No. 22-16490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiff-Appellees,
v.
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendant-Appellants,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellants,
and
KATIE HOBBS, in her official capacity as Arizona Secretary of State; et al.
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:22-CV-01374-GMS

INTERVENOR-DEFENDANT'S OPENING BRIEF

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Dated: November 18, 2022

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, Defendant-Appellant Yuma County Republican Committee (the "YCRC") states that no corporation owns more than 10% of its stock.

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INTRODUCTION

States must regulate the "Times, Places and Manner of holding Elections." U.S. Const. art. I, § 4, cl. 1. Carrying out this authority, the Arizona legislature has created a framework designed to safeguard the integrity of its election while "generally mak[ing] it very easy to vote." *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021). This year, Arizona added to this voter-friendly framework by enacting Senate Bill ("SB") 1260, which contains, among other things, A.R.S. § 16-165(A)(10) and (B) (the "Cancellation Provision") and § 16-1016(12) (the "Felony Provision"). SB 1260 is a common-sense election measure designed to manage duplicate voter registrations and deter voter fraud, codify decades-old practices, and close gaps in existing state law.

Plaintiffs filed suit challenging the constitutionality of these provisions and, weeks later, filed a request for emergency relief to preliminarily enjoin SB 1260. Their challenge relied on an alarmist reading of the bill's text, raising only speculative, subjective fear of harm.

Nonetheless, the district court partly ruled in favor of Plaintiffs, entering a preliminary injunction against SB 1260's Cancellation and

Felony Provisions. In doing so, the district court committed several legal errors.

First, the district court erred in ruling that Plaintiffs were likely to succeed on the merits of their claim that the Cancellation Provision conflicts with the National Voter Registration Act ("NVRA"). The Cancellation Provision narrowly works to eliminate duplicate *intrastate* voter registrations by canceling a voter's old registration when that voter affirmatively requests to re-register in a different Arizona county. The Provision works in harmony with the NVRA, which requires the election official to cancel an old registration when requested by the voter. Because an Arizona voter cannot maintain a residence in two separate Arizona counties for voting purposes, a re-registration in one Arizona county supplies the requisite consent to cancel an outdated registration in another Arizona county. The district court erroneously relied on a pair of inapplicable Seventh Circuit cases that invalidated laws canceling duplicate voter registrations in different states—*not* duplicate voter registrations within the same state.

Second, the district court erroneously concluded that the Felony Provision was unconstitutionally vague. The district court's vagueness

determination relied on a boundless, unreasonable interpretation of the Felony Provision to include virtually any activity that is remotely related to voting, such as voter registration activities. But the actual text of the Felony Provision is much narrower: it prohibits "[k]nowingly provid[ing] a mechanism for voting to another person who is registered in another state . . ." A "mechanism for voting" is a device used to cast a vote, such as a ballot. To make matters worse, because the Felony Provision does not include voter registration activities, it does not burden any First Amendment activity and the district court should not have even considered the facial vagueness claim.

Third, the district court's conclusion that the remaining *Winter* factors—likelihood of irreparable harm and balance of the hardships—weighed in Plaintiffs' favor was premised on its erroneous conclusion that Plaintiffs were likely to succeed on the merits. Compounding this error, the district court relied on Plaintiffs' subjective fears of what they think *may* or *could* occur once the law goes into effect. Those fears are undercut by Plaintiffs' failure to challenge the decades-old practices that SB 1260 sought to codify in the first place with the Cancellation Provision. Indeed, despite calling into question the legality of the identical practices, the

district court did not enjoin any of these procedures. As a result, the preliminary injunction order amounts to an advisory opinion.

This Court should correct these errors, vacate the preliminary injunction, and return this case to the district court with instructions regarding the proper interpretation of the Felony and Cancellation Provisions.

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Arizona had original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343, because this case raises federal questions related to the National Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501 through 20511, and for violations of the First and Fourteenth Amendments, cognizable under 42 U.S.C. §§ 1983 and 1988.

On September 26, 2022, the district court issued an interlocutory order granting in part Plaintiffs' Motion for Preliminary Injunction of SB 1260. 1-ER-001–22. YCRC and Defendant Mark Brnovich, in his official capacity as Attorney General for the State of Arizona, timely filed a joint notice of appeal the following day. 5-ER-396–98. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES PRESENTED

1. Did the district court commit legal error by concluding the NVRA and Cancellation Provision conflict when the plain language of SB 1260 and surrounding statutory context establish that the Cancellation Provision applies only to intrastate cancellations, in harmony with the NVRA?

2. Did the district court commit legal error by concluding that the Felony Provision was unconstitutionally vague when, contrary to Plaintiffs' speculative fears, nothing in the plain text of the statute suggested that it prohibits any voter registration activities?

3. Did the district court commit legal error by concluding that Plaintiffs met their burden of demonstrating irreparable harm and that the hardships weighed in Plaintiffs' favor when the district court's conclusions were premised on its faulty legal analysis on the merits of Plaintiffs' claims?

STATUTORY ADDENDUM

The full text of statutory provisions at issue is included in the addendum filed concurrently with this brief. *See* Ninth Circuit Rule Cir. R. 28-2.7.

STATEMENT OF THE CASE

On June 6, 2022, Arizona's Governor signed SB 1260 into law, which took effect on September 24, 2022. 2-ER-267 ¶ 1. Two of SB 1260's provisions are at issue in this appeal.

