

No. 16-16865

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**In the United States Court of Appeals  
For the Ninth Circuit**

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LESLIE FELDMAN, *et al.*,

*Plaintiffs/Appellants,*

and

BERNIE 2016, INC.,

*Plaintiff-Intervenor/Appellant,*

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

*Defendants/Appellees,*

and

ARIZONA REPUBLICAN PARTY, *et al.*,

*Defendant-Intervenors/Appellees.*

On Appeal from the United States District Court for the District of Arizona  
Cause No. CV-16-01065-PHX-DLR

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**DEFENDANT/APPELLEES' AND DEFENDANT-  
INTERVENOR/APPELLEES' JOINT RESPONSE IN OPPOSITION TO  
EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

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## I. BACKGROUND

“Since at least 1970, Arizona has required voters to cast ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the correct precinct.” ER0002. There is no dispute that when a voter arrives at the wrong polling location in an Arizona county that uses the precinct model,<sup>1</sup> that voter cannot receive the correct ballot with all races in which he or she is eligible to vote and—should he or she nevertheless choose to cast a provisional ballot in that incorrect precinct—that ballot will not be counted. ER0002-03. Thus, multiple elections have occurred under the out-of-precinct (“OOP”) voting system without Plaintiffs raising an issue as to the administration of elections in this manner.

On the eve of the 2016 election, Plaintiffs seek a mandatory preliminary injunction that would require Arizona to count OOP ballots for those races in which a voter was eligible to vote (*e.g.*, presidential, statewide, and countywide races). ER0003. Plaintiffs did not file their Amended Complaint until April 2016 and did not move for a preliminary injunction until June 10, 2016. ER0018; ER0126. Even after the district court denied their requested preliminary injunction, Plaintiffs waited until after close of business on October 18, 2016, to file their “Emergency Motion” seeking an injunction pending appeal and expedited

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<sup>1</sup> A small number of Arizona counties use vote centers, which allow voters to show up at any polling location in that county and receive the correct ballot. ER0003. Plaintiffs do not ask for an injunction requiring all counties to use vote centers.

review.<sup>2</sup>

Because of Plaintiffs' long delay, county election officials will only have a very short time between now and the 2016 General Election to determine a manual process for counting OOP ballots, if Plaintiffs' requested interim relief is granted. The district court found that this would be "significantly burdensome" and will "impose substantial costs" on the county election officials, most of whom are not part of this case. ER0015-16.

Plaintiffs' inexcusable delay in raising their OOP-related claims, their failure to name necessary parties, and the enormous hardship that their requested mandatory preliminary injunction would impose all require denial of their request for the extraordinary relief of an injunction pending appeal. Plaintiffs' failure to show a likelihood of success on the merits related to their statutory and constitutional claims further confirms that the "Emergency Motion" should be denied.

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<sup>2</sup> Pursuant to the Court's October 19, 2016 Order (Doc. 4), setting the deadline for filing "an opposition" to the Emergency Motion and communications with the assigned Motions Attorney, Defendants the Arizona Secretary of State's Office, Secretary of State Michele Reagan, and Attorney General Mark Brnovich (collectively, the "State Defendants"), the Maricopa County Board of Supervisors and its members, Maricopa County Recorder Helen Purcell, and Maricopa County Elections Director Karen Osborne (collectively, the "County Defendants"), and the Defendant-Intervenors the Arizona Republican Party, Debbie Lesko, Tony Rivero, Bill Gates, and Suzanne Klapp (all, collectively, the "Defendants") jointly file this Response. The Court's Order also granted Plaintiffs' request to expedite this appeal, scheduled simultaneous briefing due on October 24, 2016, and ordered oral argument to be scheduled before the General Election. Doc. 4. Accordingly, Defendants limit this Response to Plaintiffs' request for an injunction pending appeal.

