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 Cause No. CV-16-01065-PHX-DLR

BRIEF OF DEFENDANT-INTERVENORS

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FRAP 26.1 Corporate Disclosure Statement

Corporate Defendant-Intervenor Arizona Republican Party ("Party") hereby certifies that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in the abovementioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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I. STATEMENT OF JURISDICTION

Based on Plaintiffs' pleading of their claims,[1] the district court's jurisdiction rests on 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, as well as 42 U.S.C. §§ 1983 and 1988. On October 11, 2016, the district court issued the Order on appeal. ER0001-17.[2] On Saturday, October 15, 2016, Plaintiffs timely appealed pursuant to FRAP 3 and 4, and this Court has jurisdiction under 28 U.S.C. § 1292(a)(1), as the district court's order is an interlocutory order denying an injunction.

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[1] Defendant-Intervenor the Arizona Republican Party ("Party") moved to dismiss Plaintiffs' Amended Complaint and Intervenor-Plaintiff's Complaint-in-Intervention, which joined in and incorporated by reference the Amended Complaint, and the individual Defendant-Intervenors Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero ("Candidates") joined in the motion to dismiss. *See* ER3941, at Doc. 128. That motion remains pending before the district court. *See* ER3939, at Doc. 108; ER3951, at Doc. 215. The Party and Candidates throughout refer to Plaintiffs and Intervenor-Plaintiff Bernie, 2016, Inc., collectively as Plaintiffs.

[2] The Party and Candidates continue Plaintiffs' numbering and chronology (using chronological instead of reverse-chronological order, as Plaintiffs did) of the Excerpts of Record, with Supplemental Excerpts of Record Volume XX, filed concurrently herewith. As agreed upon with Plaintiffs' counsel, and as a courtesy to Plaintiffs, the Party and Candidates include the supplemental expert report of one of Plaintiffs' experts with the Supplemental Excerpts of Record, without conceding that it is relevant or necessary for this Court's decision.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in finding Plaintiffs unlikely to succeed on their claims that Arizona's out-of-precinct ("OOP") voting regulations violate Section 2 of the Voting Rights Act?

2. Whether the district court abused its discretion in finding Plaintiffs unlikely to succeed on their claims that Arizona's regulation of out-of-precinct voting violates the Fourteenth Amendment?

3. Whether the district court abused its discretion in concluding that Arizona's rejection of provisional ballots cast OOP did not cause Plaintiffs irreparable harm and that the balance of hardships and public interest weighed against issuance of a preliminary injunction?

III. STATEMENT OF THE CASE

Plaintiffs brought this action in April 2016 challenging Arizona's reasonable and standard regulation of "OOP ballots under the Voting Rights Act of 1965 (VRA) and the Fourteenth Amendment of the United States Constitution." ER0003. Specifically, Plaintiffs asserted that Arizona's regulation of out-of-precinct Election Day voting—which has

been in place for nearly five decades—violated Section 2 of the Voting Rights Act and the Fourteenth Amendment to the Constitution. *Id.*

Almost two months later, Plaintiffs moved, based on those claims, to preliminarily enjoin the State[3] from not counting provisional ballots cast out-of-precinct and for "a mandatory preliminary injunction preventing Arizona from rejecting OOP ballots for the races in which the voter is eligible to vote." ER0003. Discovery, including expert discovery, and motion practice ensued, oral argument occurred on September 2, 2016, and on October 11, 2016, the district court denied Plaintiffs' motion. ER0001-17.

The district court found that Plaintiffs were unlikely to succeed on the merits of their claims. Specifically, it found that:

> Plaintiffs have not satisfied their heavy burden for obtaining a mandatory preliminary injunction. Plaintiffs have not shown that Arizona's rejection of OOP ballots likely results in a cognizable disparity in the electoral opportunities of minority as compared to white voters. Nor have they shown that the practice more than minimally burdens voting rights. Further, Arizona has required voters to cast ballots in their correct precinct since at least 1970, and the data upon which Plaintiffs rely has been available since at least 2008.

[3] As discussed *infra*, Plaintiffs did not sue or join defendants from any other county in Arizona, despite the fact that most of them use a precinct-based system for elections and, consequently, also do not count provisional ballots cast out-of-precinct. *See* A.R.S. § 16-122.

> Plaintiffs delay in challenging the practice implies a lack of urgency and undermines the need for immediate mandatory injunctive relief during the waning months of an election year. (ER0016.)

Plaintiffs appealed this ruling, but the district court's decision should be affirmed. As recognized by the district court, the regulations have been in place, without issue, for nearly 50 years; for each election Arizona has held this year, including a Special Election in May 2016 and its most recent Primary Election in August 2016; and—importantly—the imminent General Election is premised upon their remaining in place. ER0001-17. Any changes or mandatory requirements at this last stage of the 2016 election cycle will cause significant hardship to local candidates, including the individual Defendant-Intervenor Candidates, who depend on the OOP regulatory scheme to ensure an orderly and fair election. Therefore, Arizona's regulation of OOP voting, for which the underlying statutes and regulations are not even challenged by Plaintiffs, should not be enjoined with a General Election imminent, or at all.

IV. STATEMENT OF FACTS

A. Arizona Adopts Its Regulation of Out-of-Precinct Voting Nearly Fifty Years Ago.

"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; *see also* Dkt. Entry 2-1, at 4, fn. 3. Not counting local municipal and special elections, at least 33 elections have occurred under the OOP voting system without Plaintiffs, or the U.S. Department of Justice,[4] raising an issue as to the administration of elections in this manner (which they only did in April of this election year) or challenging the actual state laws—including A.R.S. §§ 16-122, 16-411 and 16-584, and the relevant portions of the Arizona Elections Procedure Manual, (ER0449-457, "Manual,")[5]—

[4] Arizona was under Voting Rights Act § 5 preclearance review until the Supreme Court invalidated the preclearance scheme in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In 2006, the particular statutes related to out-of-precinct regulation of voting were revised to accommodate provisions of the Help America Vote Act (HAVA), 52 U.S.C. § 21082, and to allow counties the choice of utilizing voting centers. These changes to the OOP system were required to be and were approved by DOJ. ER0020.

[5] The Manual, which was developed with and is updated via input from the county recorders in Arizona, and approved by the Arizona Secretary of State, the Governor, and the Attorney General, has the force of law. A.R.S. § 16-452. As discussed *infra*, the Governor, Attorney General,

mandating such administration (which they still have not done).

It is undisputed that when a voter arrives at the wrong polling location in an Arizona county that uses the precinct model,[6] that voter cannot receive the correct ballot with all races in which he or she is eligible to vote. ER0002, ER2148-49. If the voter nevertheless chooses to cast a provisional ballot in that wrong precinct, that ballot will not be counted pursuant to A.R.S. § 16-122, a statute for which Plaintiffs do not challenge. ER0002-03.