The Cancellation Provision adds two administrative subsections to A.R.S. § 16-165. It provides that "[i]f the county recorder receives credible information that a person has registered to vote in a different county, the county recorder shall confirm the person's voter registration with that other county. . ." A.R.S. § 16-165(B). Upon "confirmation from another county recorder that the person registered has registered to vote in that other county," the recorder must remove the duplicate registration. *Id.* § 16-165(A)(10).

This procedure codifies and clarifies long-standing procedure set forth in statute and the state's elections procedure manual ("EPM").1 2-ER-179. The "Secretary of State's Office maintains and oversees a statewide voter registration system known as the Arizona Voter Information Database (AVID)." 2-ER-180 (citing the 2019 Election

[1] The Secretary of State is required to "prescribe rules" related to election administration "in an official instructions and procedures manual." A.R.S. § 16-452(A), (B).

Procedures Manual ("EPM") at Ch. 1(IV)(A)); A.R.S. § 16-168(J). The EPM explains:

> Before a new registration record is entered into [AVID], a County Recorder must first conduct a search of the voter records to determine whether there is already an existing record for the registrant *within the county*. A County Recorder may use any appropriate criteria to identify potential matches, including (but not limited to) any information in the voter's record.
>
> If a County Recorder ultimately determines that the registration form was submitted by an existing registrant in the county, the County Recorder must update the registrant's existing record with the new registration information in lieu of creating a new record. ***In other words, the new registration form is treated as a request to update the registrant's existing/original record***. If the initial duplicate search indicates that the registrant does not already have a record in that county, the County Recorder must create a new record. If a County Recorder overlooks an existing/original record and inadvertently creates a new record for the registrant, the statewide voter registration system will flag the records for the County Recorder to resolve.

EPM at 22 (first emphasis in original, second emphasis added); *see also* 2-ER-180 (noting that the procedure is designed to "ensure that voters only have one active voter registration record in Arizona at any given time."); A.R.S. § 16-166(B) (requiring county recorder to "change the general register to reflect the changes indicated on" a voter's updated registration form).

Further, when a county recorder enters a "new or amended voter registration record . . . into [AVID], the system automatically checks the registrant's information against AZMVD records" and "automatically verif[ies the record] against existing records in [AVID] for the purpose of identifying (and potentially canceling) any duplicate record." EPM at 23; *see also* A.R.S. § 16-164(A) ("On receipt of a new registration form that effects a change of . . . address . . . the county recorder shall indicate electronically in the county voter registration database that the registration has been canceled and the date and reason for cancellation."). Once this process is completed, the voter's new county recorder sends a notice to the voter confirming the current registration. A.R.S. § 16-163(B).

The Felony Provision adds a class 5 felony to the list of voting infractions found in A.R.S. § 16-1016 (including illegal voting and tampering with ballot boxes). It prohibits "[k]nowingly provid[ing] a mechanism for voting to another person who is registered in another state, including by forwarding an early ballot addressed to the other person." *Id.* § 16-1016(12). SB 1260's sponsor explained that the Felony Provision seeks to prevent individuals from "sending a ballot to someone

in another state who is registered in another state." *Jan. 31, 2022 Hearing on SB 1260 Before S. Comm. on Gov't*, 55th Leg., 2d Reg. Sess. at 36:25–36:29, 39:00–40:40 (Ariz. 2022).[2]

In their motion for a preliminary injunction, Plaintiffs challenged SB 1260 on three grounds: (1) the Felony Provision violates the First and Fourteenth Amendments because it is unconstitutionally vague and overbroad; (2) the Cancellation Provision conflicts with the NVRA; and (3) the Cancellation Provision and a separate, so-called "Removal Provision" violate due process. 2-ER-219–243. Notably, Plaintiffs did not challenge any of the existing statutory framework or the EPM.

The district court set an expedited briefing schedule. 2-ER-217–18. On September 26, 2022, two days after SB 1260 went into effect, the district court preliminarily enjoined the Felony and Cancellation Provisions. 1-ER-001–22. More specifically, the district court ruled that (1) the Felony Provision was unconstitutionally vague under the First Amendment; and (2) the Cancellation Provision conflicted with the

[2] https://www.azleg.gov/videoplayer/?eventID=2022011106&startStreamAt=2098.

NVRA. 1-ER-004–14 However, the district court ruled that the Removal Provision did not violate Plaintiffs' due process rights.3 1-ER-014–19.

On September 27, 2022, the Defendants4 filed a notice of appeal and an emergency motion with the district court to stay the injunction pending appeal. 2-ER-077–93; 5-ER-396–97. Predictably, the district court's order sowed confusion, with the Arizona Secretary of State issuing conflicting guidance and, apparently, ignoring the order's direction. 2-ER-029–034, 074–76. More specifically, the Secretary of State advised the county recorders to continue to follow the EPM's instructions for the cancellation of duplicate voter registrations, *id*., despite the fact that the district court invalidated the identical procedures in the Cancellation Provision and called into question the validity of the pre-existing procedures. 1-ER-021–22. Despite this confusion, the district court denied Defendants' request for a stay on October 3. 2-ER-023–28.

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[3] Because the district court ruled that the Cancellation Provision was invalid under the NVRA, it did not analyze whether the Cancellation Provision violated Plaintiffs' due process rights. 1-ER-007–14.

[4] "Defendants" refers to Defendant Attorney General Mark Brnovich ("AG") and Intervenor-Defendant Yuma County Republican Committee ("YCRC").