## **II. PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION PENDING APPEAL.**

Plaintiffs must make the same showing for an injunction pending appeal as for a preliminary injunction. *See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). The district court concluded that Plaintiffs failed to make this showing, and its findings and application of the law to the facts are entitled to deference. *See Sw.Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

Furthermore, a request for a mandatory preliminary injunction (as Plaintiffs seek here) should be denied “unless the facts and law clearly favor the moving party.” *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994). As this Court has stated, “a mandatory injunction is particularly disfavored” and generally is “not granted unless extreme or very serious damage will result[,] and [is] not issued in doubtful cases.” *Park Vill. Apartment Tenants Ass’n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011). Mandatory preliminary injunctions are especially disfavored in election law matters because they require significant shifting of additional resources shortly before an election, which will impact the orderly administration of the election, cause voter confusion, and possibly reduce the electorate’s confidence in the election process. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006).

### **A. The District Court Did Not Abuse Its Discretion in Determining that Plaintiffs Failed to Establish a Likelihood of Success on the Merits.**

In arguing the merits of their claims, Plaintiffs do not dispute the legal

standards, but rather object to the district court's factual findings and how it applied the legal standards to the facts that have existed in some form for at least the past 46 years. The district court's factual findings are entitled to deference and were not clearly erroneous, and this Court should deny the request for an injunction pending appeal. *Sw. Voter Registration*, 344 F.3d at 918 (“[O]rder will be reversed only if the district court relied on an erroneous premise or abused its discretion.”) (internal quotation marks omitted).

**1. The Restriction on OOP Voting Does Not Violate Section 2.**

For their claim under § 2 of the Voting Rights Act (“VRA”), Plaintiffs had to establish a likelihood of success on their contentions (1) that Arizona’s restriction on OOP voting imposes a discriminatory burden on a minority group, (2) as it interacts with social and historical conditions that have produced discrimination. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at \*13 (6th Cir. Aug. 23, 2016); *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc); 52 U.S.C. § 10301. They failed at both steps.

**a. Plaintiffs Failed to Show a Disparate Impact on Any Minority Group.**

The district court concluded that Plaintiffs failed to show the requisite disparate impact for two independent reasons, each of which was backed by substantial § 2 legal authority and the record evidence.

**(1) Plaintiffs Failed to Establish any Disparity Cognizable Under § 2.**

The district court made factual findings, which are entitled to deference, that because “OOP ballots represent such a small fraction of the overall votes cast in any given election, . . . OOP ballot rejection likely has no *meaningful* impact on the opportunities of minority as compared to white voters to elect their preferred representatives.” ER0008 (emphasis added); *see also Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004) (vote-denial claim under § 2 requires “the exclusion of the minority group from meaningful access to the political process”). Specifically, the district court explained—and Plaintiffs do not dispute—that in the 2012 General Election, only 0.5% of the total ballots cast were OOP ballots. ER0008. Even assuming that Plaintiffs’ expert on this issue (Dr. Jonathan Rodden) correctly estimated the race of Arizona voters through surname data, which is a matter of dispute,<sup>3</sup> “OOP ballots cast by white voters accounted for only 0.3% of all votes cast during the 2012 election, whereas OOP ballots cast by Hispanic and African American voters accounted only for 0.13% and 0.07%, respectively.” *Id.*

These miniscule percentages make it impossible to ascertain whether the differences reflect actual racial disparities or are simply the result of an unavoidable margin of error. *See* ER2266-68 (highlighting accuracy issues in predicting voter race); ER3652 (admission by Dr. Rodden that “race predictions will never be perfect”). And because Dr. Rodden provided no information on his rate of error in predicting voter race, the district court properly found as a factual

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<sup>3</sup> Dr. Rodden did not use accurate or reliable methods. *See* ER1855-57, 61; ER2243-81 (similar).



matter that Arizona's practice of rejecting OOP ballots had not resulted in any "meaningful impact" in the opportunities of minority groups "to elect their preferred representatives." ER0008.

