twombly*, 550 U.S. at 557)

22 *Regents* is highly instructive here. There, the Ninth Circuit wrongly accepted as
23 sufficient under *Twombly/Iqbal* allegations strikingly similar to those made here, *i.e.*, that
24 DACA "disproportionately impact[ed] Latinos and individuals of Mexican heritage;" that
25 many statements by President Trump evidenced "animus toward persons of Hispanic
26 descent;" that there was a history of such animus; and that DACA was subject to a "unusual
27 history," including a "strange about-face, done at lightning speed." *See Regents of the*
28 *Univ. of California v. DHS*, 908 F.3d 476, 519 (9th Cir. 2018), *rev'd in part* 140 S. Ct.

1 1891 (2020).

2 The Supreme Court had little trouble reversing: “none of these points, either singly
3 or in concert, establishes a plausible equal protection claim.” *Regents*, 140 S. Ct. at 1915.
4 The Supreme Court’s rejection of that claim—much more extensively supported than the
5 Plaintiffs’ here—strongly supports dismissal.

6 The Plaintiffs’ nonconclusory allegations fall into a few categories: (1) allegations
7 relating to disparate impacts; (2) a legislator’s statement; (3) allegations relating to
8 “departures from practice;” and (4) allegations relating to “history.” Those fail to satisfy
9 their burden under *Twombly/Iqbal/Regents*.

10 **1. Disparate Impacts**

11 Plaintiffs provide several allegations as to disparate impact. *See* MTD Opp. at 6-7
12 (citing Compl. ¶¶ 77, 83, 90-94; Interv. Compl. ¶¶ 97, 120-21). But the bare statistical
13 patterns Plaintiffs rely upon are not “unexplainable on grounds other than race.” *Village*
14 *Of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252, 266 (1977). Instead,
15 “differences in employment, wealth, and education may make it virtually impossible for a
16 State to devise rules that do not have some disparate impact.” *Brnovich*, 141 S. Ct. at 2343.
17 They are thus readily explainable on other grounds—which Plaintiffs’ allegations certainly
18 do not preclude. Plaintiffs’ statistical allegations are “merely consistent with” their
19 claims, *Iqbal*, 556 U.S. at 678, and thus do little to satisfy their burden of pleading facts
20 making intentional discrimination plausible.

21 As *Regents* explains, “[w]ere this fact [that immigration policy disproportionately
22 affects Latinos] sufficient to state a claim, virtually any generally applicable immigration
23 policy could be challenged on equal protection grounds.” *Regents*, 140 S. Ct. at 1915-16.
24 So too here, as it is “virtually impossible” for electoral regulations *not* to have “some
25 disparate impact.” *Brnovich*, 141 S. Ct. at 2343. *See also Ramos v. Wolf*, 975 F.3d 872,
26 898 (9th Cir. 2020) (“Under the district court’s logic, almost any TPS termination in the
27 history of the program would bear ‘more heavily’ on ‘non-white, non-European’
28 populations and thereby give rise to a potential equal protection claim.”).

2. Legislative Statements

1
2 Plaintiffs' Complaint cites only the statement of a *single* legislator, Representative
3 Kavanaugh. Compl. ¶67.¹⁰ But that statement was plainly not about race at all. Any racial
4 subtext that Plaintiffs wish to read into these statements is nothing more than a conclusory
5 assertion about what these representatives “really meant”—in contradiction to the plain
6 meaning of the statements themselves. Such conclusory claims are not entitled to a
7 presumption of truth. *Iqbal*, 556 U.S. at 680. Accordingly, the Court should read these
8 statements for itself and determine if they support the plausibility of Plaintiffs' claims.
9 *Compare with Brnovich*, 141 S. Ct. at 2349-50 (concluding that “‘racially-tinged’ video”
10 used in debate over bill did not show discriminatory purpose).

11 But even if Representative Kavanaugh's statement were read in the Orwellian
12 manner that Plaintiffs require, it still would not suffice for two reasons. *First*, as the
13 statement of only one legislator, by definition it could not be used to impugn the entire
14 legislature *except* through cat's paw theory. *Second*, Plaintiffs do not even attempt to
15 respond to the State's argument (MTD at 14) that Kavanaugh's is *far* less probative of
16 discriminatory intent than the Le Faro video in *Brnovich*—which the Supreme Court held
17 was insufficient.¹¹

18
19
20 ¹⁰ Intervenor-Plaintiffs also quoted (at ¶114) a second statement by Representative
21 Grantham, though Plaintiffs do not rely upon it meaningfully in their opposition: neither
22 quoting it nor referencing Grantham by name at any point. Nor could that statement save
23 Original Plaintiffs' complaint from dismissal. In any event, the same deficiencies that
24 apply to the Kavanaugh Statement apply to the Grantham statement.