By this time, Arizona's 2022 General Election was in progress. Election officials distributed Military and Overseas Ballots, which must be mailed or sent out forty-five days before the election, on September 24, 2022. A.R.S. § 16-543(A). Moreover, individuals could register or make changes to their voter registration until October 11, 2022, and election officials mailed early ballots and opened voting centers on October 12, 2022. *Id.* §§ 16-120(A), 16-542(A), (C). The General Election occurred on November 8, 2022.

SUMMARY OF THE ARGUMENT

1. The district court erred in concluding that Plaintiffs were likely to succeed on their argument that the Cancellation Provision conflicts with the NVRA. The Cancellation Provision directs a county recorder to cancel a voter's outdated registration when that same voter re-registers to vote in a different Arizona county. This intrastate process is entirely consistent with the NVRA's requirement that the voter's old registration may be cancelled at their request or with written confirmation that the voter has changed addresses. The district court relied on two Seventh Circuit cases to come to a contrary conclusion. This reliance was misplaced because those cases invalidated laws that allowed cancellation

of a state registration when it received information from an unverified, third-party database that the voter re-registered to vote in *another state*. This is nothing like the Cancellation Provision's impact on duplicate, in-state registrations based on registration forms received from a voter.

2. The district court erred in concluding that Plaintiffs were likely to succeed on their claim that the Felony Provision is unconstitutionally vague. The term "mechanism for voting" merely relates to the devices necessary to actually cast a vote—not prerequisites like voter registration. The narrow scope of the Felony Provision is further reinforced by the the scienter requirement ("knowingly"). To be culpable, a person must knowingly supply a ballot to someone that he *knows* is registered out of state. Because this is the only reasonable interpretation of the statute, the Felony Provision is not vague. Moreover, because this interpretation does not implicate any First Amendment activity, the court should not have even entertained the vagueness challenge.

3. The district court erred in concluding that Plaintiffs met their high burden to demonstrate that they would suffer irreparable harm or that the balance of equities tipped in their favor. The district court's reasoning on these two *Winter* factors was inextricably tied to its erroenous

conclusion that Plaintiffs are likely to succeed on the merits of their NVRA preemption and vagueness claims. As such, the district court's conclusions related to irreparable harm and the balance of the equities must be reversed.

ARGUMENT

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (internal quotation and emphasis omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court reviews "order[s] regarding preliminary injunctive relief for abuse of discretion, but review[s] any underlying issues of law de novo." *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019). Reliance on an "erroneous legal premise" is grounds to reverse a preliminary injunction. *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995).

The district court committed legal error in every step of the preliminary injunction analysis; thus, its decision should be reversed.

I. The District Court Committed Legal Error in Ruling that Plaintiffs Are Likely to Succeed on the Merits.

A. The Cancellation Provision Works in Harmony with the NVRA.

The district court concluded Plaintiffs were likely to succeed on the merits of their claim that the Cancellation Provision is preempted by the NVRA. 1-ER-007–14. This ruling constituted legal error.

1. The Cancellation Provision is Consistent with Section 20507(a)(3)(A) of the NVRA.

The NVRA requires that in administering its voter registration programs, "each State shall . . . provide that the name of a registrant may not be removed from the official list of eligible voters except . . . at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A). "A 'request' by a registrant [under subsection (a)(3)(A)] would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction." *See* S. Rep. No. 103-6, 31; H.R. Rep. No. 103-9, 14–15.

The Cancellation Provision complies with Section 20507(a)(3)(A)'s "request" requirement. When a voter re-registers in a new Arizona

county, the new registration form serves as the registrant's written request to be removed from the rolls in the prior Arizona county. Thus, once a county recorder "receives confirmation from another county recorder that the person registered has registered to vote in that other county" (*i.e.*, that duplicate registrations exist), a county recorder may remove that registrant from the prior county's rolls, in compliance with the NVRA. A.R.S. § 16-165(A)(10).

Arizona's overall framework for voter registration supports the conclusion that a re-registration form supplies the "request" required by the NVRA. *See Sciranko v. Fid. & Guar. Life Ins. Co.*, 503 F. Supp. 2d 1293, 1319 (D. Ariz. 2007) ("It is a well-settled canon of statutory construction that the provisions of a unified statutory scheme should be read in harmony. . ." (internal citation and quotations omitted)). A voter's registration form constitutes "an official public record of the registration of the elector." A.R.S. § 16-161(A). It must be accompanied by proof of residence, essentially verifying that the voter resides where they are registering. *Id.* § 16-123. This is important because, in Arizona, a voter is only qualified to register to vote where they reside, and they can only

have *one* residence for voting purposes. *Id.* § 16-101(B) (one residence rule); § 16-120(A) (noting voter is qualified to vote where he resides).

Although county recorders administer voter registration, Arizona requires that the Secretary maintain a single statewide voter registration database, AVID. *Id.* § 16-168(J) (requiring a centralized statewide voter registration database); *see* 2-ER-180 (citing EPM at Ch. 1(IV)(A)). Like the Cancellation Provision, AVID seeks to prevent duplicate, intrastate registrations: when "the elector provides the county recorder with a *new registration form* or otherwise revises the elector's information, the county recorder" does not add a new, second registration to AVID, but "*shall change* the general register to reflect the changes indicated on the new registration." *See* A.R.S. § 16-166(B) (emphasis added); *see also* § 16-164(A) ("On receipt of a new *registration form* that effects a change of . . . address . . . the county recorder shall indicate electronically in the county voter registration database that the registration has been canceled and the date and reason for cancellation." (emphasis added)); EPM at 22–23 (describing AVID's process for cross-referencing the voter's information with current registrations to ensure no duplicate registrations exist). Stated another way, "the new

registration form is treated as a request to update the registrant's existing/original record." EPM at 22. Once this process is completed, the voter's new county recorder sends a notice to the voter confirming the current registration. A.R.S. § 16-163(B).