Since 2011, the State has allowed each county to choose whether to conduct elections under a precinct model or "vote center" system. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (April 29, 2011) (amending A.R.S. § 16-411). In a precinct model, which Arizona and multiple other states have long used successfully, voters must vote within their designated precinct for their votes to be counted. ER 1867-70; *see also* A.R.S. §§ 16-122, 16-584(C), -584(E); *Sandusky Cty. Democratic Party v.*

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and parties representing all other counties in Arizona other than Maricopa County, are not named as defendants for purposes of Plaintiffs' OOP claims. Contrary to Plaintiffs' assertions, Doc. 11 at 7, this failure to name the correct parties is a threshold issue.

[6] A small number of Arizona counties have used 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.

Blackwell, 387 F.3d 565, 568 & n.1 (6th Cir. 2004) ("at least 27 of the states using a precinct voting system"). If a voter declines to go to the correct polling place and instead demands to cast a provisional ballot outside his or her precinct in a county using a precinct model, that provisional ballot will not be counted. *See Id.* Plaintiffs admitted in their pleadings below that OOP provisional ballots have been rejected in Arizona since at least 2006. ER0136.

Under a vote-center system, voters are permitted to vote at any designated vote center in the county in which they live and "receive the appropriate ballot." A.R.S. § 16-411(B)(4). In this relatively new and untested model, each vote center must be equipped to print a specific ballot depending on the voter's particular district that includes all races in which that voter is eligible to vote. ER1873. The vote-center model thus creates administrative and logistical burdens not associated with the traditional precinct model. *Id.* Indeed, a bipartisan federal commission has recommended treading lightly before moving to vote centers, which "are not appropriate for every jurisdiction." ER1934.

The March 22, 2016, presidential preference election ("PPE") was the first time Maricopa County used vote centers. ER 1877, 1881-82.

Much of Plaintiffs' evidence below concerned the burdens that Plaintiffs or other voters allegedly faced in the PPE, such as long lines at the centers. ER0132-39. Plaintiffs have since settled with Maricopa County their polling place allocation claims, however, resulting in no changes in the current Election Day administration system. ER4068-71.

In any event, Maricopa County used identical precincts in the 2012 and 2014 general elections, with no more than one polling place per precinct. ER1885, ER2454, ER2462. A significant majority of the actual polling places will also be the same. ER2462. Because these precincts have been in place for several years,[7] they previously received DOJ approval, without any objection as to Arizona's policy of not counting ballots cast out-of-precinct. ER0020.

B. Plaintiffs File Their Challenge.

Plaintiffs filed their Complaint in April 2016 challenging Arizona's

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[7] As discussed in Defendant-Intervenors' Motion to Dismiss below, Plaintiffs' request for a preliminary injunction requiring all Arizona counties (most of which are not parties to this case) to count out-of-precinct provisional ballots is barred by laches. *See* ER3961-62; *Ariz. Libertarian Party v. Reagan*, --- F. Supp. 3d ---, CV-16-0109-PHX-DGC, 2016 WL 3029929, at *2 (D. Ariz. May 27, 2016) (discussing application of laches in election matters). Despite admitting that the out-of-precinct voting restriction has been in place since at least *2006*, ER0136, Plaintiffs' Motion provided no justification for the years of delay in raising this issue.

practice of regulating the counting of OOP ballot under the VRA and the Fourteenth Amendment of the United States Constitution. ER0003. Plaintiffs only brought their OOP claim against Defendants Arizona Secretary of State and Maricopa County, even though the choice regarding precinct-based voting and, thus, OOP regulation, is within the jurisdiction of each county. ER0058; *see* A.R.S. § 16-411. Plaintiffs also did not challenge any specific Arizona statute or regulation related to the OOP regulatory scheme. ER0059-66.

Instead, 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. The relief requested is for the counties—all but one of which are not parties—to develop a system within a limited time to count the votes for election contests in which voters would have been eligible had they voted in the correct precinct, benefiting the two named candidate Plaintiffs while hurting the individual Candidates. ER1871-1883.

Thus, Defendant-Intervenors—the Party and Candidates—intervened. Indeed, local candidates would be particularly affected by

changes to OOP practices, as such changes would directly affect the number of voters eligible to vote in "down-ballot" races like those being run by the candidates. *Id.* Specifically, they will be harmed by the potential loss of voters who are confused by a modified system or that vote OOP under modified OOP rules, thus making themselves ineligible for "down ballot" races. *Id.* As such, the district court granted the motions to intervene. ER0002.

Subsequently, almost two months after filing their initial Complaint, on June 10, 2016, Plaintiffs filed their Motion for Preliminary Injunction seeking a mandatory injunction related to Arizona's OOP practices, while not challenging any specific law or regulation. ER0126-62.

C. The District Court Enters Its Order.

On October 11, 2016, the district court entered its Order denying Plaintiffs' Motion for Preliminary Injunction on their Provisional Ballot Claims, which had been fully briefed and orally argued after discovery, including expert discovery. ER0001-17. The district court held Plaintiffs have not satisfied their heavy burden for obtaining a mandatory preliminary injunction and would not likely succeed on the merits.

ER0010. Simply, Plaintiffs failed to present adequate evidence to reflect that Arizona's long-standing and reasonable regulation of OOP ballots likely results in a cognizable disparity in the electoral opportunities of minority as compared to white voters. *Id.* Plaintiffs also did not present adequate evidence to show they would succeed on the merits of their constitutional claims because the OOP regulatory scheme does no more than minimally burden voting rights. ER0013-14.

Further, in a clear recognition of the undue delay by Plaintiffs in bringing this action, the district court recognized that the balance of hardships is against Plaintiffs since Arizona has required voters to cast ballots in their correct precinct since at least 1970, and the data upon which Plaintiffs rely has been available since at least 2008. ER0014-16. Thus, Plaintiffs' need for expedited relief was undermined by the lack of urgency, especially balanced against the significant impact that will be caused by any mandated changes this close to the General Election. *Id.*

D. Plaintiffs Notice this Appeal.

Plaintiffs did not file their notice of appeal until October 15, 2016. ER3951, at Doc. 216. Plaintiffs then waited until after close of business on October 18, 2016—the night before oral argument before this Court

in a related appeal from an earlier order in the same case—to file their "Emergency Motion" seeking an injunction pending appeal and expedited review. Dkt. Entry 2-1.

E. A General Election is Imminent; Precinct Designations Have Long Been Set and Voters Have Notice of Them.

The various counties have long planned for the 2016 General Election. ER0015-16. The precincts are set and will almost be identical to the precincts used for the May 2016 Special Election and the August 2016 Primary Election. ER2462. Because of Plaintiffs' delay, however, if relief is provided, the 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 in this manner, appropriate the necessary resources to adhere to the ruling, and ensure proper training. ER0015-16. The district court found that this will be "significantly burdensome" and will "impose substantial costs" on the county election officials who are not part of this case. *Id.* Furthermore, it will be extremely burdensome on local candidates who will need to shift resources to ensure that voters cast ballots in the correct precinct. ER1871-1883.

