No. 16-16865

In the United States Court of Appeals
for the Ninth Circuit

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
No. CV-16-01065-PHX-DLR

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Plaintiffs' opening brief ("Br.") explains that in 2012 and 2014, Arizona rejected nearly 14,500 out-of-precinct ("OOP") ballots; this more than doubles the number of OOP ballots that were rejected in any other state; these rejected ballots are cast by minority voters at substantially disparate rates, for reasons linked to the ongoing effects of discrimination; and other states are perfectly able to count OOP ballots, as Plaintiffs request here. Br. 2-7, 12-17. Defendants' response ("Opp.") does not persuasively rebut any of these critical facts or Plaintiffs' showing that the equitable factors favor the issuance of an injunction.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Plaintiffs' VRA Claim Is Likely to Prevail

As set forth in the opening brief, the record shows that there are substantial and persistent racial disparities in the rejection of OOP ballots in Arizona. Br. 8-9. The record also establishes that these disparate burdens are directly linked to ongoing effects of Arizona's history of discrimination, including disparities in residential mobility, access to a vehicle, and employment. Br. 6-7, 13. Plaintiffs' VRA claim is therefore likely to succeed under the applicable two-part test. Br. 8.

Defendants respond that Arizona's OOP policy does not "meaningful[ly]" impact minority voters, Opp. 5-7, but this misunderstands the applicable test.

Under § 2, the question is not how *severely* a law burdens voters but whether it burdens them *disparately*.[1]

Defendants' argument that it was correct for the District Court to assess the disparities of OOP votes as a percentage of all votes cast, versus solely in-person votes, similarly fails. Opp. 7-8. In the VRA context, this is a distinction without a difference: "[N]o matter how one slices the data," there is a "substantively large and statistically significant" racially disparate effect from Arizona's rejection of OOP ballots. ER3642; *see also* ER1792-94, 1797-1800, 3660, 3665-72, 3675-83, 3688-97. Further, Defendants' argument misses the point that if minority voters are materially more likely than white voters to be unable to use one of the most common methods of voting—here, in-person voting on Election Day—the political processes cannot be "equally open to participation" by minority voters, 52 U.S.C. § 10301(b), particularly given that voting by mail may be an insufficient substitute. *See Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016).

[1] *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("*LOWV*") ("what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority is") (quoting 52 U.S.C. § 10301(a)); *Chisom v. Roemer*, 501 U.S. 380, 407-08 (1991) (Scalia, J., dissenting) ("if, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity to *participate* in the political process than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able to *elect* their own candidate"); *id.* at 397 (majority op.).

Defendants' claim that Plaintiffs have failed to establish causation because Arizona's refusal to count OOP ballots is not the sole factor that causes OOP voters to be disenfranchised is difficult to comprehend. These other factors only result in the disenfranchisement of OOP ballots *because Arizona refuses to count those ballots*. That policy is the "standard, practice, or procedure" that proximately causes OOP voters to have their right to vote denied or abridged. *See generally* 52 U.S.C. § 10301(a). In any event, a "plaintiff need not show that the challenged voting practice caused the disparate impact by itself." *Gonzalez v. Arizona*, 624 F.3d 1162, 1193 (9th Cir. 2010), *on reh'g en banc*, 677 F.3d 383 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). It is sufficient that the practice was *one of* the causes of the disparate impact. *Farrakhan v. Washington*, 338 F.3d 1009, 1018-19 (9th Cir. 2003) (no "by itself" requirement).

Defendants' argument that Plaintiffs have failed to establish a causal link between the disparate burdens at issue and the ongoing effects of discrimination fares no better. While Defendants point to the District Court's holding that "Plaintiffs failed to show 'that racial discrimination is a *substantial cause* of'" current socioeconomic disparities, Opp. 10, the pertinent question is whether the disparate burdens at issue are "*in part* … caused by or *linked to* social and historical conditions that have or currently produce discrimination against

members of the protected class." *LOWV*, 769 F.3d at 240 (emphases added); *see also Chisom*, 501 U.S. at 403-04 (VRA interpreted "in a manner that provides the broadest possible scope in combating racial discrimination"). Moreover, the record plainly demonstrates that Arizona—until recently a covered jurisdiction under § 5—not only has severe, ongoing racial disparities in employment, wealth, transportation, health, and education, but also that these disparities are in part attributable to discrimination by the State. ER989-93, 996-97, 1778-83. And, these disparities—in transience, vehicle ownership, employment, and other areas—are directly tied to the disparate burdens imposed by Arizona's refusal to count OOP ballots. *E.g.*, ER989; ER1767-77. The extreme, persistent racial disparities in disenfranchisement of OOP voters are not a matter of happenstance.