The post-trial decision in *Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS (D. Ariz. Aug. 20, 2008), which was affirmed by this Court in relevant part, supports the district court's order in this case. ER2330-78; *see also Gonzalez*, 677 F.3d at 407. After trial, the evidence in *Gonzalez* showed that Proposition 200 might potentially cause the total Latino electorate to increase by 0.1% and Latino voter turnout to increase by 0.6%. ER2370. Because the plaintiffs in *Gonzalez* could only estimate which voters were Latino (as Dr. Rodden did in this case), the district court concluded that the miniscule percentages relating to the claimed impact on minority voters were "subsumed by the uncertainty associated with the original identification of who is and is not Latino." ER2371. The plaintiffs in that case thus failed to show a "statistically significant disparate impact." *Id.* As this case involves similar miniscule percentages, the same is true here. ER0008.

Plaintiffs argue that a § 2 violation can be established if *any* minority voter is denied the equal opportunity to vote. Doc. 2, at 9. This is incorrect. Congress specifically targeted § 2 at practices that *disparately impact* minorities, not practices felt just as much (or even more) by white voters. *See* 52 U.S.C. § 10301(b); *Husted*, 2016 WL 4437605, at \*\*13-14. Thus, without evidence to show the rejection of OOP ballots results in "some *relevant statistical disparity* between minorities and whites," Plaintiffs' § 2 claim fails at the first step. *Gonzalez*, 677 F.3d at 405 (emphasis added).

Plaintiffs further contend that the district court erred in assessing the claimed disparities in relation to total votes cast rather than just in-person votes. Doc. 2 at 10. They then contradict this argument, however, by repeatedly stating that § 2 requires consideration of a “totality of the circumstances.” *Id.* at 12, 16; *cf. Husted*, 2016 WL 4437605, at \*6 (analyzing claimed burden from election regulation in context of state’s entire voting system). Plaintiffs also ignore the statutory text of § 2, which makes clear that a violation only occurs when, among other things, the challenged practice gives a minority group “less opportunity” to “to elect representatives of their choice.” 52 U.S.C. § 10301(b). Only through consideration of total votes cast can a court determine whether minorities have the same opportunity “to elect representatives of their choice.” *Id.*

Plaintiffs also cite *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), but that decision does not support their argument that the district court in this case should have only considered in-person votes. *See* Doc. 2 at 10. *Veasey* merely stated that, for purposes of assessing the specific burden on plaintiffs of a law that required voters to show identification in order to vote in-person, “mail-in voting is not an acceptable substitute for in-person voting *in the circumstances presented by this case.*” *Veasey*, 830 F.3d at 255 (emphasis added). Moreover, the quantitative evidence in *Veasey* on disparate impact related to *all* registered voters, not just those voters who used in-person voting. *See id.* at 250-51.

Plaintiffs’ conclusory effort to negate the extensive outreach by governmental agencies to educate voters of their correct precinct is also misplaced and unsupported by the record. Doc. 2 at 11-12. The district court properly

considered these extensive efforts in reviewing Arizona's election system as a whole, including all the various means of voting that are available, to decide that Plaintiffs had failed to meet their burden. ER0012.

**(2) Plaintiffs Failed to Show that the Challenged Practice Caused the Claimed Disparity.**

As an alternative holding, the district court concluded that even if the minimal disparities discussed above were cognizable under § 2, Plaintiffs failed to show that these disparities were actually likely caused by Arizona's restriction on OOP voting. ER0008. The district court explained that Plaintiffs had attributed incidents of OOP voting to "systemic problems in Arizona's administration of elections" without actually challenging any of those "problems." ER0008-09. Thus, by Plaintiffs' own admission, "Arizona's requirement that voters cast ballots in their assigned precincts is not the reason it is difficult or confusing for some voters to find or travel to their correct precinct." ER0009.

Plaintiffs contend that this alternative analysis was erroneous because they were "not required to challenge or seek to rectify every aspect of the electoral system that may be flawed." Doc. 2 at 14. But Plaintiffs cannot rely solely on a challenge to the OOP restriction that does not actually *cause* the disparities of which they complain. *See Gonzalez*, 677 F.3d at 405 ("[A] § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected."). Indeed, as the district court recognized, Plaintiffs' requested relief will not prevent continued OOP voting or voters from receiving

the wrong ballot—without all races in which they are eligible to vote—should they show up at the wrong precinct in the General Election. *See* ER0014.