Therefore, with the General Election imminent, this case is presently in a procedural and factual posture nearly identical to *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006). There, the Supreme Court vacated interim relief ordered by this Court and allowed a general election to go forward with the challenged law in effect. *Id.* at 4-5 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *see also id.* at 6 (Stevens, J., concurring) (stating that "[a]llowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality," and that the court's action would "enhance the likelihood that [the constitutional issues] will be resolved correctly on the basis of historical facts rather than speculation").

In *Purcell*, the plaintiffs sought to enjoin enforcement of Arizona requirements of (1) documentary evidence of citizenship to register, and (2) identification to vote at a polling place on Election Day, which in 2006 fell on November 7. *Id.* at 2-3. This Court granted the injunction pending appeal on October 5, 2006, more than a month before the election. *Id.* at 3. To avoid the confusion caused by changing the rules of

an election shortly before it took place, the Supreme Court vacated the interim relief on October 20, 2006. *Id.* at 5. Here, the concerns about changing the rules so close to an election are even more pronounced, because OOP affects the entire administration of the election, how voters expect the election to proceed, and how local candidates expend resources to ensure an opportunity to be elected.

V. SUMMARY OF ARGUMENT

Plaintiffs simply disagree with the district court's factual findings and weighing of evidence presented during the expedited preliminary injunction proceedings. To attempt to obtain a *de novo* review from this Court, Plaintiffs couch their appeal as legal error. This is not correct. Rather, the district court reviewed all the evidence presented—even evidence that was presented for the first time with reply briefs—weighed the evidence, and determined that Plaintiffs did not meet their burden that they would factually succeed on the merits of their claims. These findings are clearly within the discretion of the district court.

In weighing the evidence, the district court correctly determined that the statistical evidence presented did not meet Plaintiffs' "heavy" burden to show they would likely succeed on the merits of the case.

ER0016.

Plaintiffs failed to show that Arizona's OOP regulatory scheme "likely results in a cognizable disparity in the electoral opportunities of minority as compared to white voters" to support a § 2 claim at trial on the merits. ER0016. Furthermore, the district court correctly weighed the presented evidence and determined that when taking into account the entire election scheme and the significant conveniences provided to voters in Arizona to encourage voting, the OOP practice did not "more than minimally burden voting rights." *Id.* These district court findings, based on the evidence presented, are supported by a long line of cases including *Crawford v. Marion County Election Board,* 553 U.S. 181, 200-02 (2008); *Ohio Democratic Party v. Husted,* --- F.3d ---, No. 16-3561, 2016 WL 4437605, at ** 7-8, 12 (6th Cir. Aug. 23, 2016); *Frank v. Walker*, 768 F.3d 744, 745-46 (7th Cir. 2014); and this Court's *en banc* decision in *Gonzalez v. Arizona*, 677 F.3d 383, 406-10 (9th Cir. 2012) (en banc).

Therefore, as the district court's findings are entitled to deference and Plaintiffs have failed to show that the district court somehow abused its discretion, this Court should affirm the ruling of the district

court denying Plaintiffs their requested preliminary injunction.

VI. ARGUMENT

A. Standard of Review

This Court reviews the denial of a preliminary injunction for abuse of discretion. *Perfect 10, Inc. v. Amazon.com, Inc.,* 508 F.3d 1146, 1157 (9th Cir. 2007). "Factual findings are reviewed for clear error, and legal conclusions are reviewed de novo." *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2013). This Court's determination that it "would have arrived at a different result if it had applied the law to the facts of the case" is not cause for reversal. *Sports Form, Inc. v. United Press Int'l, Inc.,* 686 F.2d 750, 752 (9th Cir. 1982); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015); *United States v. Hinkson,* 585 F.3d 1247, 1261–62 (9th Cir. 2009) (en banc).

In fact, the "review is limited and deferential." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). This Court has "held that an order 'will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.'" *Id.* It does "not review the underlying merits of the case." *Id.* (internal punctuation omitted).

Here, Plaintiffs do not dispute how the district court reached its legal conclusions (*i.e.*, what legal test to apply), but rather object to the district court's factual findings and how it applied the law to the facts that have existed in some form for at least the past 46 years. Dkt. Entry 2-1, at 8-12; Dkt. Entry 11, at 1-4. As reflected *infra*, the district court's factual findings are entitled to deference on appeal so long as they were not clearly erroneous. And they were not. The district court's decision should thus be afforded that deference, and it should be affirmed. *Gonzalez,* 677 F.3d at 406-07; *Sw. Voter Registration Educ. Project*, 344 F.3d at 918 ("[O]rder 'will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.'").

This Court in *Gonzalez* specifically agreed with this standard of review and deferred "to the district court's superior fact-finding capabilities," reviewing for clear error the district court's findings of fact, "including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2." *Gonzalez ,* 677 F.3d at 406, *citing Old Person v. Cooney,* 230 F.3d 1113, 1119 (9th Cir. 2000). In fact, in *Gonzalez*, this Court reviewed the exact legal analysis utilized by the district court here and determined that there was no

clear error in concluding that plaintiff in that case failed to establish the election statute at issue had a disparate impact on a minority. *Id.*, at 406-07. The same standard of review is therefore applicable.

B. The District Court Properly Found Plaintiffs Unlikely to Succeed on the Merits of Their Voting Rights Act Claim, as the Regulation of Out-of-Precinct Voting Does Not Violate Section 2.

The district court properly found that Plaintiffs failed to show a likelihood of success on their Section 2 claim, which has two essential elements: (1) a challenged voting practice imposes a discriminatory burden on a minority group (2) as it interacts with social and historical conditions that have produced discrimination. *See Gonzalez*, 677 F.3d at 405-06;[8] 52 U.S.C. § 10301; *see also Husted*, 2016 WL 4437605, at **13-14. As the district court properly found, Plaintiffs failed to present the necessary evidence at both steps.

[8] In their Emergency Motion for Injunction Pending Appeal (Dkt. Entry 2-1) and Reply in Support of the same (Dkt. Entry 11), Plaintiffs largely ignore this Circuit's law in *Gonzalez*, instead citing to the § 2 analysis of *League of Women Voters of N.C. v. North Carolina ("LOWV")*, 769 F.3d 224 (4th Cir. 2014), which decision is founded upon significantly different well-developed facts and from another circuit.

1. Plaintiffs Failed to Show a Disparate Impact on Any Minority Group, and Failed to Show that the Challenged Practice Caused Any Claimed Disparity.

The district court correctly concluded that Plaintiffs failed to produce the necessary evidence to show the requisite disparate impact to meet the first step of the § 2 test for two independent reasons, each of which was backed by substantial § 2 legal authority and the entire record below. ER0004-10.

a. 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") (emphasis added). The district court further 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, a non-statistician) correctly estimated the race of Arizona voters through surname data, which is a matter of dispute,[9] "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 by themselves 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"). Underscoring this, Dr. Rodden provided no information on his rate of error in predicting voter race. ER0146-47, ER0314-408. Dr. Rodden admitted in his deposition that the documents he reviewed did not actually identify voters' race. ER2025. He claimed he predicted each voter's race by using a statistical algorithm available online—that he

[9] All Defendants disputed that Dr. Rodden used accurate or reliable methods. *See* ER1855-57, 61; ER2243-81 (similar).

then admitted he had *no part* in developing. ER1856-57, 2025.[10] Again, Dr. Rodden provided no information on the algorithm's margin of error, nor did he attempt to verify its accuracy as to Arizona voters. *Id.* And the individuals who did create the algorithm have not offered any evidence in this case to establish its reliability.