Below, the Secretary and Maricopa County Recorder Office ("MCRO") explained that AVID "is designed to check for duplicate, cross-county registration records at the point of initiation of each new voter registration record so that counties can appropriately review and maintain Arizona's voter records" and "ensure[s] that voters only have one active voter registration record in Arizona at any given time." 2-ER-180; *see also* 2-ER-213 ¶ 8 (noting that under current procedure, when MCRO "receives confirmation from another county that a person is registered in Maricopa County, registered to vote in that county" the MCRO cancels the Maricopa County registration and the "voter information is merged to the voter record in the new county through the voter registration systems").

Accordingly, when read with the overall statutory and regulatory scheme, the Cancellation Provision simply codifies existing intrastate practice as described by the State's election officials. Because a voter is

not permitted to maintain multiple residences for voting purposes in Arizona, when a voter re-registers to vote with a new address in a new Arizona county, it is equivalent to a request or "direct authorization" to cancel their registration at his old residence in another Arizona county. 1-ER-008.

The district court ignored this statutory framework and looked solely at § 16-165(A)(10) and (B) to conclude that "[n]either provision requires direct authorization from voters or compliance with the NVRA's notice provisions prior to a county recorder removing a voter's registration from the rolls." 1-ER-008 (citing to absence of acknowledgement on new voter registration forms and the Seventh Circuit cases discussed *infra*). The district court erred in ignoring the surrounding statutory context and the operation of Arizona's voter registration laws. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (reasoning that when a federal statute "is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." (internal quotation and citation omitted)); A.R.S. § 16-168(J) (mandating compliance with NVRA when removing duplicate voters).

2. The Cancellation Provision Is Consistent with Section 20507(d)(1) of the NVRA.

Alternatively, the Cancellation Provision satisfies the NVRA's requirement for canceling a voter's registration in Section 20507(d)(1). Subsection (d)(1) provides that a "*State* shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the registrant—(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," or (B) the registrar follows the NVRA's notice-and-waiting requirements. 52 U.S.C. § 20507(d)(1) (emphasis added).

By submitting a re-registration form, which is a verified and official state record, an Arizona voter has confirmed in writing that he has changed his voting address. *See* A.R.S. §§ 16-123, 16-161(A); EPM at 22. The form thus supplies the written confirmation required by subsection (d)(1) of the NVRA. The district court rejected this straightforward conclusion, reasoning that the "county recorder's confirmation with *another county recorder* is . . . insufficient to constitute confirmation *from the registrant* under the NVRA." 1-ER-013. This analysis improperly read

the Cancellation Provision in isolation and ignored the totality of Arizona's election laws, such as Arizona's requirement that all county recorders must use a centralized Statewide voter registration database. A.R.S. §§ 16-161, 16-168(J); *see also* 52 U.S.C. § 20507(d)(1) (setting requirements on States as a whole).[5]

3. The District Court's Reliance on *Common Cause* and *Sullivan* Was Misplaced.

The district court further relied on two Seventh Circuit cases to disregard YCRC's reasonable interpretation and support its conclusion that the Cancellation Provision conflicts with the NVRA. Both are inapposite.

The first case relied on by the district court was *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019). This case concerned an Indiana law that "required that election officials cancel a voter's registration upon finding a match through the Crosscheck system," a third-party independent database "that confirmed a voter was registered

[5] The Cancellation Provision is not superfluous to A.R.S. § 16-165(a)(1) or (a)(9) because those provisions authorize a county recorder to cancel a registration upon direct communication with the voter, whereas (a)(10) authorizes a county recorder to cancel a registration when the voter directly communicates with another election official.

in Indiana and in another state." 1-ER-009 (citing *Common Cause*, 937 F.3d at 957). The court reasoned that "[d]rawing an inference from information *provided by Crosscheck* indicating that a voter has registered in another jurisdiction is neither a request for removal nor is it from the registrant." *Common Cause*, 937 F.3d at 960 (emphasis added); 1-ER-009. Arizona's law differs in three important ways.

First, the Indiana law conflicted with the NVRA because it was reasonable to maintain registrations *in two different states*; thus, re-registering to vote *outside of Indiana* could not be deemed a "request" under Section 20507(a)(3)(A) to the "State." By contrast, Arizona's Cancellation Provision only applies to duplicate *in-state* registrations.

The district court dismissed this key distinction because it wrongly concluded that "[n]othing in the text of [SB 1260] limits its application to only county recorders in Arizona." 1-ER-011. However, courts must assume that identical words have the same, consistent meaning throughout an act. *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111, 1118 (9th Cir. 2015); *see also Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the

same meaning."). That canon applies to the phrase "county recorder" in Title 16, which consistently uses the phrase to refer to *Arizona* county recorders. For example, A.R.S. § 16-165(A) sets forth the conditions upon which a county recorder may remove Arizona voters from election rolls. It is implausible to construe county recorders in that subsection to mean county recorders in *any* state. And even if the text could theoretically bear that meaning, "[i]t is . . . incumbent upon [federal courts] to read the statute to eliminate those [constitutional] doubts so long as such a reading is not plainly contrary to the intent of [the enacting legislature]." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). The district court's strained interpretation of Arizona law turned the constitutional avoidance doctrine on its head.