**b. Plaintiffs Failed to Show Interaction Between the Out-of-Precinct Limitation and the Senate Factors.**

The district court also correctly held that Plaintiffs failed to show a likelihood of success at the second step of their § 2 claim because they “only loosely linked the observed disparities in minority OOP voting to social and historical conditions that have produced discrimination.” ER0009. In particular, the district court explained that Plaintiffs relied on a contention that “historical discrimination in employment, income, and education has had lingering effects on the socioeconomic status of racial minorities.” *Id.* The district court rejected Plaintiffs’ argument that these lingering socioeconomic disparities were enough to show the “requisite causal link,” as this “would allow a plaintiff to successfully challenge any aspect of a state’s election regime in which there is not perfect racial parity simply by noting that the costs of voting fall heavier on minorities due to their socioeconomic status.” ER0010. Under this theory, “nearly all voting regulations could conceivably violate the VRA.” *Id.*; *see also Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) (“[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules.”).

Plaintiffs contend that they showed “particular causal linkages” between discrimination and socioeconomic disparities, but cannot show that the district court clearly erred in rejecting this contention. Doc. 2 at 15. The district court did not “discount” the “lingering effects” of discrimination “on the socioeconomic

status of minorities,” but it also concluded that Plaintiffs failed to show “that racial discrimination is a *substantial cause* of these disparities.” ER0009-10 (emphasis added). By way of example, the district court explained—and Plaintiffs do not contest—that “Plaintiffs cite[d] no evidence of private or state-sponsored discrimination in housing.” ER0009; *see also Frank*, 768 F.3d at 753 (Section 2 “does not require states to overcome societal effects of private discrimination”).

Plaintiffs also argue that “other courts have found that evidence of ‘socioeconomic disparities’ is sufficient proof under § 2.” Doc. 2 at 15. The cases cited in support are easily distinguished. In *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016), the Fourth Circuit considered whether election laws had been enacted with racially discriminatory *intent*. Discriminatory intent is not an issue before this Court.<sup>4</sup> In *Veasey*, with the luxury of a full trial and a record “span[ning] more than one hundred thousand pages,” the Fifth Circuit found that Texas’s “history of State-sponsored discrimination *led to* . . . [socioeconomic] disparities” in that state. *Veasey*, 830 F.3d at 249, 255 (emphasis added). As discussed, Plaintiffs failed to support a direct causal link in this case. ER0009.<sup>5</sup>

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<sup>4</sup> Moreover, both *McCrory* and *League of Women Voters of N.C. v. North Carolina* (“*LOWV*”), 769 F.3d 224 (4th Cir. 2014), involved circumstances in which a state had allowed OOP voting, and thus had the infrastructure in place to handle OOP voting, but then took away this option with the specific intent to discriminate. *See McCrory*, 831 F.3d at 217, 230; *LOWV*, 769 F.3d at 233. In contrast, Arizona does not have any infrastructure in place for counting OOP ballots. *See* ER0015-16.

<sup>5</sup> The Fifth Circuit in *Veasey* also found that “[t]he evidence supports the district court’s finding that “the legislature knew that minorities would be most affected by

Furthermore, and contrary to the totality of the circumstances standard, Plaintiffs simply ignore evidence or factual findings by the district court that undermine their § 2 claim. The complete evidentiary record included, for example, evidence on the significant efforts by governments at every level to encourage voting via multiple methods within the 27-day window before the election, which the district court credited. *See* ER0008-09, 0012. Thus, based on a proper consideration of *all* evidence in the record, the district court concluded that Plaintiffs failed to meet their burden.