This matters—and the district court properly honed in on it—because Dr. Rodden cannot serve as the spokesman for a statistical formula that is not his own. "The expert witness must in the end be giving his own opinion. He cannot simply be a conduit for the opinion of an unproduced expert." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 664 (S.D.N.Y. 2007) (individual's "occasional use of statistics in his daily life simply does not qualify him as an expert on that complex subject").[11] With no other evidence on disparate impact

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[10] Although Dr. Rodden contended that he sometimes used statistics in his work, he does not have a statistics degree, last took a formal statistics course about 16 years ago, does not describe himself professionally as a statistician, and is not a member of the American Statistical Association, the "[p]rofessional association for people who focus on statistics as their profession." ER2022-24.

[11] *See also In re Whirlpool Corp. Front-Loading Washer Prods.*, 45 F. Supp. 3d 724, 741 (N.D. Ohio 2014) ("non-statistician [was] unqualified to say" that another's "statistical analysis [was] valid"); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722,732 (10th Cir. 1993) (expert testimony excluded when he "clearly adopted the projections" of another, thus

and no way to determine if a meaningful disparate impact actually exists (because of the lack of margin of error combined with alleged low disparate rates opined on by Plaintiffs' expert), the district court correctly determined that Plaintiffs' § 2 claim necessarily fails.[12]

Thus the district court properly weighed the evidence available and concluded that Arizona's practice of rejecting OOP ballots had not resulted in any "meaningful impact" on 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, is on point in supporting 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 if Proposition 200 were not enacted, it might potentially allow the total Latino electorate to increase by 0.1%

"assum[ing] the very matter at issue on which he was called to express his opinion").

[12] Dr. Rodden also compared the locations of OOP votes to racial data at the census block level, but he admitted this analysis "may fall prey to so-called aggregation bias." ER0347. The other evidence cited by Plaintiffs for an alleged disparate impact, ER0147, does not provide data on out-of-precinct provisional ballots. ER0720 (hearsay evidence relating to total number of rejected provisional ballots); ER0767 (statistics on total number of provisional ballots cast).)

and Latino voter turnout to increase by 0.06%. 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.*; *see also Gonzalez*, 677 F.3d at 406 (internal quotations and citation omitted)(recognizing that the district court concluded that the voter ID law did not violate Section 2 since it did "not have a *statistically significant* disparate impact on Latino voters."). As this case involves similar miniscule percentages and no error rate to evaluate the veracity of the statistical analysis, the same is true here.

Despite this, Plaintiffs argue that a § 2 violation can be established if *any* minority voter is denied the equal opportunity to vote. Dkt. Entry 2-1, at 9; Dkt. Entry 11, at 2. Plaintiffs desire that this then becomes a legal issue and not a factual issue for which the district court is otherwise entitled to deference and discretion. That is not correct. The determination of the weight of the evidence, including the

utilization of statistical data, is a matter left in the discretion of the district court in determining whether to grant preliminary injunction. *See Gonzalez*, 677 F.3d at 406-407.

Furthermore, Plaintiffs' argument that "any" impact is required defies both logic and the evidence and argument they presented to the district court.[13] Specifically, if "any" impact is the standard, Plaintiffs would not even have to provide statistical data for the district court's consideration. *See* ER0146. Instead, a plaintiff could provide only anecdotal evidence from individual voters reflecting that (1) they are a member of minority class and (2) the OOP regulations interact with the alleged social and historical conditions so that individual voter is denied the right to vote. This rationale is more akin to an Equal Protection claim under the Fourteenth Amendment, on which Plaintiffs also fail to meet their burden, as discussed *infra*. Interestingly, Plaintiffs' entire Complaint, on all claims, is completely void of such evidence by individuals that are actually directly impacted. Instead, as to the OOP §2 claim, Plaintiffs provided statistical analysis only, and now object to

[13] Interestingly, in regard to Plaintiffs' H.B. 2023 claims, they argued below and before this Court in the related case (No. 16-16698) that *no* quantitative evidence is actually needed.

how the district court evaluated and weighed the evidence. *See* ER0146.

Plaintiffs' reliance on *LOWV* is misplaced. Dkt. Entry 2-1, at 9; Dkt. Entry 11, at 2. In stark contrast to this case, *LOWV* involved source data where the race of voters was actually known and readily available; accordingly, expert estimates of race, and their unavoidable measurement error, were not required in that case. *See LOWV*, 769 F.3d at 244; *see also* Doc. 117-2 in *United States v. North Carolina*, No. 1:13-CV-861 (M.D.N.C.) at 97 (discussing source data for disparate impact calculations). Particularly, the district court in *LOWV* "accepted the determinations of plaintiffs' experts that" African-American voters disproportionately voted out-of-precinct. *LOWV*, 769 F.3d at 233. This was easy for the *LOWV* plaintiffs to do and was not speculative, as the actual data was readily available on the North Carolina OOP provisional balloting practices because, by that state's law at the time, the provisional ballots were accepted. *Id.*; *see also* Dkt. Entry 11, at 7 (referencing how OOP ballots were accepted in North Carolina, and therefore easily categorized). The district court did not accept such determinations here and, with good reason, did not credit Plaintiffs' expert's algorithm and results (especially without a stated margin of

error), making the actual data in *LOWV* a significant distinguishing factor for that case from another circuit. *Id.*

Here, as stated *infra*, Plaintiffs' expert Dr. Rodden predicted each voter's race by using a statistical algorithm available online that he had *no part* in developing. ER1856-57, 2025.[14] Dr. Rodden did not provide any information on the algorithm's margin of error, nor did he attempt to verify its accuracy as to Arizona voters. ER3757-58, at 177:19–22, 178:9–17.

The district court's decision is, therefore, in line with direction from Congress and the history of § 2 cases. The plain language of the statute specifically mandates a comparison between minority voters and white voters. *See* 52 U.S.C. § 10301 (employing quantifying and comparative phrases, including "on account of race or color" and "not equally open"). The very nature of the term "disparate impact" implicates a comparative factual exercise with meaningful quantitative data, as recognized in this Court's cases outside the voting rights context. *See Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008) (Fair Housing Act); *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749

[14] Again, as referenced in footnote 10, *supra*, Dr. Rodden's statistical bona fides are questionable. ER2022-24.

