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

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America, and Intervenor-Plaintiff/Appellant Bernie 2016, Inc., respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Arizona ("District Court") had original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1357, because this case raises federal claims under § 2 of the Voting Rights Act of 1965 ("VRA"), as amended, 52 U.S.C. § 10301, and for violations of the First and Fourteenth Amendments, cognizable under 42 U.S.C. § 1983. The District Court denied Plaintiffs' motion for a preliminary injunction on October 11, 2016, ER2, and Plaintiffs timely filed a notice of appeal on October 15, 2016. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in holding that Plaintiffs are unlikely to succeed on the merits of their claims that Arizona's policy and practice of refusing to count any portion of a provisional ballot cast in a voter's county of residence but "out-of-precinct"—even for races in which the voter is eligible to participate—violates § 2 of the VRA and the U.S. Constitution? Specifically:

A. Did the District Court err as a matter of law in concluding that the disparate impact of the challenged policy was not "meaningful" because it impacted "only" 10,979 voters in the last presidential election, where, by its plain terms, § 2 of the VRA protects against the "denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color" (emphasis added)?

B. Did the District Court err as a matter of law in finding that the VRA required it to assess the disparate impact of the challenged practice on *all*

voters, i.e., both absentee and in-person voters, when the challenged practice only applies to in-person voters?

C. Did the District Court err as a matter of law in finding that Plaintiffs failed to meet § 2's causation requirement because factors in addition to Arizona's OOP policy contribute to the disenfranchisement of OOP ballots?

D. Did the District Court err as a matter of fact and law in finding that the disparate burden was not sufficiently linked to social and historical conditions of discrimination in Arizona to establish a § 2 violation?

E. Did the District Court err in its analysis of Plaintiffs' *Anderson-Burdick* claim by finding a minimal burden from the rejection of OOP ballots even though that policy disenfranchises thousands of voters and far more voters than OOP policies in other states?

F. Did the District Court err in giving significant weight to the State's interest in having a precinct-based system for election administration when there was no evidence in the record that the requested injunction was incompatible with such a system?

2. Did the District Court err in finding that the equities did not favor preliminary relief?

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, the primary authorities pertinent to this case are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

Plaintiffs challenge Arizona's practice of rejecting, in their entirety, ballots cast out-of-precinct ("OOP") by duly registered voters. Since 2006, Arizona has rejected over 121,000 provisional ballots, consistently finding itself at or near the top of the list of states that collect and reject the largest number of provisional ballots each election. ER1763, 704, 257. Unfailingly, one of the top reasons that ballots are rejected is because they are cast OOP. *See, e.g.*, ER1786-88; *see also* 742-43, 710, 716-22. In fact, in the 2012 and 2014 elections, approximately 14,500 Arizona voters were disenfranchised solely for casting a ballot OOP. ER1763. Many of these ballots are cast OOP through no fault of the voters who cast them. ER167-69, 171-73, 175-77, 215-17, 228-30, 177, 664.

Arizona's refusal to count the ballots of thousands of eligible voters has a racially disparate effect. Relative to white voters, Hispanic voters are more than twice as likely, African American voters are 62% more likely, and Native American voters are 37% more likely to be disenfranchised for casting an OOP ballot. ER7, 1799-1800. And these disparities are directly linked to the ongoing effects of Arizona's long history of discrimination—including racial disparities in residential mobility, access to transportation, and employment—as well as systemic problems in Arizona's electoral system. ER990-93, 1004.

Arizona chooses to impose these severe, racially disparate burdens on its voters even though there is nothing preventing the State from counting at least portions of OOP ballots. Around half of other states do so. ER629, 13. And

testimony from a longtime election administrator in a large county in North Carolina—a state that partially counts OOP ballots—shows that the counting of such ballots is minimally burdensome for election officials. ER3785, 3789, 3791. For these reasons and those set forth below, this Court should reverse the decision below and grant the requested injunction.

II. FACTUAL BACKGROUND

A. Arizona's Policy of Not Counting OOP Ballots

Arizona permits counties to choose whether to hold each election under a "vote center," precinct-based, or hybrid model. A.R.S. § 16-411(B)(4). In a vote-center election, voters can vote at *any* polling place in the county in which they reside, as an alternative to the precinct-based model, which requires voters to vote in their assigned precinct. *Id.*; *see also* ER1770. Graham, Yavapai, and Yuma Counties have used vote centers for countywide elections. ER2325. Maricopa County, Arizona's most populous, switched to a vote center model during the presidential preference election in March 2016 and the special election on May 17, 2016. In the upcoming general election, however, it will switch back to a precinct-based model, assigning each voter to one of the 724 precincts within the county. ER704.

Precincts are small groups of households entitled to vote on the same array of races in a particular election. While most precincts have their own polling place, some precincts share a polling location. Some voters assigned to such "multi-precinct locations" must therefore cast their ballot at a polling location that is outside the geographical boundaries of their precinct. ER1770, 1811-12. Maricopa

County will operate a number of multi-precinct locations in the upcoming election. ER135, 328.

Under federal and state law, a voter who appears to vote at the wrong precinct is entitled to cast a provisional ballot. 52 U.S.C. § 21082; A.R.S. §§ 16-135, 16-584. Arizona rejects these ballots in their entirety—that is, not only for local races for which a voter may be ineligible to vote but also for countywide, statewide, and federal races for which the voter is eligible. ER451-57; A.R.S. §§ 16-584, 16-452 (violations of Secretary of State's procedures manual punishable by law). In 2012 and 2014 alone, Arizona rejected approximately 14,500 OOP ballots. ER1786. Statistical evidence "credit[ed]" by the District Court shows that Hispanic voters are more than twice as likely, African American voters are 62% more likely, and Native American voters are 37% more likely than white voters to cast an OOP ballot that is rejected. ER7, 1799-1800.