Second, Arizona does not rely on a third-party database, but instead on official voter registration forms *from voters themselves* maintained in a central statewide database. *See* A.R.S. §§ 16-165(A)(10) & (B), 16-161, 16-168(J); *cf. Common Cause*, 937 F.3d at 961 (requiring that the "registrant herself make[] the request to the state" and declining to interpret NVRA to reach "information from a third-party database").

Third, unlike registrations in several states, Arizona law requires that when a voter re-registers to vote at a different address within the state, the voter must verify that the new address is their residence for voting purposes. A.R.S. §§ 16-101(B), 16-120(A), 16-123. This re-registration will then prompt election officials to *change* a voter's state registration—not add a second duplicate registration—and send a confirmation notice of the change to the voter. *See id.* §§ 16-163(B), 16-164(A), 16-166(B). Because the re-registration form is verified by the voter herself, Arizona election officials do not rely on any "inference" like the one relied upon in Indiana. Moreover, Arizona voters have actual notice regarding their new registration.[6]

For all these reasons, the district court erred in ruling that the NVRA compels Arizona to include on its registration forms a check box or other notation indicating that the voter wishes to cancel her old registration in another Arizona county. *See* 1-ER-008. This box would serve no purpose because Arizona law does not allow voters to maintain

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[6] For the same reasons, the Court's adoption of *Common Cause's* reasoning related to Section 20507(d) is distinguishable. *See Common Cause*, 937 F.3d at 961–62 (reasoning that Indiana's law did not fulfill Section 20507's written confirmation requirement because "Crosscheck is not the resident, nor is it the resident's agent.").

multiple, in-state registrations. To the extent the operation of Arizona law requires Arizona election officials to infer the voter's intent, it is one endorsed by the U.S. and Arizona Supreme Courts. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020) (individuals are "presumed to know the law"); *Merrill v. Gordon*¸ 15 Ariz. 521, 532 (1914) (similar).

The district court also looked to the Seventh Circuit in citing *League of Women Voters of Indiana Inc. v. Sullivan*, which concerned an Indiana law that allowed election officials to cancel a voter's registration upon receiving notice that a voter was registered in another state. 5 F.4th 714, 724 (7th Cir. 2021). That law conflicted with the NVRA because it did not require the state to "have a copy of the voter's signed voter registration application" and thus "impermissibly allow[ed] Indiana to cancel a voter's registration without . . . direct communication from the voter." *Id.*

Arizona's scheme is entirely different. It does not rely on voter representations made to other states or provide for cancellation without written verification from the voter. Instead, Arizona directly communicates with the voter by receiving the actual registration form submitted by the voter herself. A.R.S. §§ 16-161, 16-168(J).

Because these Seventh Circuit cases are so factually distinct, this Court should give them no weight.

B. Plaintiffs Are Not Likely to Prevail in a Facial Challenge to the Felony Provision.

The district court concluded that the Plaintiffs were likely to succeed on the merits of their facial claim that the Felony Provision is unconstitutionally vague. 1-ER-004–07. This ruling was premised on an incorrect, unreasonable reading of the Felony Provision's text and misapplication of the facial vagueness test.

1. The District Court Erred in Its Statutory Interpretation of the Felony Provision.

When a federal court is "interpreting a state statute as a matter of first impression," its role "is to 'determine what meaning the state's highest court would give to the law.'" *Brunozzi v. Cable Comm'ns, Inc.*, 851 F.3d 990, 998 (9th Cir. 2017) (quoting *Bass v. Cty. of Butte*, 458 F.3d 978, 981 (9th Cir. 2006)).

The Arizona Supreme Court will "read words in context and effectuate the plain meaning of [the statute] unless doing so would be absurd." *S. Point Energy Ctr. LLC v. Ariz. Dep't of Rev.*, 253 Ariz. 30 ¶ 14 (2022); *see also Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940

(9th Cir. 1997) (starting a void for vaugeness analysis by interpreting the plain lanugage of the statute in context).

The Felony Provision states that a "person is guilty of a class 5 felony who . . . [k]nowingly provides a mechanism for voting to another person who is registered in another state, including by forwarding an early ballot addressed to the other person." A.R.S. § 16-1016. This statutory language is unambiguous and adequately guides individuals of ordinary intelligence regarding what it bans. In reaching a contrary conclusion, the Court misinterpreted two key components of the statute: (1) the phrase "mechanism for voting" and (2) the "knowingly" scienter requirement.

a. "*Mechanism for Voting*"

Mechanism is defined as "the *fundamental processes* involved in or responsible for an action, reaction, or other . . . phenomenon." *Mechanism*, Merriam Webster (Nov. 11, 2022) (emphasis added).[7] *See also* 1-ER-005 (citing Oxford English Dictionary defining Mechanism as "the interconnection of parts in any complex process," "[a] means by which an effect or result is produced."). A process is defined as a "series

[7] https://www.merriam-webster.com/dictionary/mechanism.

of actions or operations conducing to an end." *Process*, Merriam Webster (Nov. 13, 2022).[8]

The process referenced in the statute refers only to the fundamental steps necessary to cast a vote in each election (*i.e.*, the process for completing a ballot in each election). For in-person voting, steps like checking into a voter's voting location, providing adequate voter ID, completing the ballot, and submitting the ballot are the fundamental steps to necessary to vote. Similarly, for mail-in voting, steps like receiving an early ballot, opening the mail-in envelope, completing the ballot, and timely submitting the ballot (either in the mail or at a drop box location), are the fundamental steps necessary to vote. These are the steps (or "mechanisms") that must be repeated each cycle in order to execute a voter's fundamental right.