25 ¹¹ Similarly, the Supreme Court in *Regents* rejected the significance of President Trump's
26 allegedly discriminatory statements about Latinos, holding that the statements were too
27 “remote in time and made in unrelated contexts” to be imputed to the “relevant actors.”
28 *Regents*, 140 S. Ct. at 1916. Here, Plaintiffs do not allege Representative Kavanaugh (or
Grantham) had any particular or decisive role with respect to these laws, nor do they allege
that these statements had any impact on the challenged provisions' content or passage. *See*
La Clinica De La Raza v. Trump, 477 F. Supp. 3d 951, 978–79 (N.D. Cal. 2020) (“Even
assuming [the Deputy Secretary of DHS's] statements plausibly demonstrate
discriminatory intent, plaintiffs have not alleged he was a relevant actor in the rulemaking
process. This reasoning also applies to the statement by acting director Morgan, who has
no apparent connection to the Rule.”); *accord California v. DHS*, 476 F. Supp. 3d 994,
1025–26 (N.D. Cal. 2020) (same).

3. Departures From Practice

1
2 Plaintiffs also rely on the supposedly suspicious timing of the challenged
3 provisions. Specifically, Plaintiffs point to the fact that these provisions were enacted
4 “after an election in which the candidate preferred by minority voters won” and the fact
5 that they were enacted at a similar time as the Arizona Senate “audit.” MTD Opp. at 8-9.

6 These are not the sort of procedural irregularities that *Arlington* indicated would
7 form meaningful circumstantial evidence of intentional discrimination. *Arlington* instead
8 referred to “departures from practice”—*i.e.*, changes in ordinary *procedure* that indicated
9 some invidious motive was at work. *Arlington Heights*, 429 U.S. at 267 (“Departures from
10 the normal procedural sequence also might afford evidence that improper purposes are
11 playing a role.”). *See also Regents*, 140 S. Ct. at 1916 (concluding “there is nothing
12 irregular about the history leading up to” DACA recession by evaluating procedural
13 history of agency action). Here, Plaintiffs provide no indication that the procedural history
14 of these laws was in any way irregular.

4. History

15
16 Finally, the history cited by Plaintiffs does nothing to advance their claim to
17 plausibility. Even if Arizona, like virtually *every* state, has a deplorable history of racial
18 discrimination, the Eleventh Circuit recently explained that a State’s prior history cannot
19 bar its current legislature from “enacting otherwise constitutional laws about voting.”
20 *Greater Birmingham Ministries v. Sec’y of State for State of Ala.*, 992 F.3d 1299, 1325
21 (11th Cir. 2021). *Greater Birmingham* limits a court’s analysis to “the precise
22 circumstances surrounding the passing of the [challenged] law.” *Id.* Evidence of historical
23 discrimination, the Eleventh Circuit held, is irrelevant under *Arlington Heights*,
24 insufficient under *Abbott*, and impermissible under *Shelby County*. *See id.* at 1325-26.
25 Moreover, the Supreme Court in *Brnovich* also considered *Arizona*’s history of racial
26 discrimination and rejected Plaintiffs’ intentional discrimination claim with facts far more
27 probative than those pled here. *Brnovich*, 141 S. Ct. at 2344.

28

1 **C. Plaintiffs Have Not Pled Sufficient Facts to Overcome the Presumption of**
2 **Good Faith Or The More Likely Explanations For The Challenged**
3 **Provisions**

4 Finally, even to the extent the non-conclusory facts the Plaintiffs allege are relevant,
5 they cannot overcome the presumption of good faith. “[U]ntil a claimant makes a showing
6 sufficient to support that allegation [of purposeful discrimination,] the good faith of a state
7 legislature must be presumed.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995). There is a
8 strong reason for this presumption; courts should “exercise extraordinary caution in
9 adjudicating claims that a State has [acted] on the basis of race” lest it paralyze States with
10 burdensome litigation. *Miller*, 515 U.S. at 916. *See also Fusilier v. Landry*, 963 F.3d 447,
11 463-67 (5th Cir. 2020) (“[T]he Supreme Court has long cautioned against the quick
12 attribution of improper motives, which would interfere with the legislature’s rightful
13 independence and ability to function.”).