The record shows that voters who go to the wrong precinct typically do so for one of a number of specific reasons: they have moved; their traditional polling location has changed; the information they received about their polling location was incorrect; or they travel to the polling location that is closest to their residence, rather than the one to which they are assigned. ER167-69, 171-73, 175-77, 215-17, 228-30. In many cases, voters are not informed that they are in the wrong polling location or that their OOP ballot will not count. ER167-69, 171-73, 175-77, 215-17, 228-30; *see also* Under Advisement Ruling at 5, *Jones v. Reagan*, No. CV-2016-014708 (Ariz. Super. Ct. Sept. 9, 2016) (Maricopa County's policy of rejecting OOP ballots unduly burdensome where it was official county policy *not*

to inform voters "that their vote will not be counted if cast in the wrong precinct"); ER664 (representatives of county boards of elections have admitted that the use of e-pollbook technology designed to remedy these rejections has proved insufficient due to poll worker error). The district court simply ignored the fact that many voters cast OOP ballots—and thus lose their right to vote—through no fault of their own. Further, Arizona's refusal to count OOP ballots has resulted in the disenfranchisement of voters who make the trivial mistake of standing in the wrong line at a multi-precinct polling location and thus cast their ballot at the correct polling location but in the wrong "precinct." ER1811-12.

The record also shows that refusing to count *any* votes on OOP ballots is not necessary to fulfill the purposes of the precinct-based model. At least one state counts votes for all races for which an OOP voter is eligible to vote. Md. Code Ann., Elec. Law § 11-303(e). Other states did so until they switched to a vote-by-mail system. Or. Rev. Stat. Ann. § 254.408(6); Wash. Admin. Code § 434-262-032(5). North Carolina has been rebuked for attempting to stop counting OOP ballots. *League of Women Voters of N.C. v. N.C.* ("*LOWV*"), 769 F.3d 224, 233, 247 (4th Cir. 2014).

There is no reason that Arizona cannot count OOP ballots as well. Arizona counties *already* have processes in place, including the use of a "duplication board," to count other types of provisional ballots. ER451-57. And counties must *already* make an individualized determination whether to reject an OOP provisional ballot (or to count it, if the voter in fact resides in the precinct), ER452-56; the requested injunction would simply require that these ballots, if cast in the

correct county, be counted in the races for which the voter is eligible to vote, rather than discarded in their entirety.

B. Arizona's History of Discrimination

The discriminatory impact of Arizona's OOP policy is tied to its history and the ongoing effects of discrimination against minorities. Until the Supreme Court decided *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), Arizona was one of only nine states to be wholly designated as a "covered jurisdiction" under § 5 of the VRA—a designation reserved for states with the most egregious and widespread histories of discrimination. ER297. Arizona became subject to § 5's preclearance requirement in 1975 in response to congressional findings that, "through the use of various practices and procedures, citizens of language minorities [had] been effectively excluded from participation in the electoral process." 52 U.S.C. § 10503; *see also* ER286-90, 296-97.[1]

Language minorities in Arizona are overwhelmingly racial minorities, ER991 (24.6% of Hispanics, 10.1% of Native Americans, and 2.7% of African Americans speak English less than "very well," as compared to 1.0% of whites), and Arizona's exclusion of language and racial minorities from political participation began even before it became a state. ER286. In 1909, Arizona's territorial legislature enacted an English "educational test" for voter registration. Shortly after becoming a state in 1912, Arizona enacted a similar literacy test designed to limit "the ignorant Mexican vote." ER288. After Congress banned

[1] Section 5 only required preclearance of *changes* to election practices. Because Arizona's OOP policy predates 1975, that policy was not subject to preclearance.

literacy tests in 1970, the U.S. Department of Justice estimated that over 73,000 Arizonans could not vote because of the State's literacy test. ER289. In 1988, Arizona voters approved the most restrictive "English-only" provision in the nation—a state constitutional amendment prohibiting the state government from using languages other than English, which this Court (sitting *en banc*) and the Arizona Supreme Court ultimately struck down as unconstitutional. ER974-75.

More recently, errors by election officials have led to multiple instances of incorrect information being provided to Spanish-speaking voters. In the 2012 election, on three separate occasions, Maricopa County sent Spanish-language documents with the wrong election date to Hispanic voters. The English versions of the same documents provided the correct date. ER780-81. For the May 17, 2016 special election, over 1.3 million households received a ballot with erroneous descriptions of propositions in the Spanish portion of the ballot. ER774-76.

Arizona has repeatedly limited minority access to education. For example, in 2000, it banned bilingual education, resulting in large achievement gaps and putting minority students at higher risk of failing or dropping out. ER997. Further, the State long failed to comply with a court order to create a special fund to improve the state's public education system, especially in poorer districts. This failure affected minority students in particular because economically disadvantaged districts have heavy concentrations of minorities and minority students are far more likely than white students to attend public schools. *Id.*

Arizona has marked racial disparities linked to its history of discrimination in areas such as employment, wealth, transportation, health, and education. ER989-

93. Minorities are more likely to rent, rather than own, their homes and accordingly have higher rates of residential mobility. ER183-84, 189-90, 228, 259, 989, 992, 1769, 1771, 1791-92. Further, minorities have lower access to vehicles, are more likely to rely on public transportation, and are less likely to hold flexible jobs permitting them to leave work to vote. These factors contribute to their higher rates of OOP voting. ER165, 220-22, 242, 259, 989-92, 1791-94, 1825, 3911.

Minority voters are also more likely to cast OOP ballots due to systemic problems in Arizona's elections administration, including (1) voter confusion caused by significant changes in polling locations from election to election; (2) the inconsistent election regimes used by and within counties; and (3) inequitable placement of polling locations. ER1772-75, 1786-87, 1804-12, 1814-18; *see also* ER183-84, 189-90, 205, 215, 228, 238, 258, 774-76, 780-81, 916. Language barriers and Maricopa County's history of providing incorrect information to Spanish-speaking voters exacerbate these systemic problems. ER774-76, 780-81; *see also* ER190, 245-46, 1764, 1815.

III. PROCEDURAL HISTORY

Plaintiffs initiated this action more than six months ago. ER18. In an initial scheduling conference, Plaintiffs stated their readiness to file a motion for preliminary injunction by May 13, but explained that the motion would benefit from limited discovery. ER70. The District Court granted Plaintiffs' request for expedited discovery, but denied their request for a highly expedited briefing and hearing schedule, directing Plaintiffs to file their preliminary injunction motion on

June 10, Defendants to file their responses six weeks later, on July 25, and scheduling argument for August 12. ER79.