The district court erroneously broadened this definition past the fundamental process for casting a vote by inferring that the Felony Provision might also include a pre-requisite for voting: voter registration. While registering to vote is a legal requirement that must be fulfilled *before* an Arizonan votes, A.R.S. § 16-120, it is not a requirement that

[8] https://www.merriam-webster.com/dictionary/process.

must be completed each time he seeks to cast a vote. Stated differently, voter registration is a necessary step to be able to carry out the "mechanism[s] for voting," but does not itself constitute a mechanism for casting a vote.[9] The Legislation did not extend the Felony Provision to a "mechanism for voting *or registration*," and yet that is precisely how Plaintiffs and the district court unreasonably interpreted the Provision.

All of the surrounding statutory framework confirms Defendants' straightforward reading of the Felony Provision's text.

First, YCRC's interpretation is consistent with and supported by the example of what constitutes a "mechanism for voting" in the statutory text: "forwarding an early ballot addressed to [another] person." A.R.S. § 16-1016(12). Plaintiffs cannot and do not dispute that acts like forwarding an early ballot constitute a "mechanism for voting."

Second, A.R.S. § 16-1016—the statute in which the Felony Provision is housed—is, as a whole, framed as a way to prevent "illegal

[9] Indeed, if voter registration was considered a "mechanism for voting" then all prerequisites to voting would also be plausibly included, such as the eligibility requirements for registration like turning eighteen, establishing a residence in Arizona, or becoming a U.S. citizen. Ariz. Const. art. 7, § 2; A.R.S. § 16-101. Reading mechanisms for voting to include the act of turning eighteen, or any other pre-requisite, is an absurd reading. *S. Point Energy Ctr. LLC*, 253 Ariz. at ¶ 14.

voting" both in person and through mail-in voting processes. It does *not* apply to voter registration efforts. To the contrary, the statute takes aim at criminalizing fraud during different steps of the voting process that are inextricably related to the act of casting a ballot, such as voting twice or tampering with ballots that have been submitted to election officials. With the addition of the Felony Provision, the Legislation similarly sought to regulate the voting process by narrowly prohibiting someone from enabling a person registered to vote in another state from casting a ballot in Arizona. The Felony Provision does not aim to criminalize any act related to registering individuals to vote. Indeed, it makes no reference at all to registration activities.

Third, the Legislature organized the distinct processes for voting and registration in different chapters of Title 16. *Compare* A.R.S. §§ 16-101 through 16-184 (Chapter 1: Qualification and Registration of Electors), *with* A.R.S. §§ 16-541 through 16-552 (Chapter 4: Voting Procedures, Article 8. Early Voting) *and* A.R.S. §§ 16-562 through 16-594 (Chapter 4: Voting Procedures, Article 9. Polling Place Procedures).

Nothing in the text of the Felony Provision or its context supports its application to registration activities. Thus, the court relied on an unreasonable reading of the statute.

b. "*Knowingly*"

Because the Felony Provision does not limit any of voter registration activities engaged in by Plaintiffs, the district court had no need to interpret the Provision's scienter requirement "knowingly." Nonetheless, this requirement further evidences the limited scope of the law's application.

Modifiers at the beginning of a phrase or list apply to that entire phrase. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012); *see, e.g.*, *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 764 (D.C. Cir. 1978) (en banc), *overruled on other grounds by Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1053 (D.C. Cir. 1981) (en banc) (holding that in the phrase "internal personnel rules and practices of an agency" the word "internal" referred to personnel rules and agency practices). Here, because "knowingly" appears at the beginning of the Felony Provision, it applies to the entire phrase. Thus, to violate the Felony Provision, an individual

must know that he is both (1) "provid[ing] a mechanism for voting to another person"; and (2) that this person "is registered in another state." A.R.S. § 16-1016. As such, Plaintiffs' stated fears that their members could be prosecuted for ordinary voter registration activities has no textual basis in the actual Felony Provision. The Felony Provision does not apply to registration, but even if it did, the Provision requires knowledge that the person being assisted is registered to vote in another state.

This reading of the statute is further supported by testimony from SB 1260's sponsor at the hearing before the senate committee on government and the fact that the AG (the only named Defendant with prosecutorial authority) has "flatly reject[ed] any interpretation of SB 1260 that would criminalize such ordinary voter outreach." 2-ER-201;[10] *Jan. 31, 2022 Hearing on SB 1260 Before S. Comm. on Gov't*, 55th Leg., 2d Reg. Sess. at 36:25–36:29, 39:00–40:40 (Ariz. 2022); *see also* 2-ER-123–27 ¶¶ 4, 8, 11–13.

[10] The district court's refusal to consider this representation just because the AG's tenure is expiring soon is not justified at the preliminary injunction phase where the AG's tenure and the preliminary injunction could have the *same* lifespan. 1-ER-006–007.