14 Plaintiffs’ primary response (and the United States’) is that the presumption of good
15 faith does not apply at the pleading stage. But as explained above and in *Miller*, Plaintiffs’
16 ultimate burden includes overcoming that presumption with *evidence*, and they necessarily
17 have to do so with *specific, non-conclusory allegations* now. *Supra* Section I.A.

18 **D. The State Does Not Oppose Leave To Amend**

19 Given the Ninth Circuit’s mandate that plaintiffs should generally be given at least
20 one chance at amendment, the State does not oppose leave for Plaintiffs to attempt to cure
21 these deficiencies. But their current Complaint does not suffice under
22 *Twombly/Iqbal/Regents*, and thus must be dismissed.

23 **VI. Democratic Intervenors’ Independent Arguments Are Irrelevant**

24 Democratic Intervenors protest (Doc. 94) that res judicata and collateral estoppel
25 should not apply here. The State agrees that DCCC would not be bound by claim or issue
26 preclusion by *Hobbs II*, though it remains a precedent to which *all* parties are bound in the
27 Ninth Circuit. Because the time for DSCC to seek Supreme Court review of *Hobbs II* has
28 not yet run (though the deadline to seek rehearing has lapsed without a petition by DSCC),
the State withdraws its application of claim or issue preclusion now and may renew by

1 separate motion at a later time.

2 The State disagrees, however, that “[t]he evidence here is necessarily different,
3 given the events that have transpired since Hobbs.” Doc. 94 at 2. As set forth above, the
4 2020 election does not change the *Hobbs II* analysis at all. *Supra* at 15-16. Moreover, if
5 DSCC believed that such evidence did alter the *Hobbs II* holding, its remedy would be to
6 seek relief under Rule 59(e) or 60(b) in the *Hobbs II* case based on “newly discovered
7 evidence” (Rule 60(b)(2))—not to bring a new freestanding action challenging the
8 identical practice as in *Hobbs II*. DSCC tellingly has not done so, and thereby betrays its
9 own view of the merit of their “newly discovered evidence” from 2020.

10 VII. The United States’ Arguments Lack Merit

11 Finally, the arguments advanced by the United States in its statement of interest
12 (Doc. 78) lack merit.

13 As an initial matter, it is important to put into perspective the positions of the
14 Administration from which that brief emerges. The Biden Administration’s views of what
15 constitutes racial discrimination have become dangerously demagogic and rely on
16 hyperbole that has become unhinged. President Biden himself has *expressly* and *directly*
17 compared those that seek minor changes of election law, such as reducing the number of
18 ballot drop boxes, to “George Wallace,” “Bull Connor,” and “Jefferson Davis”—*i.e.*, two
19 avowed segregationists and the leader of the Confederacy engaged in civil war (in which
20 more than one million Americans died) to preserve race-based slavery.¹² President Biden
21 has also repeatedly referred to recent election bills as “Jim Crow 2.0,”¹³—even though
22 Jim Crow reprehensibly, and with surgical accuracy, disenfranchised virtually all African
23 American voters in the South. Put simply, the overwrought claims of discrimination made
24 by President Biden bear no resemblance to the actual governing law, which has no trouble
25 distinguishing between the patently illegal measures of the actual Jim Crow system and

26
27 ¹² See Remarks of President Biden on Protecting the Right to Vote (Jan. 11, 2022)
<https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/>

28 ¹³ See, e.g., *id.*; <https://www.ajc.com/politics/what-does-jim-crow-20-mean-a-look-at-the-history-of-segregation-laws/NNCS3B7I2ZDPNCVQ3IKU6BVI5E/>.

1 putative “Jim Crow 2.0” measures that the Biden Administration somehow thinks are
2 virtually indistinguishable.