One week after Plaintiffs filed their motion for preliminary injunction as scheduled on June 10, ER126, Defendants moved for an extension of time, requesting they be permitted *ten weeks* to prepare their responses and expert reports. ER836. Appellants objected, arguing (among other things) that even the initial six weeks the District Court had given Defendants for filing a response was generous, particularly in the context of voting rights cases, which often involve extensive expert analysis and much shorter briefing schedules; that the expert reports were largely based on data that Defendants previously had access to; and that delaying adjudication of these matters could result in irreparable injury if a ruling came too late to protect Arizona voters in the upcoming election. ER842-50.

The District Court held a hearing on the motion for an extension and directly 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 that, for the relief requested in relation to the OOP ballots, "it would really be only necessary in time for counting the ballots in the general election, which will not take place until November." ER931. In granting the motion, the District Court relied on those statements, and revised the briefing schedule so that Defendants' briefs were not due until August 22, with oral argument to be held on September 2. ER918. On October 11, 2016, the District Court issued the order that is the subject of this appeal. ER2.

Plaintiffs timely filed a notice of appeal on October 15, and an emergency motion for injunction pending appeal and a motion to expedite this matter on October 18. Doc. 2. The next day, a motions panel of this Court granted the motion to expedite and referred the emergency motion for an injunction pending appeal to the merits panel. Doc. 4. Even though Appellants initiated this case more than six months ago and immediately requested that it be expedited, as of today only 15 days remain before the November 8 election.

SUMMARY OF THE ARGUMENT

In declining to issue the requested injunction, the District Court made several errors of fact and law. In its VRA analysis, for example, the District Court focused on the severity of, rather than the disparity in, the burden resulting from Arizona's refusal to count OOP ballots. The court also erred as a matter of fact and law in assessing whether the disparate burden at issue is linked to the ongoing effects of discrimination; the court improperly imposed a strict test for establishing this causal connection and ignored overwhelming factual evidence of such a connection in Arizona. Likewise, in assessing whether Arizona's OOP policy unduly burdens the right to vote, the court ignored the significance of the fact that Arizona's OOP policy disenfranchises thousands of voters and far more than any other state's OOP policy, while incorrectly assuming that the requested injunction is incompatible with a precinct-based system of election administration. The court compounded these errors in its assessment of the equities by overvaluing administrative burdens and undervaluing the harms to Plaintiffs and the public

interest that result from the abridgement or denial of the right to vote. Absent these and other errors, the District Court should have granted a preliminary injunction.

STANDARD OF REVIEW

The denial of a preliminary injunction is reviewed for abuse of discretion, which occurs when a court "applies an incorrect legal rule or relies upon a factual finding that is illogical, implausible, or without support in inference that may be drawn from the record." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (quotation marks and citation omitted). The District Court's legal conclusions are thus reviewed *de novo*, and its factual findings for clear error. *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 911 (9th Cir. 2014).

ARGUMENT

To obtain a preliminary injunction, a plaintiff must establish (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). An injunction may also issue if there are "[s]erious questions going to the merits," the hardships tip sharply in favor of the plaintiff, there is a likelihood of irreparable injury, and the injunction is in the public interest. *Id.* Here, each of the pertinent factors favors relief.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Arizona's OOP Ballot Policy Violates § 2 of the VRA

Section 2 of the VRA forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to

vote on account of race or color." 52 U.S.C. § 10301(a). The VRA should be read to "provide[] 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). Proving a § 2 claim "does not require a showing of discriminatory intent, only discriminatory results." *Gonzalez v. Ariz.*, 677 F.3d 383, 405 (9th Cir. 2012) ("*Gonzalez II*"), *aff'd sub nom., Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). Moreover, a plaintiff need not show that the challenged voting practice caused a disparate impact by itself, *Farrakhan v. Wash.*, 338 F.3d 1009, 1018-19 (9th Cir. 2003), or that the challenged practice makes voting *impossible* for minorities—merely that it makes voting disproportionately more *burdensome*. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986); *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J. concurring).

Courts typically apply a two-step analysis in evaluating a § 2 vote-denial claim. First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class." *LOWV*, 769 F.3d at 240 (citations omitted). Second, "that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id.* (citations omitted). Thus, a plaintiff must produce some evidence that the challenged voting qualification interacts with the totality of the circumstances and causes the disparity, in that the disparity is not representative of some preference divorced from those circumstances, but rather "accommodate[s] or amplif[ies] the effect that … discrimination has on the voting process." *Farrakhan*, 338 F.3d at 1019 (citation and quotation marks omitted); *see*

also N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 233 (4th Cir. 2016); *Gonzalez II*, 677 F.3d at 405; *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984). Both elements were more than satisfied here.

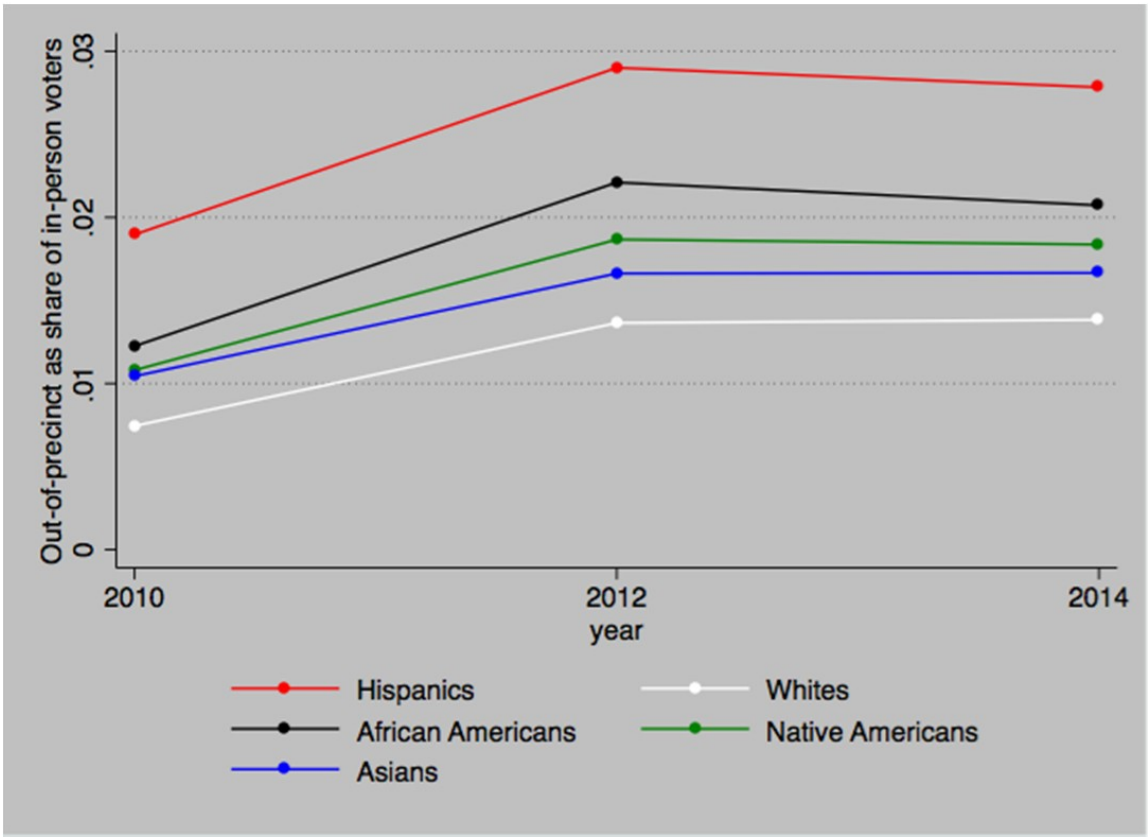
1. The OOP Ballot Policy Imposes a Discriminatory Burden.