(9th Cir. 2003) (Age Discrimination in Employment Act). While Plaintiffs have even argued in the related case (No. 16-16698) that the remedial purpose of the VRA means no quantitative evidence is necessary, their authorities are remarkably distinguishable. Here, Plaintiffs cite *Chisom v. Roemer*, 501 U.S. 380, 397 (1991), and at 407-08 (Scalia, J., dissenting) for the proposition that they have met their burden to show a disparate impact. Dkt. Entry 11, n.1. The *Chisom* court cited this purpose, however, in the different context of Section 2 as applied to a vote-*dilution* claim relating to state judicial elections. *See Chisom*, 501 U.S. at 403-04.

Congress specifically targeted the remedial nature of § 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 fail to show a likelihood of success on their § 2 claim. *Gonzalez*, 677 F.3d at 405; *see also Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate impact

on a racial minority does not satisfy the § 2 'results' inquiry.").

Plaintiffs further contend that the district court erred in assessing the claimed statistical disparities in relation to total votes cast rather than just in-person votes.[15] Dkt. Entry 2-1, at 10; Dkt. Entry 11, at 2. They then contradict this argument, however, by repeatedly arguing 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); *see also* ER0146 (recognizing the totality of circumstances standard). Plaintiffs again ignore the statutory text of § 2, which makes clear that a violation only occurs when, among other things, the challenged practice give a minority group "less opportunity" to "elect representatives of their choice." 52 U.S.C. 10301(b). Only through consideration and comparison of total votes cast can a court determine whether minorities have the same substantial opportunity "to elect

[15] Again, Plaintiffs' claim this is legal error. This is not correct. Rather, it is a well-taken review and balancing of the facts and factors at issue—an exercise fully within the purview of the district court and for which its review is entitled to deference. *Gonzalez*, 677 F.3d at 406-7.

representatives of their choice." *Id.*[16]

Moreover, and contrary to Plaintiffs' assertion (Dkt. Entry 2-1, at 10), the Fifth Circuit's decision in *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), does not support Plaintiffs' argument that the district court should have only considered in-person votes. *Veasey* merely stated that, for purposes of assessing the specific burden on plaintiffs of a law that required voters to show identification 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, in discussing the quantitative evidence on disparate impact, the Fifth Circuit addresses evidence on *all* registered voters, not just

[16] Plaintiffs contend that "many voters are never told that their OOP ballots will be discarded," citing an under advisement ruling in *Jones v. Reagan*, No. CV-2016-014708, at 5 (Ariz. Super. Ct. Sept. 9, 2016). Dkt. Entry 2-1, at 11. But unlike this case, the Maricopa County Superior Court in *Jones* was not addressing a §2 claim and explicitly stated that "[t]he issue is *not* the State's policy of rejecting all provisional ballots cast by voters at the wrong precinct." *Jones*, No. CV-2016-014708, at 5. (Emphasis added). And, regardless of what evidence may have been presented in state court in *Jones*, the district court in this case rejected any contention that Arizona has any systemic issues with voters being provided incorrect information concerning OOP ballots. *See* ER0012 ("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"). Plaintiffs cannot show that this factual finding was clearly erroneous and it actually supports the district court's order.

those voters who used in-person voting. *See id.* at 250-51.

Likewise, Plaintiffs' conclusory effort to negate the extensive outreach by governmental agencies to educate voters of their correct precinct is misplaced and not supported by the record. Dkt. Entry 2-1, at 11-12. The district court properly considered these extensive efforts, ER0012, in reviewing Arizona's election system as a whole, including all the various means of voting within a 27 day period before the election,[17] to decide that Plaintiffs had failed to carry their evidentiary burden in regard to the existence of disparate impact.

b. Plaintiffs Failed to Show That OOP Regulation Caused Any Claimed Disparity.

In addition to presenting meaningful statistical comparison data to show that any alleged burden is disproportionally felt by minorities, a plaintiff must also show for step one of the § 2 test that the alleged burden actually "result[s] in a denial or abridgement" of the opportunity to vote. 52 U.S.C. § 10301(a). As the district court noted, a plaintiff

[17] Plaintiffs ignore that under Arizona law, a voter can deliver an early ballot at *any* polling place on the day of the election. A.R.S. § 16-548(A). They further ignore the option to vote early and in-person at various vote centers in a 27-day period before the election. ER2464-65. Voters who use these options, or who mail in an early ballot, cannot be affected by OOP regulation.

must show that the challenged practice (*e.g.*, OOP regulations) itself likely causes the statistically disparity in denial of the vote. ER0008. This Court stated the requirement succinctly in *Gonzalez* which held "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." 677 F.3d at 405 (internal quotation marks omitted).

Minimal inconveniences on voting do not satisfy the causal requirement to violate § 2. *Frank,* 768 F.3d at 753 (photo ID requirement that did not make it "needlessly hard" to vote did not violate § 2); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (§ 2 requires "a denial of 'meaningful access to the political process'") (quoting *Osburn v. Cox*, 369 F.3d at 1289).

Here, as an alternative holding to Plaintiffs' failure to provide a meaningful and necessary comparative quantitative analysis to meet the requisite heavy burden, the district court also 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 regulation of OOP voting. ER0008. Simply, the

OOP regulatory scheme did not cause the claimed disparity.

Instead, as the district court explained, Plaintiffs had attributed incidents of OOP voting not to the requirement that OOP ballots not be counted, but instead to "systemic problems in Arizona's administration of elections," without Plaintiffs actually challenging any of those "problems." ER0008-09.[18] By Plaintiffs' own admission, then, OOP voting was allegedly caused by societal issues wholly outside of government control. *See* Dkt. Entry 11, at 3 (recognizing additional causes). Plaintiffs' claim thus fails under *Gonzalez*. *See Gonzalez*, 677 F.3d at 405 ("[P]roof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial.")(internal quotation marks omitted).

Plaintiffs contend that this alternative factual analysis was erroneous because they were "not required to challenge or seek to rectify every aspect of the electoral system that may be flawed." Dkt. Entry 2-1, at 14; Dkt. Entry 11, at 3. But, Plaintiffs fail to appreciate that they cannot rely solely on a challenge to the OOP regulatory

[18] As repeatedly raised before the district court, Plaintiffs have not challenged any Arizona statute as allegedly violating § 2 (or the Constitution). ER0014.

scheme, a long-standing system that does not actually *cause* the disparities of which they complain. *See Gonzalez*, 677 F.3d at 405 (challenged practice must cause complained of disparity). 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.[19] As Plaintiffs failed to meet its burden that they would likely succeed on the merits as to step one of their § 2 claim, the mandatory preliminary injunction request was properly denied by the district court.

2. Plaintiffs Failed to Show the Requisite Causal Link Between the Out-of-Precinct Regulation and Their Selective Senate Factor Evidence.

If a plaintiff is able to show a disproportionate burden exists and the challenged voting qualification causes that disparity, a plaintiff must then overcome the second step that requires a showing that the

[19] Additionally, Plaintiffs cannot show a § 2 violation when Arizona extends to all voters the same opportunity to identify and vote at their assigned polling place. *Frank*, 768 F.3d at 754 ("It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it"). Voters who fail to satisfy this minimal hurdle have not been not denied an equal opportunity to participate in the political process.

"challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions." *Husted*, 2016 WL 4437605, at *14; *see also Gonzalez*, 677 F.3d at 405-06.

Because Plaintiffs failed to show a likelihood of success on the first step of a Section 2 claim (disparate impact), the district court had no need to reach the second step. Regardless, and in the alternative, 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."[20] *Id.* The district court rejected Plaintiffs' factual argument that these lingering socioeconomic disparities were enough to show

[20] In their Reply in Support of Their Motion for Injunction Pending Appeal, Plaintiffs acknowledge that other practices are actually at issue for voters casting ballots in the wrong precincts. Dkt. Entry 11, at 3. They fail to show how these more predominant factors will ever be addressed to ensure election administration consistency in Arizona.

under a totality of circumstances 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.*

Other courts have similarly declined to interpret the VRA in such a manner as to completely handcuff states from enacting reasonable voting regulations. *See Frank*, 768 F.3d at 754 ("[I]t would be implausible to read § 2 as sweeping away almost all registration and voting rules."); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 867 (5th Cir. 1993) ("[S]ocioeconomic disparities and a history of discrimination, without more" are insufficient to show §2 violation).

Although Plaintiffs contend that they showed "particular causal linkages" or "in part" linkage between historical discrimination and socioeconomic disparities (Dkt. Entry 2-1, at 15; Dkt. Entry 11, at 3), they fail to show that the district court clearly erred in rejecting this alleged factual contention. Of note, the district court did not "discount"

the "lingering effects" of racial discrimination with respect to socioeconomic disparities in Arizona, but it also concluded that Plaintiffs had failed to show "that racial discrimination is a *substantial cause* of these disparities," such as through "evidence of private or state-sponsored discrimination in housing," which Plaintiffs failed to provide. ER0009-10 (emphasis added). Plaintiffs appear to expect the government to correct all historical wrongs, but, fatally, cannot link government action to the socioeconomic disparities of which they complain. *See Frank*, 768 F.3d at 753 (§ 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." Dkt. Entry 2-1, at 15. But the cases cited in support are easily distinguished. In *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), the Fourth Circuit considered whether election laws had been enacted with racial discriminatory *intent*, which is not an issue before this Court.[21] And, in *Veasey*, with the luxury of a full trial and a record

[21] Moreover, both *McCrory* and *LOWV* involved circumstances in which a state had allowed OOP voting for some time, and thus had the infrastructure in place to handle OOP voting, but then took away the

"span[ning] more than one hundred thousand pages," the Fifth Circuit found that Texas' "history of State-sponsored discrimination *led to* . . . [socioeconomic] disparities" in that state. *Veasey*, 830 F.3d at 249, 259 (emphasis added.) As determined by the district court, Plaintiffs failed to support such a direct causal link in this case. ER0009.[22]

Furthermore, and directly contrary to the proper application of the totality-of-the-circumstances test, Plaintiffs simply ignore evidence or factual findings by the district court that undermine their § 2 claim. *See* Dkt. Entry 11, at 3-4. However, consistent with the totality of the circumstances standard, the district court did not limit its analysis to Plaintiffs' evidence; it considered the totality of the circumstances, as it is required to do. ER0004-10. This analysis thus necessarily accounted for Defendants' evidence on such issues as the lack of state-sponsored

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OOP voting option with the specific intent to discriminate. *See McCrory*, 831 F.3d at 217, 230; *LOWV*, 769 F.3d at 233. By contrast, Plaintiffs here have not shown that Arizona has any infrastructure in place for counting OOP ballots.

[22] Also, in analyzing the second step of § 2, the Fifth Circuit in *Veasey* concluded that "[t]he evidence supports the district court's finding that the legislature knew that minorities would be most affected by the voter ID law." *Veasey*, 830 F.3d at 261-62. By contrast, there is no such evidence in the record concerning Arizona's OOP voting regulatory scheme, which has been in place since at least 1970. ER0002.

discrimination related to the alleged disparities and the significant efforts by governments at every level to encourage voting via multiple methods within the 27-day window before the election. *See* ER0008-09, 0012; *see also* ER2464. Plaintiffs' attempt to micromanage elections, to the benefit of the top of the ballot only, ignores this most important direction and should be rejected. *See Husted*, 2016 WL 4437605, at *1 (noting "yet another appeal . . . asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes").

Simply, Plaintiffs did not provide adequate factual evidence to support their § 2 claim to show they would likely succeed on the merits. Therefore, the district court did not abuse its discretion and instead properly determined that a mandatory preliminary injunction was not appropriate. This Court should defer to the district court's factual findings.

C. The District Court Properly Found Plaintiffs Unlikely to Succeed on the Merits of Their Remaining Claims, as the Regulation of Out-of-Precinct Voting Does Not Violate the Fourteenth Amendment.

There is no dispute that the district court employed the proper legal standard to find that Plaintiffs were unlikely to succeed on their

constitutional claims. As noted by this Court recently in *Public Integrity Alliance, Inc. v. City of Tucson*, No. 15-16142, 2016 WL 4578366, at **3-4 (9th Cir. Sept. 2, 2016), this is "a balancing and means-end fit analysis."

> The Supreme Court delineated the appropriate standard of review for laws regulating the right to vote in *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). *Burdick* recognized that governments necessarily 'must play an active role in structuring elections,' and '[e]lection laws will invariably impose some burden upon individual voters.'
>
> . . .
>
> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments 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.'
>
> (internal punctuation and citations omitted).

Plaintiffs' only issue is how the district court weighed the facts in declining to determine that Plaintiffs would likely prevail on the merits. Dkt. Entry 11, at 5. The district court's findings should be affirmed.

1. The District Court Properly Found Plaintiffs Unlikely to Succeed on the Merits of Their *Anderson-Burdick* Claim.

Plaintiffs contend that rejecting OOP ballots violates the Fourteenth Amendment because of the burden it imposes on voters. Dkt. Entry 2-1, at 16-18. This Court has recognized, however, that "governments necessarily must play an active role in structuring elections, and [e]lection laws will invariably impose some burden upon individual voters." *Pub. Integrity All., Inc.*, at *3 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)) (internal quotations omitted; alteration in original). A "flexible standard" thus applies when "considering a challenge to a state election law" that "must weigh 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." *Id.* (quoting *Burdick*, 504 U.S. at 434) (internal quotations omitted). Under this framework, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions' upon the First and Fourteenth 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).[23]

Here, on the first part of the balancing test, the district court correctly factually 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). By comparison, the Supreme Court has explained that the much more onerous burdens of "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

Arizona's OOP regulations have *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 centers that are open for in-person voting during the 27 days prior to the General Election. ER0011, 2464-65; *see also* ER0012 ("'[I]t does not seem to be much of an

[23] "This framework is commonly referred to as the *Anderson-Burdick* test, named after the two Supreme Court cases from which it derives." ER0011.

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.'") (internal citation omitted).