**2. The Restriction on OOP Voting Does Not Violate the Fourteenth Amendment.**

Plaintiffs contend that rejecting OOP ballots violates the Fourteenth Amendment because of the burden it imposes on voters. Doc. 19 at 16-18. This claim required the district court to apply a “flexible standard” that “weigh[s] the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Pub. Integrity All., Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at \*3 (9th Cir. Sept. 2, 2016) (en banc) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)) (internal quotations omitted; alteration in original). Under this framework, “when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth

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the voter ID law.” 830 F.3d at 261-62. By contrast, there is no such evidence in the record concerning Arizona’s OOP voting restriction.

Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (quoting *Burdick*, 504 U.S. at 434) (internal quotations omitted).

Here, on the first part of the balancing test, the district court correctly determined that “the rejection of OOP ballots likely imposes no more than *minimal* burdens not substantially greater than those typically associated with voting.” ER0012 (emphasis added). Arizona’s OOP restriction has *no* impact on the great majority (77%) of Arizona voters who vote by mail. And for voters who do vote in person, it simply requires that the voter locate and “timely travel” to their assigned precinct or to one of the many early voting locations that are open for in-person voting during the 27 days prior to the General Election. ER0011; ER2464 ¶ 32; *see also Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at \*14 (Colo. Dist. Ct. Oct. 18, 2004) (“[I]t does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place.”).

Plaintiffs failed to provide any evidence below to show that these very accommodating options are somehow “severe” restrictions on voting in Arizona. To the contrary, the district court found that Arizona uses a variety of methods to educate both English and Spanish-speaking voters about their correct precinct, and “poll workers are trained to tell voters if they are at the wrong polling place and to give voters information about their correct polling place.” ER0011. Plaintiffs do not challenge these findings. Nor did they take issue with the district court’s recognition that they are not challenging the alleged practices that may actually be

causing the alleged burden, namely the relocation of voting locations between elections. ER0012. And none of Plaintiffs' declarants even suggested they are unable to ascertain or travel to their assigned precinct.

Plaintiffs simply point to the quantity of rejected OOP ballots in past elections. Doc. 2 at 17. This is not enough. The mere fact that some voters have arrived at the wrong precinct in past elections does not show that any particular voter (or group of voters) faces more than a minimal burden in voting at the correct precinct. *See Serv. Employees Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (holding that voters cannot be absolved "of all responsibility for voting in the correct precinct or correct polling place by assessing voter burden solely on the basis of the outcome—*i.e.*, the state's ballot validity determination").

As to the second part of the balancing test, Plaintiffs do not dispute the district court's finding that a precinct-based voting system provides the State with "significant and numerous" advantages. ER0013 (quoting *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004)). Plaintiffs instead argue that their interim relief would not deprive the State of those advantages because counties could continue to use precinct systems, so long as the top of the ballot will be counted. Doc. 2 at 17-18.

But that argument ignores the district court's finding that "Arizona's prohibition on counting OOP ballots is one mechanism by which Arizona *enforces* and *administers* this precinct-based system." ER0013 (emphasis added). Indeed, if voters were allowed show up at any precinct and have their vote counted for at least some races, this would directly harm the State's important interests in:



(1) “cap[ping] the number of voters attempting to vote in the same place on election day”; (2) “mak[ing] it easier for election officials to monitor votes and prevent election fraud”; and (3) ensuring that voters receive the correct ballot “list[ing] all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies,” thus “making ballots less confusing.” *Id.* (quoting *Sandusky*, 387 F.3d at 569). Contrary to Plaintiffs’ assertions otherwise, Arizona’s OOP model is an accepted norm. *See* ER0013 n.6 (finding that dozens of states, like Arizona, reject OOP ballots); ER2176 (similar); *see also Husted*, 2016 WL 4437605, at \*6 (“[C]ourts routinely examine the burden resulting from a state’s regulation with the experience of its neighboring states.”).

In short, Plaintiffs do not object to the legal test used by the district court, and they fail to show that the district court clearly erred in finding that the State has long held important interests in restricting OOP voting that outweigh any minimal burden on voters.