Plaintiffs presented overwhelming evidence that minorities in Arizona are "vastly over-represented among those casting [OOP] ballots" and, as a result, are far more likely to be disenfranchised by Arizona's refusal to count those ballots. ER1797. This evidence included the expert report of Dr. Jonathan Rodden, who examined the relationship between race and OOP voting. As summarized by the District Court:

> Dr. Rodden concluded that white voters accounted for only 56% of OOP ballots, despite casting 70% of all in-person votes. In contrast, African American and Hispanic voters made up 10% and 15% of in-person voters, but accounted for 13% and 26% of OOP ballots, respectively. Dr. Rodden analyzed comparable data from Pima County and found that the results were similar to those in Maricopa County. In his rebuttal report, he analyzed data from Arizona's non-metro counties and found similar disparities among in-person voters.

ER7 (citations omitted). These disparities "have been quite persistent over time." ER1797-98.

For example, the following figure shows the racial disparities in OOP voting (as a share of in-person ballot cast) in Maricopa County—by far, Arizona's largest county—in recent elections:



ER1799.

The District Court "credit[ed] Dr. Rodden's assignment of race to OOP voters," ER7, and the State's own expert, Dr. Janet Thornton, repeatedly acknowledged that Dr. Rodden's findings were "statistically significant." ER2275-76. Nevertheless, the District Court erroneously concluded that, because "OOP ballots represent such a small fraction of the overall ballots cast in any election"—in 2012, "only 10,979" ballots cast in the general election were OOP ballots—"OOP ballot rejection likely has no meaningful impact on the opportunities of minority as compared to white voters to elect their preferred representatives." ER8.

This was clear legal error. Relying on the plain text of the VRA, courts have recognized that "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 being denied equal electoral opportunities." *LOWV*, 769 F.3d at 244 (quoting 52 U.S.C. § 10301(a)).[2] Thus, in *LOWV*, where the district court found that the rejection of OOP ballots would have disenfranchised approximately 3,348 voters in the 2012 general election and the failure to count such ballots "will have a disproportionate effect on [African American] voters," but nevertheless found that plaintiffs were unlikely to succeed on their § 2 claim, because of its conclusion that "such an effect 'will be minimal,'" the Fourth Circuit easily rejected the district court's reasoning as a "misapprehen[sion] and misapplic[ation]" of law. *Id.* The District Court here likewise erred in finding an even larger number of disenfranchised voters insignificant.

The District Court's holding that Dr. Rodden's analysis is "incomplete" because it is "based only on in-person voting," ER8, is also erroneous. To the extent the court's point is that rejected OOP ballots make up a smaller share of total ballots than of in-person ballots, that is certainly accurate, but it is irrelevant to the VRA inquiry for the reasons explained in the preceding paragraph. If the

[2] *See also Chisom*, 501 U.S. at 397 ("*Any* abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of the election.") (emphasis added); *id.* at 407-08 (Scalia, J., dissenting) ("[i]f, 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"); *Sanchez v. Cegavske*, -- F. Supp. 3d --, 2016 WL 5936918, at *7 (D. Nev. Oct. 7, 2016).

court was suggesting that disparities might not persist if OOP ballot rejection were considered in relation to the total number of votes cast, the court was incorrect: "[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.

If instead the court's point was that disenfranchised OOP voters could have voted absentee by mail, the court erred in several respects. The VRA asks whether a specific "voting … standard, practice, or procedure [is] imposed or applied … in a manner which results in a denial or abridgment of the right … to vote on account of race or color." 52 U.S.C. § 10301(a). Indeed, where 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. *Id.* § 10301(b). Voting by mail is also "not the equivalent of in-person voting for those who are able and want to vote in person." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016). "Mail-in voting involves a complex procedure that cannot be done at the last minute" and "deprives voters of the help they would normally receive in filling out ballots at the polls"; and voters who vote by mail "lose the ability to account for last-minute developments, like candidates dropping out of a primary race, or targeted mailers and other information disseminated right before the

election." *Id.* at 255-56 (citations omitted).[3] More fundamentally, voting by mail is simply not an option for a voter who mistakenly goes to the wrong polling location on Election Day. *See* A.R.S. § 16-542(E) (early ballot request must be received by no later than 11th day prior to election); *see also* Under Advisement Ruling at 5, *Jones v. Reagan*, No. CV-2016-014708 (many voters never told OOP ballots will be discarded); ER167-69, 171-73, 75-77, 215-17, 228-30; ER1811-12 (rejection of ballots cast at correct multi-precinct location but wrong precinct).