Plaintiffs have not shown that Arizona's longstanding restriction on OOP voting imposes any severe burden, or even any moderate burden, on voting. To the contrary, the district court found that Arizona uses a variety of methods to educate both English or 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; *see also* ER1877, ER1881, ER2004. Plaintiffs do not challenge these factual findings. Plaintiffs also do not take issue with the district court's recognition that they are not actually challenging the alleged practices that may actually be causing the alleged burden, namely changes in voting locations between elections, poll location placement generally, inconsistent election regimes, and procedural errors.[24] ER0011-12. Nor

[24] Of note, this is not an issue for the General Election, as the vast majority of the polling locations in Maricopa County will be the same as those used in the 2016 primary election and the previous general election in Arizona. ER2209-10. Thus, by now, voters should be well aware of their assigned polling location.

did any of Plaintiffs' declarants suggest they are unable to ascertain or travel to their assigned precinct.

Plaintiffs suggest that the quantity of previously rejected OOP ballots, in and of itself, establishes a severe burden. Dkt. Entry 2-1, at 17; Dkt. Entry 11, at 4. But that is not correct. In *Crawford*, the Supreme Court assessed the burden on *individual* voters of a voter-ID law. *Crawford*, 553 U.S. at 198; *see also Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 729 (9th Cir. 2015) (courts assess "the severity of the burden the election law *imposes on the plaintiff's rights*") (internal quotations and citation omitted; emphasis added). *Crawford* thus upheld more onerous burdens than the slight inconvenience of ascertaining and traveling to an assigned polling place. *See Crawford*, 553 U.S. at 198.

Without challenging any specific law, such as A.R.S. §§ 16-122 or 16-411, Plaintiffs also contend that Arizona's election administration is confusing due to changes in polling locations. Dkt. Entry 2-1, at 17; Dkt. Entry 11, at 5. As noted by the district court, Plaintiffs do not dispute that Arizona voters can ascertain their correct voting location with

minimal effort.[25] ER0012.

Again, Plaintiffs simply point to the quantity of rejected OOP ballots in past elections. Dkt. Entry 2-1, at 17; Dkt. Entry 11, at 5. This is not enough. The mere fact that some voters have showed up 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. Emps. 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 (the state's regulatory interests), Plaintiffs do not dispute—in any of their briefing—the district court's finding that a precinct-based voting system provides "significant and numerous" advantages. ER0013 (quoting *Sandusky*,

[25] Moreover, Plaintiffs' "voter confusion" argument is unsupported by evidence. Plaintiffs again rely on Dr. Rodden, but he did not analyze (1) the different methods by which voters can learn their voting location, ER2026-27; (2) the extent to which General Election polling places in 2016 will be the same as previous elections, ER2028-30; or (3) where any specific polling places should be placed to allegedly avoid confusion.

387 F.3d at 569). The "significant and numerous" advantages of the precinct system far outweigh any minimal burdens it imposes on voters. *Id.* The system (1) enhances predictability by "cap[ping] the number of voters attempting to vote in the same place on election day;" (2) "allows each precinct ballot to list all of the votes a citizen may cast for all pertinent [elections];" (3) allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing;" (4) "makes it easier for election officials to monitor votes and prevent election fraud;" and (5) "generally puts polling places in closer proximity to voter residences." *Id.*; *see also* ER2083 ("[V]ote centers are not appropriate for every jurisdiction" and can lower turnout.).

The same advantages apply to Arizona's restriction on out-of-precinct voting. ER1871-73. While Plaintiffs express concern about disenfranchisement, they ignore that requiring voters to go to an assigned location eases this concern by ensuring voters receive correct ballots with all races in which they are eligible to vote. ER1871-83, 2005-06. Plaintiffs further ignored below that allowing voters to vote at any county location could increase wait times—the very issue Plaintiffs originally allegedly sought to avoid. *See* ER2083 (vote centers can

"increase, rather than decrease, voter wait times").

Plaintiffs instead argue that their requested 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 (that includes two of the Plaintiffs' campaigns) will be counted. Dkt. Entry 2-1, at 17-18. But Plaintiffs' 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 to 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."[26] *Id.* (quoting *Sandusky*, 387 F.3d

[26] In their Reply in Support of Their Motion for Injunction Pending Appeal, Plaintiffs argue that there is not a "shred of evidence" to support the application of these factors. Dkt. Entry 11, at 6. Yet, the

at 569).

Moreover, and contrary to Plaintiffs' assertions otherwise, Arizona's OOP model is the 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 ("While comparisons with the laws and experience of other states may not be determinative of a challenged law's constitutionality, to ignore such information as irrelevant is to needlessly forfeit a potentially valuable tool in construing and applying 'equal protection of the laws,' a constitutional standard applicable to *all* the states."). Indeed, in enacting HAVA, Congress expressly rejected a proposed requirement that all states allow OOP voting. *See Sandusky*, 387 F.3d at 575 (HAVA was "in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered.") quoting 148 Cong. Rec. S10488, S10493 (daily ed. Oct. 16, 2002)).

By contrast, Plaintiffs' proposal to ensure a modified voting center type model, which is in essence what Plaintiffs are requesting, is

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Sandusky court, as noted by the district court, already substantiated this rationale. Regardless, the individual Defendant-Intervenors presented their concerns about Plaintiffs' ill-founded plan. ER1873-74, ER1877, ER1882, ER2005.

frowned upon until states actually have the resources and administrative support to ensure this model is actually sustainable. *See* ER2083 (statement by bipartisan presidential commission that "vote centers are not appropriate for every jurisdiction, and election authorities need to take a number of key factors into account if and when they transition to them"). The irony of Plaintiffs' requested relief is that counties may have no way to ensure proper manning of polling places if an injunction is granted and the potentially resulting long wait times, voter confusion, and voter confidence in the election system that Plaintiffs objected to in their Amended Complaint could occur again. *See* ER0026, 46-47.

In short, Plaintiffs do not object to the legal test used by the district court, and they fail to show that the district court abused its discretion in holding that the State has long held important interests in regulating OOP voting that outweighed any minimal burden on voters. Therefore, Plaintiffs fail to show a likelihood of success on their constitutional claim.

2. The District Court Properly Found Plaintiffs Unlikely to Succeed on the Merits of Their 'Disparate Treatment' Equal Protection Claim.

Before the district court, Plaintiffs asserted a "disparate treatment" Equal Protection claim, arguing that if some Arizona counties allow out-of-precinct voting through vote centers, then *all* counties *must* count votes cast out of precinct for those specific races in which a voter was eligible to vote. Below, Plaintiffs cited *Bush v. Gore*, 531 U.S. 98, 104-05 (2000), for the standard that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." ER0064. The district court rejected this claim, concluding that Plaintiffs' theory was not "coherent." ER0013. It is unclear whether Plaintiffs' are pursuing the claim on appeal. *See* Dkt. Entry 2-1, at 16-17. Regardless, the district court's holding was correct for several reasons.