**B. No Irreparable Harm Will Arise Absent an Injunction.**

Having concluded that Plaintiffs were unlikely to succeed on the merits, the district court also held that they did not show they would suffer irreparable harm. ER0014. Furthermore, the district court correctly determined that Plaintiffs’ “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” ER0015 (quoting *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)). The district court explained that Plaintiffs waited until April 2016 of an election year to bring suit, and until June 2016 to move for a preliminary injunction, even though: (1) “Arizona has required

voters to cast ballots in their assigned precinct since at least 1970”; (2) “all parties agree that OOP provisional ballots have been rejected since at least 2006”; and (3) data on rejected OOP ballots in Arizona goes back to at least 2008. ER0014-15. Plaintiffs do not challenge these findings or explain their strategic delay.

Plaintiffs instead argue that delay only matters for purposes of a requested preliminary injunction when the complained-of harm has already occurred. Doc. 2 at 18. But that argument confirms that a preliminary injunction is improper. Plaintiffs do not dispute that the “harm” they complain of—*i.e.*, OOP ballots not being counted—has already occurred in multiple election cycles in Arizona going back to at least 2006, including the 2016 Primary Election. ER0014.

Plaintiffs further argue that their years of delay should be excused because they have asserted a constitutional claim. Doc. 2 at 18. But even setting aside Plaintiffs’ failure to come close to showing a likelihood of success on that claim, courts frequently reject requests for interim relief in election matters when a plaintiff fails to timely assert constitutional claims. *See Ariz. Libertarian Party v. Reagan*, No. CV-16-01019-PHX-DGC, 2016 WL 3029929, at \*2 (D. Ariz. May 27, 2016) (denying motion for temporary restraining order and preliminary injunction under laches doctrine in action challenging constitutionality of Arizona election statutes); *Ariz. Pub. Integrity All. Inc. v. Bennett*, No. CV-14-01044-PHX-NVW, 2014 WL 3715130, at \*2 (D. Ariz. June 23, 2014) (same).

The Plaintiffs here cannot show irreparable harm, “the *sine qua non* for all injunctive relief.” *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978).

**C. The District Court Properly Found that Neither the Balance of Hardships Nor the Public Interest Favors Plaintiffs.**

The district court correctly found “neither the balance of hardships nor the public interest supports the issuance of a mandatory preliminary injunction,” explaining that “Defendants provide evidence that requiring counties to develop procedures for counting OOP ballots in the upcoming general election would be *significantly burdensome*.” ER0015 (emphasis added). Plaintiffs seek to minimize these hardships, calling them “claimed administrative burdens.” Doc. 2 at 19.

Plaintiffs do not, however, dispute any of the district court’s factual findings on this issue, all of which reflect a likely administrative and financial nightmare. The district court credited a declaration from a county election director who explained that, in order to count OOP ballots for the specific races in which the voter is eligible to vote, “counties likely would use a *manual* approach” that “could take up to fifteen minutes *per* OOP ballot.” ER0016 (emphasis added). This new manual process “would impose *substantial costs* . . . and could heighten the risk of human error in vote tabulation.” *Id.* (emphasis added). However, “the elections budgets for counties are likely already set and do not necessarily include funds to cover the additional labor and duplicate ballots that would be required to count OOP ballots.” ER0015 (quoting ER2196). And the district court also explained if counties are forced to institute new counting procedures for OOP ballots, this will “likely put the counties and the state past the statutory deadlines” to complete and verify the canvass for the General Election. ER0015 (quoting ER2196).<sup>6</sup>

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<sup>6</sup> Plaintiffs argue that “Defendants previously assured the court that the extended briefing schedule that they requested would not result in a ruling too late to be

Rather than confront these factual findings, Plaintiffs assert that “Arizona would hardly be a pioneer in counting OOP ballots” because other states purportedly count these ballots. Doc. 2 at 19. Yet, the district court noted that “more than two dozen other states enforce precinct-based systems by rejecting OOP ballots. ER0013 at n.6; *see also* ER2176. Regardless, Plaintiffs’ contention that Arizona *could* count OOP ballots does not negate the substantial burden and costs that would be required. Plaintiffs provided no evidence below on the processes used by other states for counting OOP ballots, which might inform this Court about such issues as whether those states (unlike Arizona) have automated processes in place for counting these ballots. The district court thus had no way of telling how other state processes could be implemented in Arizona for the General Election.