Nor is the disparate burden on minority voters lessened by the District Court's observation that "Arizona employs a variety of methods to educate voters about their correct precincts." ER12. As the striking disparate impact demonstrates, these methods are simply not working for many minority voters. Indeed, due to undisputed socioeconomic differences, many minorities lack the online resources required to receive this information. ER989-93. And this problem is compounded by Maricopa County's record of providing misinformation to Spanish-speaking voters. ER774-76, 780-81.

Further, the District Court erred in finding that Plaintiffs' evidentiary showing failed on causation grounds because "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." ER9. Put simply, these reasons that it can be difficult for voters to find their assigned precinct only result

[3] The inadequacy of mail-in voting as a full alternative has been exacerbated by Arizona's elimination of ballot collection, as discussed in the record for Case No. 16-16698. The District Court erred in failing to mention this change in discussing the availability of absentee voting as an alternate to in-person voting.

in disenfranchisement *because Arizona refuses to count OOP 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). Moreover, a "plaintiff need not show that the challenged voting practice caused the disparate impact by itself." *Gonzalez v. Ariz.*, 624 F.3d 1162, 1193 (9th Cir. 2010), *on reh'g en banc*, 677 F.3d 383 (9th Cir. 2012). It is sufficient that the practice was *one of* the causes of the disparate impact. *Farrakhan*, 338 F.3d at 1018-19 (no "by itself" requirement). Arizona's OOP ballot policy plainly meets that test here.

2. The Burden Imposed Is Linked to Social and Historical Conditions that Produce Discrimination

In evaluating whether a voting practice works together with the totality of circumstances to produce discrimination against minority voters, courts often look to nine non-exclusive factors known as the "Senate Factors." *Gingles*, 478 U.S. at 44-45. These factors include, among other things, the "history of voting-related discrimination in the [jurisdiction]" and "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Id.* "[T]here is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other." *LOWV*, 769 F.3d at 240 (alteration in original) (citation omitted); *see also United States v. Blaine Cty., Mont.*, 363 F.3d 897, 914 n.26 (9th Cir. 2004); *Farrakhan*, 338 F.3d at 1015-16. Unsurprisingly, given that it was a covered jurisdiction under § 5 of the VRA, there is powerful evidence as to the presence of the Senate Factors

in Arizona, as discussed at length in the expert report of Dr. Allan Lichtman. ER974-1002. This alone strongly suggests that the disparate burden imposed by Arizona's OOP ballot policy is caused by or linked to the ongoing effects of discrimination in Arizona.

The evidence in the record also directly establishes this link. For example, Hispanic victims of Arizona's historic language-barrier discrimination are far more likely than whites to be misinformed about voting rules. *See supra* at 5 (§ II.B). Likewise, because minority voters have disproportionally higher rates of residential mobility, they must continuously reeducate themselves about their new voting location, and as a result, they are much more likely to vote in the wrong precinct. ER989, 1767-72. Minorities are also less likely than whites to be able to travel from an incorrect precinct to the correct one (assuming they are aware of the need to do so) because minorities have less access to vehicles, are more likely to rely on public transportation or assistance to travel, and are more likely to hold less flexible, working-class jobs that can make it more difficult for them to travel to a second polling location before polls close. ER165, 220-22, 242, 259, 989-93, 1825, 3911.

Despite this evidence, the District Court held that Plaintiffs "only loosely linked the observed disparities in minority OOP voting to social and historical conditions that have produced discrimination" and that "the requisite causal link under § 2" could not be "established primarily by pointing to socioeconomic disparities between minorities and whites." ER9-10. This holding was erroneous as a matter of fact and law. As a factual matter, the evidence shows far more than the

District Court's opinion suggests. The evidence, as noted above, shows that Arizona has severe, ongoing racial disparities in employment, wealth, transportation, health, and education that are attributable to discrimination by the State, ER989-93, 996-97, 1778-83, and that these disparities—in transiency, vehicle ownership, employment, and other areas—are directly tied to the disparate burdens imposed by Arizona's refusal to count OOP ballots. *E.g.*, ER989-93, 996-97, 1767-83. The extreme, persistent racial disparities in disenfranchisement of OOP voters are not a matter of happenstance.

As a legal matter, the court erred in holding that establishing a link between a disparate burden and socioeconomic disparities resulting from discrimination does not satisfy step two of the test for VRA vote-denial claims. As that test makes clear, the relevant inquiry 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). The District Court's narrow reading of the VRA also ignores that the statute must be interpreted "in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403-04 (quotation marks omitted). Indeed, other courts have specifically pointed to evidence of "socioeconomic disparities" in support of their findings that a disparate burden is "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 (citation omitted); *Veasey*, 830 F.3d at 259 ("socioeconomic disparities . . . hindered . . . ability of African-Americans and Hispanics to . . .

participate in the political process") (citation omitted); *see also McCrory*, 831 F.3d at 233 ("socioeconomic disparities establish that no mere 'preference' led African Americans . . . to disproportionately lack acceptable photo ID").

More broadly, the District Court's analysis lost sight of the touchstone of § 2 analysis: determining whether, "considering the totality of the circumstances, [minority voters] do not have an equal opportunity to participate in the political process." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988). The District Court's approach here is not substantively distinguishable from the approach rejected in *Farrakhan*, which held that the district court had "misconstrued the causation requirement of a Section 2 analysis" when it found that the plaintiffs had failed to carry their burden because they did not demonstrate that the provision at issue "by itself" caused a disparity. 338 F.3d at 1016-19. In particular, in finding that the plaintiffs "had failed to satisfy their causal burden" because the cause of the disparity was "not the voting qualification" that was specifically challenged but "bias external to the voting qualification," the district court "applied a causal standard at odds with" the precedent of this Circuit, "the plain language of the VRA, its legislative history, and other well-established judicial precedent." *Id.* at 1017. This is because "it is clear that whether a particular practice results . . . in violation of Section 2 always depends on the 'totality of the circumstances' in which the practice operates"; "demanding 'by itself' causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied" by the case law. *Id.* at 1017-18.