B. Plaintiffs' *Anderson-Burdick* Claim Is Likely to Prevail

As noted, Plaintiffs' opening brief explains that Arizona has disenfranchised thousands of OOP voters, that it rejects far more OOP ballots than any other state, and that other states are able to count OOP ballots, as Plaintiffs request here. Br. 2-4, 17. Defendants do not meaningfully dispute these facts. Opp. 12-14.

Instead, Defendants argue that "the quantity of rejected OOP ballots … does not show that any particular voter (or group of voters) faces more than a minimal burden," and they note the District Court's similar holding. Opp. 12-13. But it is strained, at best, to claim that a law that disenfranchised nearly 11,000 voters in the

2012 election alone, ER1786, and more than twice as many voters as comparable laws in other states, Br. 17, is not meaningfully burdensome on any class of voters.[2] This argument also ignores clear evidence showing *why* Arizona leads the nation in OOP disenfranchisement: the transiency, low incomes, and lack of job flexibility resulting from Arizona's history of discrimination make it more likely that some voters will be confused about their assigned polling place and/or unable to travel to the correct polling place on Election Day, *see supra* page 4; Arizona's large number of changes in polling locations, placement of polling locations, and use of inconsistent election regimes within and across counties lead directly to increases in OOP voting, ER168, 172, 177, 215-16, 1764, 1772-75, 1786-87, 1804-18, 3684-85; and Arizona's repeated election maladministration (in conjunction with its history of and ongoing discrimination) has engendered distrust among voters generally and Hispanic voters in particular, which limits the efficacy of Defendants' efforts to inform voters about their polling locations. Br. 5; ER222-24, 246, 774-76, 780-81. In each of these ways, Arizona's system makes voting in the

[2] This Court recently made clear that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at *3 n.2 (9th Cir. Sept. 2, 2016) (en banc).

correct precinct far more burdensome than it is anywhere else in the country—a point on which the numbers speak for themselves.[3]

The state interests identified by Defendants do not justify disenfranchising thousands of voters. In response to the point that Arizona can simultaneously have a precinct-based system *and* count OOP ballots, Defendants argue that the disenfranchisement of OOP voters is a mechanism by which Arizona enforces and administers its precinct-based system and that counting OOP ballots would undermine the interests served by such a system. Opp. 13-14. This argument is premised on the notion that counting OOP ballots will cause a meaningful number of voters to ignore their precincts and intentionally cast their ballots in the wrong precinct. But there is not a shred of evidence in the record remotely suggesting that this would happen, even though such evidence could readily be obtained from states that count OOP ballots. *Cf. Pub. Integrity All.*, 2016 WL 4578366, at *4 ("*Burdick* calls for neither rational basis review nor burden shifting."). Indeed, it is highly implausible that any material number of voters would have the detailed knowledge of the minutiae of election administration required to know that OOP ballots would be counted, and yet not care that their votes for down-ballot races would not be counted.

[3] Defendants again argue that Plaintiffs should have challenged the cause of OOP voting rather the disenfranchisement of OOP ballots. Opp. 12-13. As explained above, this ignores that the policy at issue is the proximate cause of the disenfranchisement of OOP voters.

The evidence that *is* in the record on this point contradicts Defendants' position. George Gilbert, who served for 25 years as the director of the board of elections for a North Carolina county that now has 350,000 registered voters, ER3785, 3789, testified (in another case) that his county (which counted OOP ballots in precisely the manner that Plaintiffs request here) "didn't have a high number of [OOP] ballots." ER3791. Gilbert explained that "[w]hen people came to the wrong polling place, … "[w]e would explain to them that … they needed to go … to the correct polling place where they could vote a full ballot; otherwise, they would have to vote a provisional ballot and only part of it would be counted"; and "we were successful in convincing most people to go to the correct precinct." *Id.* Such *de minimis* burdens on election administrators cannot justify a policy that causes thousands not to have their votes counted.[4]

II. THE EQUITABLE FACTORS FAVOR AN INJUNCTION

Ignoring that courts "routinely deem restrictions on fundamental voting rights irreparable injury" because "once the election occurs, there can be no do-over and no redress," *LOWV*, 769 F.3d at 247, Defendants argue that Plaintiffs'

[4] Defendants' argument that Plaintiffs have sued the wrong defendant is groundless. The proper defendant in a constitutional challenge to a state law is the state official designated to enforce the law. *See, e.g.*, *ACLU v. Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993) (citing *Diamond v. Charles*, 476 U.S. 54, 64 (1986)). In Arizona, the Secretary of State issues the Arizona Election Procedures Manual, which directs the counties how to determine the validity of ballots and carries the force of law. A.R.S. § 16-452.