* * *

When "the terms challenged by Plaintiffs as vague are either clear or are clarified when considered in context of [the challenged ordinance], other applicable ordinances, and common sense," their vagueness claim "is without merit." *Recreational Devs. of Phx., Inc. v. City of Phoenix*, 83 F.Supp.2d.1072, 1087–89 (D. Ariz. 1999). It is not enough that a "fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in . . . question.'" *Id.* at 1088 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 110 n. 15 (1972)) (alteration in original). Despite Plaintiffs' imaginative efforts to sow confusion, the plain language of the Felony Provision, including "mechanism for voting," is clear and there is no reasonable way to read the Felony Provision as criminalizing voter registration activities. Accordingly, the district court's vagueness analysis hinges on a legally incorrect reading of the statute and it should be reversed.

2. The Court Should Not Have Entertained the Facial Challenge Because the Statute Does Not Implicate a Substantial Amount of First Amendment Activity.

Courts do not look favorably on facial vagueness challenges. *Schwartzmiller v. Gardner*, 752 F.2d 1341, 1346 (9th Cir. 1984). "In a

facial challenge to the . . . vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) ("*Flipside*"). When "a statute is challenged as unconstitutionally vague in a cause of action not involving the First Amendment," courts "do not consider whether the statute is unconstitutional on its face." *United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001); *see also Flipside*, 455 U.S. at 945 n.7 (holding that "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.").

Under the only reasonable interpretation of the Felony Provision, there is no risk of criminalizing any First Amendment activity. It does not implicate any voter registration efforts and does not impose penalties on the person actually voting. Rather, the Felony Provision only prohibits the *physical act* of both (1) knowingly providing a mechanism for voting to another person that is (2) known to be registered in another state. Providing a ballot to another person is non-expressive conduct, *not speech*. *See United States v. Williams*, 553 U.S. 285, 292 (2008); *Feldman*

v. Ariz. Sec'y of State's Off., 843 F.3d 366, 392–93 (9th Cir. 2016) (holding that the act of collecting ballots is not protected speech); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (similar).

Because the law does not burden any First Amendment conduct, Plaintiffs' facial vagueness challenge to the Felony Provision must fail.

II. The District Court Improperly Determined that Plaintiffs Established They Were Likely to Suffer Irreparable Harm.

To obtain a preliminary injunction, a party must show that it "is likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. As discussed, the district court erred as a matter of law in determining that Plaintiffs are likely to succeed on their preemption and vagueness claims. Thus, the general rule that constitutional harms are irreparable does not apply, and Plaintiffs cannot presumptively establish any irreparable harm on this basis. *See, e.g.*, *Rendish v. City of Tacoma*, 123 F.3d 1216, 1226 (9th Cir. 1997). The district court's conclusion to the contrary is legally incorrect.

Moreover, because of its erroneous determination that Plaintiffs were likely to succeed on the merits, the district court improperly overlooked the fact that Plaintiffs failed to identify a single voter who would be harmed by SB 1260.

On the Cancellation Provision, the district court erroneously assumed that SB 1260 could result in a denial of the voter's opportunity to cast a vote they would otherwise be entitled to cast. But nothing in the Cancellation Provision affects current voter registration status. The Provision instead impacts outdated registrations. And now that the 2022 general election has passed, Plaintiffs' members do not "likely" risk disenfranchisement. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020). Plaintiffs' allegations of speculative injury and "unsupported and conclusory statements" are insufficient to establish irreparable harm. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldridge*, 844 F.2d 668, 676 (9th Cir. 1988).

Perhaps most damaging to Plaintiffs' "irreparable harm" argument is the fact that both Plaintiffs and the district court conceded that the identical statutes and procedures that require the State's election officials to cancel outdated voter registrations were not challenged or affected by the district court's order. 2-ER-026; 055–57. If the Cancellation Provision was so damaging, invalidating SB 1260 but not the identical procedures offers Plaintiffs no real relief.

On the Felony Provision, no objective evidence was presented to bolster Plaintiffs exaggerated (and subjective) fears of arbitrary enforcement and self-censorship. And even if the language of the Felony Provision did create uncertainty about its scope (it did not), the Attorney General's Office's confirmed that it would not prosecute the lawful registration activities of Plaintiffs or similar organizational activities. Harm that is "merely speculative" will not support injunctive relief. *See Am. Trucking Ass'ns*, 559 F.3d 1046, 1057 (2009).

Accordingly, Plaintiffs' allegations of theoretical harm are insufficient to carry its burden, and the district court should have found that the irreparable harm factor tipped in Defendants' favor.

III. The District Court Erred in Finding that Balance of the Equities and Public Interest Tip in Plaintiffs' Favor.

When a government entity is a party to a lawsuit, it is appropriate to "consider the balance of equities and the public interest together." *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). Here, the district court properly recognized that a "State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. S.F. Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989) (per curium). As YCRC explained below, voter confidence in elections is essential to a

functional process and is especially pertinent in Yuma County. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."); 2-ER-118–19.

However, due to its erroneous assumption that the Felony and Cancellation Provisions are likely unlawful, the district court misapplied these considerations as weighing *against* the public interest. Neither provision interferes with anyone's right to vote nor violates the Constitution. To the contrary, these provisions merely eliminate duplicate, intrastate voter registrations and ensure that each person qualified to vote is able to vote, but only once.[11] Given these considerations, the balance of the equities plainly tips in Defendants' favor, and the district court's finding to the contrary was erroneous.

[11] The district court also misapplied the *Purcell* doctrine in Plaintiffs' favor. Rather than maintaining the status quo, the district court unilaterally overhauled a duly enacted law codifying decades of valid, constitutional practices and procedures, injecting unnecessary confusion into the process mere weeks before the election. *See Purcell*, 549 U.S. at 4–5.