For the reasons explained above, consideration of the "totality of circumstances" here leads to only one possible conclusion: the practice of excluding OOP ballots imposes a disparate burden on Arizona's minority voters that is linked to lasting socioeconomic effects of Arizona's extensive history of discrimination. Reaching a contrary conclusion requires a finding that Arizona's minority voters are disproportionately making a choice, divorced from their socioeconomic circumstances, to go through the completely meaningless process of casting ballots OOP. *See* ER989, 1767-77. Because such a conclusion is not only implausible but at odds with the record in this case, the Court should hold that Arizona's refusal to count OOP ballots accommodates and amplifies the effect that discrimination has on the voting process in Arizona, *Farrakhan*, 338 F.3d at 1019, and reverse the court below.

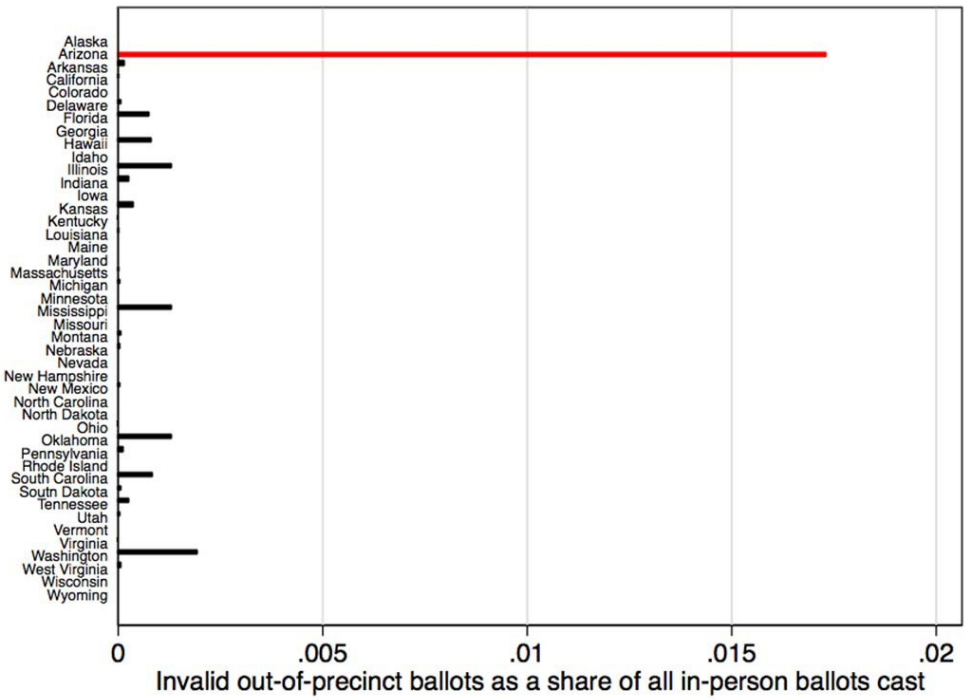
B. Arizona's OOP Policy Unduly Burdens the Right to Vote

In evaluating whether an election law imposes an "undue" burden on the right to vote in violation of the First and Fourteenth Amendments, courts "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' 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.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Here, the burden imposed on Arizona voters by the exclusion of OOP ballots is severe. Since 2012 alone, Arizona has disenfranchised some 14,500 voters for

casting an OOP ballot—a number that far outpaces any other state in the country. ER1786. The raw number of rejected ballots in Arizona is more than *double* the number of such ballots in any other state, even without accounting for population differences. ER3649. And a comparison of Arizona to other states in the rejection of OOP ballots as a share of in-person ballots cast is staggering:

Figure 6: Rejected out-of-precinct ballots as a share of in-person ballots cast according to 2012 EAC Report



ER1786.

In rejecting Plaintiffs' undue burden claim, the District Court reasoned that "the difficulties experienced by some voters in locating their correct precinct are caused primarily by the relocation of polling places from election to election," rather than by the practice of excluding OOP ballots *per se*. ER12. But as discussed above, it is the practice of rejecting the ballot that burdens the right to

vote by directly transforming those difficulties into disenfranchisement. The District Court's holding that "the rejection of OOP ballots likely imposes no more than minimal burdens" because of "the many ways in which Arizona voters can learn their correct polling place location," ER12, also does not stand up to scrutiny. This holding ignores the clear evidence, discussed above, that shows how Arizona's election process and the ongoing effects of discrimination burden voters and why Arizona leads the nation in the disenfranchisement of OOP voters. Moreover, it simply is not plausible 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, ER3649, is not meaningfully burdensome on any class of voters.

Having erroneously discounted the burden imposed by Arizona's OOP policy, the District Court proceeded to justify that policy by listing the regulatory advantages of a precinct-based voting model. ER13. But that misses the mark. Plaintiffs here are not challenging Arizona's use of precinct-based voting. Rather, as discussed in Section II above, a state may enjoy the benefits of precinct-based voting without disqualifying the entirety of an OOP ballot. Other states that use this model recognize this point by counting the votes on OOP ballots for races for which the voter was eligible, and discarding only the votes for races for which the voter was ineligible. *See supra* at 2-4 (Section II.A).

While it is true that "[i]n this Circuit, courts uphold as not severe restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process," *Gonzalez v. Ariz.*, 485 F.3d

1041, 1049 (9th Cir. 2007) ("*Gonzalez I*") (citation omitted), Arizona's wholesale rejection of OOP ballots does not fit this bill. Unlike Proposition 200, it does not "appl[y] to all Arizonans." *Id*. It applies only to those unlucky enough to live in a jurisdiction that opts to run its election under a precinct-based system, and even then, only to those voters who present in person at the wrong location to vote and are either not informed that the provisional ballot that they cast will be rejected in its entirety, or are unable to travel by the close of polls to cast a ballot in the precinct to which they are assigned. As explained above, the rejection of OOP ballots also imposes disparate burdens; and that fact, as well as the identity of the parties involved in this case, demonstrates that the law is not politically neutral. Nor is there any reason to think that the rejection of OOP ballots protects the reliability and integrity of the election process.