3 The Biden Administration’s credibility on this issue as a neutral voice is thus
4 dubious at best, undermining the value of its views as to the sufficiency of Plaintiffs’
5 intentional discrimination claims. Indeed, one might fairly wonder if this Administration
6 has ever encountered *any* complaint challenging voting laws that it thought fails to state a
7 claim of intentional discrimination. Moreover, it is quite notable what the Government will
8 not say: *i.e.*, a single word supporting Plaintiffs’ standing arguments or their *Anderson-*
9 *Burdick* claim. And that is in spite of its willingness to make outlandish Jefferson-Davis-
10 esque claims elsewhere. Given its propensity to see “Jim Crow 2.0” around innumerable
11 corners, its “silence is most eloquent” as to the merits of those arguments/claims. *Edmonds*
12 *v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

13 As to the claims to which the United States is willing to lend any support, its
14 arguments are unpersuasive. First, the United States’ view of what allegations are
15 sufficient violate controlling precedent (much of which it ignores). For example, the
16 United States essentially argues (at 10)—contrary to the Plaintiffs own position—that the
17 disparate impacts alone establish discriminatory intent. Not so. “[A]bsent a pattern as stark
18 as *Gomillion* or *Yick Wo*, impact alone is not determinative.” *Arlington*, 429 U.S. at 266.
19 And those cases involved extreme effects, like a district drawing in *Gomillion* which
20 removed almost 400 black voters and 0 white voters; nothing like the impact alleged here.
21 And the United States does not even mention *Regents*, which involved *much* starker
22 disparate impacts of the DACA recission on Latinos—and that was not even sufficient to
23 survive a motion to dismiss, must less establish discriminatory intent on its own.

24 The United States’ consideration of the remaining *Arlington Heights* components
25 is similarly deficient. Importantly, the United States fails to distinguish between
26 conclusory and non-conclusory statements, as required by *Iqbal*. And its consideration of
27 Plaintiffs’ complaint does not meaningfully address the content of those allegations, rather
28 choosing to summarize them in a cursory manner. *See* U.S. Br. at 12-14 (citing paragraph

1 blocks in Plaintiffs’ complaints without discussing the content of those paragraphs).

2 In addition to these deficiencies, the only real case relied on by the United States to
3 support Plaintiffs wafer-thin allegations is the Fourth Circuit’s decision in *N.C. State*
4 *Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016). And *McCrory* is an
5 out-of-circuit decision, with highly distinguishable facts, that does not bind this Court. *Cf.*
6 *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1278-79 (N.D. Ala.
7 2018) (stressing the unusual facts of *McCrory*); *Lee v. Va. State Bd. of Elections*, 843 F.3d
8 592, 603-04 (4th Cir. 2016) (same). Furthermore, four Supreme Court Justices (on an
9 eight-Justice Court) voted to stay the Fourth Circuit’s decision in that case. *See* 137 S. Ct.
10 27, 28 (2016), and the standard it applied is unlikely to survive if it reaches the Court again.

11 Finally, the United States argues (at 14) that the presumption of good faith should
12 not apply now. But their central argument is that applying that presumption now would
13 force Plaintiffs to “prove their claim now at the motion to dismiss stage.” U.S. Br. at 15.
14 But asking Plaintiffs to plead sufficient facts such that, if taken as true, it would entitle
15 them to relief, is simply asking them to comply with Rule 8. *See Iqbal*, 556 U.S. at 684
16 (federal rules apply the same way in “all civil actions”). Accordingly, Plaintiffs must *plead*
17 (but not yet prove) specific facts that both “overcom[e] the presumption of good faith” and
18 “prov[e] discriminatory intent”—that is, to show that they would be entitled to relief on
19 the face of their complaint. *See Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). *See also*
20 *supra* Section I.A.

21 In both *Iqbal* and *Regents*, the Supreme Court dismissed claims of discrimination
22 because alternative explanations were much more likely. But the United States completely
23 ignores *Regents*, and never acknowledges that *Iqbal* was a case involving intentional
24 discrimination. Indeed, aside from citing *Iqbal* in its legal standard section (at 4), the U.S.
25 tellingly never cites it (or *Twombly*) anywhere else. A brief about pleading sufficiency in
26 a case like this that never grapples with *Twombly*, *Iqbal*, or *Regents* is simply unserious.

27 CONCLUSION

28 Plaintiffs’ and Intervenor-Plaintiffs’ Complaints should be dismissed.

1 Respectfully submitted this 11th day of February, 2022.

2
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4
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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 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
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