"delay" in bringing suit implies that Plaintiffs—and voters across Arizona—will not be irreparably harmed by the disenfranchisement of thousands of Arizonans in the upcoming election. But a constitutional violation cannot be grandfathered in, *e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and the deprivation of a constitutional right "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) (public interest always "favor[s] prevent[ing] the violation of a party's constitutional rights").

Defendants' brief also emphasizes administrative difficulties, arguing that the requested injunction would impose "a massive endeavor in the very short time remaining before the General Election." Opp. 17 n.6. Yet one week after Plaintiffs filed their motion for a preliminary injunction in the District Court, ER126, *Defendants* moved for an extension of time that would give them *10 weeks* to prepare their response. ER836-37. After Plaintiffs objected, ER842-50, the District Court held a hearing and asked Defendants: "When do we hit the mark where a ruling would be too late to be effective? What's our drop-dead date, if there is one?" ER930. Counsel for the Secretary of State responded, "[I]t would really be only necessary in time for counting the ballots in the general election, which will not take place until November." ER931. The District Court granted the motion, moving the deadline for Defendants' response to August 22 and setting oral

argument for September 2, ER918-21; the court ruled on the preliminary injunction motion on October 11, ER2, 17. In light of this background, Defendants' administrative-burdens argument cannot be credited.[5]

Regardless, the administrative difficulties of implementing an injunction are strongly outweighed by the public interest in protecting constitutional rights. *E.g.*, *Johnson v. Halifax Cty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) ("[A]dministrative and financial burdens" county would experience developing interim voting plan were "not … undue in view of the otherwise irreparable harm to be incurred by plaintiffs."). Arizona should not be permitted to "pit its desire for administrative ease against its minority citizens' right to vote." *LOWV*, 769 F.3d at 244.

Defendants' assertion that relief is disfavored here because Plaintiffs seek a mandatory injunction fails as well. "A mandatory injunction orders a responsible party to take action," while a "prohibitory injunction prohibits a party from taking action and preserves the status quo." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014). Here, Plaintiffs are challenging a policy that requires counties to *reject* OOP ballots—that is, Plaintiffs seek to prevent the State from taking an action. The requested injunction is therefore more like a prohibitory

[5] Defendants assert that counting OOP ballots would be an "administrative and financial nightmare." Opp. 16. They do not explain why OOP ballots could not simply be segregated at the time they are cast so they can easily be found and processed during the canvass. Nor do they explain why it would be a "nightmare" for Arizona to do what other states do. *See* ER3792 (Gilbert testimony that canvass never had to be delayed to count OOP ballots).

injunction than a mandatory injunction. Certainly, it is different in kind from a classic mandatory injunction—e.g., an injunction requiring a state to adopt early voting or to open new polling locations.

However classified, the injunction Plaintiffs seek is warranted for the reasons set forth above: Plaintiffs have a powerful case on the merits, they face irreparable harm, and the public interest favors relief. *LOWV*, 769 F.3d at 247. Indeed, there is no question that a mandatory injunction is appropriate to effectuate the VRA's "broad remedial purpose of rid[ding] the country of racial discrimination in voting," *Chisom*, 501 U.S. at 403-04, or otherwise to safeguard the right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).[6]

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant the requested injunction pending appeal.

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[6] *E.g.*, *Alabama v. United States*, 304 F.2d 583, 591 (5th Cir.) (holding mandatory injunction appropriate to enforce Civil Rights Act of 1957; "[i]t is inconceivable that in its enactment Congress meant by this broad language to grant less than effective judicial tools to combat it"), *aff'd*, 317 U.S. 37 (1962); *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1349 (N.D. Ga. 2015) ("[T]here is no 'particular magic in the phrase 'status quo'" and "'[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury.'") (quoting *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)).

RESPECTFULLY SUBMITTED this 24th day of October, 2016.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs hereby inform the Court that they have also appealed an order issued by the District Court on September 23, 2016, denying Plaintiffs' motion for preliminary injunction on HB2023, Arizona's recent criminalization of ballot collection. That appeal is currently pending before this Court under Case No. 16-16698.

Dated: October 24, 2016

s/ *Sarah R. Gonski*

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 24, 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/ *Sarah R. Gonski*

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that the herein complies with the length limits permitted by Ninth Circuit Rule 27(d)(2), and is jointly filed by separately represented parties. The brief contains 2,607 words and 10 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*