Both the Supreme Court and this Court have made it clear that the burdens imposed by a voting practice challenged under *Anderson-Burdick* are properly evaluated from the vantage point of the specific group of voters for whom the practice is likely to pose the most serious challenges. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 186, 191, 198, 201 (2008) (controlling op.); *Pub. Integrity All., Inc. v. City of Tucson*, -- F. 3d --, 2016 WL 4578366, at *3 n.2 (9th Cir. Sept. 2, 2016) (en banc); ER2620-22, 2631-33. And the burden that the OOP policy imposes on those voters is severe. Indeed, if the voter is not advised that

they are in the wrong precinct or that their ballot will not count, the burden is total disenfranchisement.[4]

Further, *Anderson-Burdick* requires courts to conduct a "means-fit" analysis, whereby it considers the specific justifications supplied for a challenged provision, and then determines the extent to which those interests make it necessary to burden a plaintiff's rights. *Pub. Integrity All.*, 2016 WL 4578366, at *3-*4. Below, the State identified three interests, none of which can justify the wholesale rejection of OOP ballots: the State argued that the policy (1) "preserv[ed] precinct based election administration," (2) avoid[ed] the partial disenfranchisement of voters," and (3) "minimize[d] the incentive for misdirection from third parties." ER2161.

The first two interests—preservation of precinct-based election administration and avoiding partial disenfranchisement—are premised on the notion that counting OOP ballots will cause a meaningful number of voters to intentionally cast their ballots in the wrong precinct. But there is no reason to believe this would happen. *Cf. Pub. Integrity All.*, 2016 WL 4578366, at *4 ("*Burdick* calls for neither rational basis review nor burden shifting."). It is implausible that any significant number of voters would simultaneously be sufficiently knowledgeable about the minutiae of election administration that they are aware of the rules for counting OOP ballots and yet sufficiently unconcerned

[4] This is accordingly not a case like *Gonzalez I*, where the question of "whether the law severely burdens anyone" could not be answered on the record then before the Court. *See* 485 F.3d at 1050. Here, almost 11,000 voters were disenfranchised by the OOP policy in the last presidential election. If the District Court's decision is not reversed and a preliminary injunction entered before the post-election canvass starts, thousands more will be disenfranchised in this election.

about down-ballot races that they would intentionally choose to cast a ballot that cannot be counted in those races. Moreover, the State has offered no evidence that the many jurisdictions that count OOP ballots have more of those ballots than other jurisdictions do. *See also* ER3785, 3789, 3791 (testimony from election administrator from large county in North Carolina about OOP voting).

The State's purported interest in minimizing the incentive for misdirection from third parties, in addition to being a wholly speculative concern, is not logically linked to the State's refusal to count OOP ballots. Under current law, such misdirection would theoretically lead to total disenfranchisement. A decision requiring the State to count OOP ballots in part would therefore *decrease* any interest that third parties have in misdirecting voters. In short, the interests identified by the State are weak and plainly outweighed by the disenfranchisement of thousands of Arizona voters.

II. THE EQUITABLE FACTORS FAVOR AN INJUNCTION

The State's OOP ballot policy, by disqualifying the ballots of duly registered voters, is the essence of irreparable harm. "Courts routinely deem restrictions on fundamental voting rights irreparable injury," recognizing that "once the election occurs, there can be no do-over and no redress." *LOWV*, 769 F.3d at 247; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("*OFA*"); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986); *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986); *see also Melandres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes

irreparable injury'") (quoting *Elrod*, 427 U.S. at 373). Appellants,[5] their individual members and constituents, and thousands of other voters, will experience this type of irreparable harm if the requested injunction is not issued.

In refusing to find irreparable harm, the District Court not only relied upon its mistaken view of the merits but also wrote that Plaintiffs' failure to challenge the OOP policy sooner "'implies a lack of urgency and irreparable harm."' ER15 (citing *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)). That view is unmoored from the law and the facts. Even assuming that the district court was correct that Plaintiffs "delayed"—and the record demonstrates otherwise, *see supra* at 10-11—the principle that delay evidences a lack of irreparable harm is limited to cases (such as *Oakland Tribune*) where the complained-of harm has already occurred. *See McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 965 (9th Cir. 2010) (delay only significant to the consideration of irreparable harm if, among other things, the harm has already occurred). That principle has no application where the harm that a requested injunction would avoid—here, disenfranchisement in the upcoming election—has yet to occur.

In any event, as a matter of law, the mere longevity of an unconstitutional practice is no basis to deny a challenge to that practice. *E.g.*, *United States v.*

[5] Courts have recognized that where, as here, disenfranchisement will clearly occur but it is impossible to identify the specific voters who will be impacted in advance, organizational plaintiffs such as the DNC, the ADP, and the political campaigns that seek the injunction are appropriate parties to bring such claims; they are likely among the only types of parties with standing to do so. *See, e.g.*, *LOWV*, 769 F.3d at 244; *OFA*, 697 F.3d at 436; *Fla. Democratic Party v. Detzner*, No. 4:16CV607-MW/CAS, 2016 WL 6090943, at *4 (N.D. Fla. Oct. 16, 2016); *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d 1073, 1078-79 (N.D. Fla. 2004).

Windsor, 133 S. Ct. 2675, 2682 (2013) (striking down parts of Defense of Marriage Act, enacted in 1996); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1411-12 (9th Cir. 1993).[6]

In addition, "[t]he public interest and the balance of equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act*, 818 F.3d at 920 (citation omitted). That point has particular force where voting rights are involved because "[t]he public has a 'strong interest in exercising the fundamental political right to vote,'" and in "permitting as many qualified voters to vote as possible." *LOWV*, 769 F.3d at 247-48 (citations omitted).

The District Court disregarded these interests, instead concluding that the public interest weighed against an injunction because of the claimed administrative burdens of counting OOP ballots, thus recycling the same "pretext of procedural inertia and under-resourcing" roundly rejected by the Fourth Circuit. *Id.* at 244. If the Court issues the requested injunction, election administrators can follow the lead of the other states that already partially count OOP ballots and, at the very least, implement a simple means of segregating OOP ballots at the time that they are cast so that they can easily be found and processed during the canvass. *See also* ER3792 (Gilbert testimony that canvass never had to be delayed to count OOP ballots). In addition, there is no dispute that the numbers of OOP voters will be minimized in the first instance if election administrators educate voters about their

[6] *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007), does not hold otherwise. While the district court opinion considered "delay" by the plaintiffs in the balance of the hardships analysis, this Court's opinion neither endorses nor adopts this view. *See generally id.*

correct precinct and train poll workers to communicate effectively with voters who arrive at the wrong precinct. *See* ER3791 ("[W]e were successful in convincing most people to go to the correct precinct.").[7] In allowing the administrative burden on the State to dominate its public interest analysis, the District Court "sacrifice[ed] voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing." *LOWV*, 769 F.3d at 244.