**D. Plaintiffs Failed to Name Necessary Parties, Making an Injunction Pending Appeal Inappropriate.**

Because the district court properly determined that Plaintiffs failed to make the necessary showing for a preliminary injunction, it declined to consider whether Plaintiffs had named the necessary defendants to obtain *statewide* relief relating to the counting of OOP ballots. ER0002 at n.1. Had the district court reached the issue, it would have denied the preliminary injunction motion under Fed. R. Civ. P.

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effective.” Doc. 2 at 19 n.5. The parties anticipated that the district court would rule shortly after the September 2, 2016 hearing. (See ER0939, at 14-16 (counsel for the County Defendants stated that poll worker training begins in early October). Moreover, this isolated statement does not show that the counties, most of which are absent from this case, could implement procedures or locate resources for such a massive endeavor in the very short time remaining before the General Election.

19(a). *See, e.g., Stevenson v. Blytheville School Dist. No. 5*, 955 F. Supp. 2d 955, 970 (E.D. Ark. 2013) (denying preliminary injunction when the “[c]ourt does not have before it the parties necessary to grant through preliminary injunction the relief plaintiffs seek.”). Rule 19(a) requires a party to be joined if necessary to “accord complete relief among existing parties.” Fed. R. Civ. P. 19(a)(1)(A), or if the action may “as a practical matter impair or impede the [party’s] ability to protect [its] interest.” Fed. R. Civ. P. 19(a)(1)(B). Only one of these factors is required; both are present here.

The counties are responsible for counting (or rejecting) votes after general elections, including provisional ballots cast within their jurisdiction. *See, e.g.,* A.R.S. §§ 16-531, -584(E), -601; ER2656. Yet, Plaintiffs have not named *any* county officials as defendants for purposes of their OOP claims.<sup>7</sup>

Plaintiffs’ proposed mandatory preliminary injunction will directly impair the interests of the absent counties. The counties—not the State—would bear the administrative burden and expense of implementing such an injunction. ER0015-16. These costs will be “substantial” and are likely not covered by the counties’ established election budgets. *Id.*

Plaintiffs assume that the Secretary of State could somehow order the counties to count all OOP ballots. But the Secretary does not have the ability to “direct” actions in violation of Arizona law. ER3890-93. The Secretary has authority to prescribe rules that the counties must follow but only in the Election

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<sup>7</sup> Plaintiffs recently moved to dismiss the Maricopa County Defendants after reaching a settlement concerning other claims. *See* Doc. 2 at iii n.1.

Procedures Manual, in accordance with Arizona law. A.R.S. § 16-452. To issue the Procedures Manual, the Secretary of State must consult with “each county board of supervisors,” and the Manual must be approved by the Governor and Attorney General. A.R.S. § 16-542(A)-(B). Because the Secretary of State cannot comply with the procedures for updating the Election Procedures Manual before the statutory deadlines for counting ballots, the Secretary cannot ensure the compliance of the non-party counties if this Court were to grant Plaintiffs’ Emergency Motion. The Court should therefore deny the requested injunction.

### **III. CONCLUSION**

The Defendants respectfully request that Plaintiffs’ request for an injunction pending appeal be denied.

RESPECTFULLY SUBMITTED this 21st day of October, 2016.

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## CERTIFICATE OF COMPLIANCE

I certify that this Response complies with the length limits permitted by Ninth Circuit Rule 27(d)(2). The Response is less than 20 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable, and is filed by three separately represented parties. The Response's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

*s/ Karen J. Hartman-Tellez* \_\_\_\_\_



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ Karen J. Hartman-Tellez* \_\_\_\_\_