CONCLUSION

For the foregoing reasons, the Defendants respectfully requests that the Court vacate the district court's preliminary injunction.

Respectfully submitted this 18th day of November, 2022.

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Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, YCRC states that it is not aware of any related cases.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number 22-16490

I am the attorney or self-represented party.

This brief contains 7,236 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature *Brett W. Johnson* **Date** November 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2022, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

s/ Kathy Greene

ADDENDUM

ADDENDUM TABLE OF CONTENTS

A.R.S. § 16-165

Causes for cancellation

A. The county recorder shall cancel a registration:

1. At the request of the person registered.

2. When the county recorder knows of the death of the person registered.

3. If the person has been adjudicated an incapacitated person as defined in § 14-5101.

4. When the person registered has been convicted of a felony, and the judgment of conviction has not been reversed or set aside. The county recorder shall cancel the registration on receipt of notice of a felony conviction from the court or from the secretary of state or when reported by the elector on a signed juror questionnaire that is completed pursuant to § 21-314.

5. On production of a certified copy of a judgment directing a cancellation to be made.

6. Promptly after the election if the person registered has applied for a ballot pursuant to § 16-126.

7. When a person has been on the inactive voter list and has not voted during the time periods prescribed in § 16-166, subsection C.

8. When the county recorder receives written information from the person registered that the person has a change of residence within the county and the person does not complete and return a new registration form within twenty-nine days after the county recorder mails notification of the need to complete and return a new registration form with current information.

9. When the county recorder receives written information from the person registered that the person has a change of address outside the county.

10. When the county recorder receives confirmation from another county recorder that the person registered has registered to vote in that other county.

B. If the county recorder receives credible information that a person has registered to vote in a different county, the county recorder shall confirm the person's voter registration with that other county and, on confirmation, shall cancel the person's registration pursuant to subsection A, paragraph 10 of this section.

C. If the county recorder cancels a registration pursuant to subsection A, paragraph 8 of this section, the county recorder shall send the person notice that the registration has been cancelled and a registration form with the information described in § 16-131, subsection C attached to the form.

D. When proceedings in the superior court or the United States district court result in a person being declared incapable of taking care of himself and managing his property, and for whom a guardian of the person and estate is appointed, result in such person being committed as an insane person or result in a person being convicted of a felony, the clerk of the superior court in the county in which those proceedings occurred shall file with the secretary of state an official notice of that fact. The secretary of state shall notify the appropriate county recorder and the recorder shall cancel the name of the person on the register. Such a notice shall name the person covered, shall give the person's date and place of birth if available, the person's social security number, if available, the person's usual place of residence, the person's address and the date of the notice, and shall be filed with the recorder of the county where the person last resided.

E. Each month the department of health services shall transmit to the secretary of state without charge a record of the death of every resident of the state reported to the department within the preceding month. This record shall include only the name of the decedent, the decedent's date of birth, the decedent's date of death, the decedent's social security number, if available, the decedent's usual legal residence at the time of death and, if available, the decedent's father's name or mother's maiden name. The secretary of state shall use the record for the sole purpose of canceling the names of deceased persons from the statewide voter

registration database. In addition, the department of health services shall annually provide to the secretary of state from the statewide electronic death registration system without charge a record of all deaths of residents of this state that are reported to the department of health services. The records transmitted by the department of health services shall include only the name of the decedent, the decedent's date of birth, the decedent's social security number, if available, the decedent's usual legal residence at the time of death and, if available, the decedent's father's name or mother's maiden name. The secretary of state shall compare the records of deaths with the statewide voter registration database. Public access to the records is prohibited. Use of information from the records for purposes other than those required by this section is prohibited. The name of each deceased person shall promptly be canceled from the statewide voter registration database and the secretary of state shall notify the appropriate county recorder and the recorder shall cancel the name of the person from the register.

A.R.S. § 16-1016

Illegal voting; pollution of ballot box; removal or destruction of ballot box, poll lists or ballots; violation; classification

A person is guilty of a class 5 felony who:

1. Not being entitled to vote, knowingly votes.

2. Knowingly votes more than once at any election.

3. Knowingly votes in two or more jurisdictions in this state for which residency is required for lawful voting and the person is not a resident of all jurisdictions in which the person voted. For the purposes of this paragraph, a person has only one residence for the purpose of voting.

4. Knowingly votes in this state in an election in which a federal office appears on the ballot and votes in another state in an election in which a federal office appears on the ballot and the election day for both states is the same date.

5. Knowingly gives to an election official two or more ballots folded together.

6. Knowingly changes or destroys a ballot after it has been deposited in the ballot box.

7. Knowingly adds a ballot to those legally cast at any election, by fraudulently introducing the ballot into the ballot box either before or after the ballots in the ballot box have been counted.

8. Knowingly adds to or mixes with ballots lawfully cast, other ballots, while they are being canvassed or counted, with intent to affect the result of the election, or to exhibit the ballots as evidence on the trial of an election contest.

9. Knowingly and unlawfully carries away, conceals or removes a poll list, ballot or ballot box from the polling place, or from possession of the person authorized by law to have custody thereof.

10. Knowingly destroys a polling list, ballot or ballot box with the intent to interrupt or invalidate the election.

11. Knowingly detains, alters, mutilates or destroys ballots or election returns.

12. Knowingly provides a mechanism for voting to another person who is registered in another state, including by forwarding an early ballot addressed to the other person.