Regardless, the administrative difficulties of effectuating an injunction—difficulties which are nearly always present for a party subject to a preliminary injunction, in election law cases in particular—are strongly outweighed by the public interest in protecting constitutional rights. *Cf. 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 cannot "pit its desire for administrative ease against its minority citizens' right to vote." *LOWV*, 769 F.3d at 244.

In all events, the District Court's balancing of the equities was fatally flawed because of its view of the merits. The court failed to acknowledge that Plaintiffs

[7] While the District Court wrote that granting relief at this point would cause delays in counting votes and impose financial burdens, *see also* Doc. 7 at 16 n.6, Defendants previously assured the Court that the extended briefing schedule they requested would *not* result in a ruling too late to be effective. ER930. As counsel for the Secretary of State explained, "[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. For this reason, as well as those set forth above, Defendants cannot credibly argue that the State would not have time to comply with an injunction.

had raised "'serious questions' as to the merits." *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016). Those serious questions, combined with the harm to voting rights that Plaintiffs will suffer absent an injunction, strongly favor the requested relief. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) ("Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction... .").

III. *PURCELL* DOES NOT BAR RELIEF

In the years since the Supreme Court issued its decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), defendants in voting rights cases have increasingly read that case as an invitation to attempt to delay litigation long enough to then argue that dicta in *Purcell* stating that "[c]ourt orders affecting elections, especially conflicting orders, can . . . result in voter confusion *and consequent incentive to remain away from the polls*," *id*. at 4-5 (emphasis added), is reason enough to deny relief. Indeed, a district court judge recently excoriated the Florida Secretary of State for attempting to do just that, rejecting his attempts to "request[] as much time as he felt he could possibly justify so that he could use every second available to run out the clock . . . thus disenfranchising thousands." Notice of Cancellation of Hr'g at 5, *Fla. Democratic Party v. Detzner*, No. 4:16-cv-00607-MW-CAS (N.D. Fla. Oct. 15, 2016) (Dkt. 34). This Court should similarly reject arguments by Defendants that time has run out and Arizonans must be deprived "of their most precious right" as a result of Appellees' own repeated objections to expedition. *Id*.

In fact, *Purcell* did not hold that a court cannot act to protect voters as an election nears. As this Court explained in the proceedings that followed, "the

Supreme Court … remanded for clarification whether this court had given due deference to the district court's findings of facts." *Gonzalez II*, 624 F.3d at 1171. Unlike here, the district court had ruled on the injunction below, but at the time this Court ruled, the district court had not yet issued findings of fact or conclusions of law, and in entering an injunction pending appeal, "[t]he Court of Appeals offered no explanation or justification for its order." *Purcell*, 549 U.S. at 2-3.

In denying a stay in *North Carolina v. N.C. State Conference of the N.A.A.C.P.*, No. 16A168 (U.S. Aug. 31, 2016), the Supreme Court recently further illustrated that *Purcell* does not act as a bar to enforcing voters' fundamental rights even when enforcing those rights requires significant administrative changes to elections procedures that were already in place and for which implementation for an upcoming election has already begun. As a result of that decision, early vote plans had to be revised, and a voter ID law for which there had been training and public education—and that had just been applied in the primary—was enjoined. N.C. Em. App. to Recall & Stay Mandate at 2, 29-30, No. 16A168 (Sup. Ct. Aug. 15, 2016). Issuing the requested injunction in this case, by comparison—and by the State's own admission—would impose comparatively less significant administrative burdens, because the requested relief is "only necessary in time for counting the ballots in the general election, which will not take place until November [8]." ER931.

Further, the State does not meaningfully argue (nor could it) that the wholesale rejection of OOP ballots promotes any State interest in preventing voter fraud or "preserving the integrity of its election process." *Purcell*, 549 U.S. at 4

(quotation marks and citation omitted). If anything, the wholesale rejection of OOP ballots, including of votes in races cast by entirely eligible Arizona voters, *undermines* the integrity of what has often been a confusing and poorly administered process, particularly when it comes to the voters that the policy impacts most—the State's minority communities. ER233-34, 246, 296, 780-81, 774-76, 1783. Thus, the dicta in *Purcell* stating that, when "[f]aced with an application to enjoin operation of" an elections procedure just weeks before an election, courts must weigh "considerations specific to election cases and its own institutional procedures," especially the concern that the court order could itself "result in voter confusion and *consequent incentive to remain away from the polls*," 549 U.S. at 4-5, weighs strongly in *favor* of issuing the requested injunction here. The OOP policy *penalizes* voter confusion about where Arizonans may cast ballot in the harshest way possible—through total disenfranchisement. If anything, it is the existence of the policy (to the extent voters are aware of it, and as the evidence demonstrates, many are not, even after casting OOP ballots themselves) that causes voter confusion and creates a consequent incentive to remain away from the polls; issuing the requested injunction would help to remediate the severe burden imposed on the fundamental right to vote.

Finally, in *Purcell*, the Court was careful to emphasize that, "[a]lthough the *likely* effects of [the law at issue in that case] are much debated, the *possibility* that qualified voters might be turned away from the polls would caution any district court judge to give careful consideration to the plaintiffs' challenges." *Id*. at 4 (emphases added). The Court necessarily used words such as "likely" and

"possibility," because the law at issue in *Purcell* was a new law. *See id*. at 6 ("[a]llowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record … to judge their constitutionality" because of "two important factual issues [that] remain largely unresolved: the scope of the disenfranchisement that the novel identification requirements will produce, and the prevalence and character of the fraudulent practices that allegedly justify those requirements") (Stevens, J., concurring). In contrast, here there can be no question of the "possibility" that the challenged practice might result in the disenfranchisement of qualified voters. It has repeatedly done so, with nearly 11,000 voters disenfranchised in just the last presidential election alone. ER1763.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court reverse the District Court's denial of the motion for a preliminary injunction and remand with instructions to immediately enter an order enjoining Defendants from continuing their policy and practice of entirely discarding OOP ballots.

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 this brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b), and is jointly filed by separately represented parties. The brief contains 9,265 words and 35 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*