First, Plaintiffs did "not challenge A.R.S. § 16-411(B), which allows Arizona counties to choose between precinct-based and vote center models, nor do they seek an injunction requiring all counties to use the same voting system." ER0014. Consequently, "Plaintiffs' requested injunction would not remedy the inequities they have

identified." *Id.* Whereas voters who live in Arizona counties that utilize vote centers can show up at any vote center in that county and receive the correct ballot with *all* races in which they are eligible to vote, the same will not be true for voters who live in counties that use a precinct-based system. *Id.*

Second, this Court has recognized the authority of local jurisdictions to devise their own election systems. *See Pub. Integrity All., Inc.*, at *3. Specifically, in *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003), this Court explained that "it is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems, and "[s]o long as their choice is reasonable and neutral, it is free from judicial second-guessing." *See also id.* ("California made a reasonable, politically neutral and non-discriminatory choice to certify touchscreen systems as an alternative to paper ballots. Likewise, Riverside County in deciding to use such a system. Nothing in the Constitution forbids this choice."). The Supreme Court has further recognized the wisdom inherent in allowing localities to make reasonable and neutral choices unquestioned. *See Bush v. Gore*, 531 U.S. at 109 ("[L]ocal entities, in the exercise of their expertise, may

develop different systems for implementing elections").

Third, there is nothing "arbitrary" about allowing county jurisdictions to decide for themselves whether to use vote centers or the precinct model, as Plaintiffs contended. As referenced *supra*, a bipartisan federal commission determined that "election authorities need to take a number of key factors into account" before implementing vote centers, which are "not appropriate for every jurisdiction."[27] *See* ER2083. This flexibility allows each county to consider its unique registered voter population; population density; geography; available funding, staff, equipment, and other resources; and other factors that inevitably vary by county. *See* ER2320.

As such, to the extent that Plaintiffs intend to pursue an Equal Opportunity claim on appeal, the district court correctly weighed the evidence presented and determined that Plaintiffs are unlikely to succeed on the merits. ER0014. Thus, a mandatory preliminary injunction benefitting primarily only two Plaintiffs is unwarranted.

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[27] Like Arizona, several other states allow local governments to decide whether to use vote centers or precinct-based systems. *See* Ark. Code § 7-1-113; Ind. Code §§ 3-11-18.1-1 *et seq.*; Tex. Elec. Code § 43.007; Utah Code § 20A-3-703; Wyo. Stat. § 22-1-102(xlix).

D. The District Court Properly Found No Likelihood of Irreparable Harm Absent Relief.

The district court's decision rests on proper findings of fact and conclusions of law regarding *all* of the factors to be considered upon denial of a preliminary injunction.

Having concluded that Plaintiffs were unlikely to succeed on the merits, the district court also held they did not show they would suffer irreparable harm. ER0014. Also, 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 has been available for all general elections in Arizona since 2008. ER0014-15. Plaintiffs do not challenge any of 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. Dkt Entry. 2-1, 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 inexcusable delay should be excused because they have asserted constitutional claims. Dkt. Entry 2-1, at 18. But even setting aside Plaintiffs' failure to come close to showing a likelihood of success on those claims, courts frequently reject requests for interim relief in election matters when a plaintiff fails to timely assert constitutional claims. *See Ariz. Libertarian Party,* 2016 WL 3029929, at *2 (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).

Because they failed to provide sufficient evidence to establish a likelihood of success on the merits or any justification for their years of

delay in challenging Arizona's longstanding practice of rejecting OOP ballots, Plaintiffs cannot show irreparable harm, "the *sine qua non* for all injunctive relief." *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978).

E. The Balance of Hardships Favors the State Defendants, County Defendants, and Defendant-Intervenor Candidates, as Well as the Necessary Parties that Plaintiffs Failed to Name.

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." Dkt. Entry 2-1, 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 if Plaintiffs' requested mandatory preliminary injunction is granted.[28] Instead, Plaintiffs point to North Carolina,

[28] Plaintiffs argue that "Defendants previously assured the court that the extended briefing schedule that they requested would not result in a

which already has a system in place to count votes cast in certain races on OOP provisional ballots and could easily revert back to that. *See* Dkt. Entry 11, at 7.

In addition to the significant hardships Plaintiffs' relief would pose for state and county election administrators, Plaintiffs fail to consider that their requested mandatory preliminary injunction could result in significant, unintended voter displacement, which contradicts the public interest and directly harms candidates for local office, including the individual Defendant-Intervenors. Specifically, if voters have their ballots counted for national, statewide, and countywide races regardless of whether they vote in the correct precinct, they may decide (or be nefariously directed) to vote elsewhere. *See* ER1873, ER1882, ER2005. Other voters may incorrectly believe, if Plaintiffs' requested interim relief is granted, that they can vote at any location and actually receive the correct ballot. *See* ER1882, ER2005. Under either scenario, many voters will likely not receive the correct ballot with *all* races in

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ruling too late to be effective." Dkt. Entry 2-1, at 19 n.5. This isolated statement does not show, however, that the counties, which are absent from this case, could come up with the processes or resources for such a massive endeavor in the very short time remaining before the General Election.

which they are eligible to vote, resulting in disenfranchisement in the elections for local officials. *See* ER1873-74, ER1877, ER1882, ER2005.

This is an important factor that Plaintiffs ignore because the relief requested is clearly meant to only protect the top of the ballot candidates, two of which are represented by Plaintiffs here. Although Plaintiffs ignore the issue (Dkt. Entry 11, at 7-9), local candidates—from *all* political parties, independent or non-partisan offices, and local bond campaigns—will have to expend significant resources to ensure that voters actually vote in the correct polling place if Plaintiffs prevail. While several individual Plaintiffs have such substantial resources to ensure their supporters get to the correct precinct poll, local candidate and issue proponents do not. *See Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (injury can occur when a law compels a party to devote resources to get supporters to the polls).

At this late date, such a hindrance when candidate resources are already dedicated is inappropriate, especially when Plaintiffs could have brought the action sometime over the last 46 years. *See Purcell,* 549 U.S. at 4-6 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent

incentive to remain away from the polls.").

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 n.1. Had the district court reached the issue, it would have denied the preliminary injunction motion under Federal Rule of Civil Procedure 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 "Court does not have before it the parties necessary to grant through preliminary injunction the relief plaintiffs seek."); *Escamilla v. M2 Tech.*, No. 4:11CV516, 2012 WL 4506081, at *6 (E.D. Tex. July 6, 2012) (similar). Specifically, "[i]n the absence of . . . a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, the merits may not be reached and a preliminary injunction may not be granted." *Boat Basin Inv'rs, Inc., v. First Am. Stock Transfer, Inc.*, No. 03 Civ. 493, 2003 WL 282144, at *1 (S.D.N.Y. Feb. 7, 2003).

Rule 19(a) requires a party to be joined if feasible and 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)(i). Only one of these factors need be present; both are present here.

Critically, and contrary to Plaintiffs' assertions otherwise (Doc. 11, at 7 n.4),[29] Arizona law makes the counties responsible for counting (or rejecting) votes after general elections, including provisional ballots cast within their jurisdiction. *See, e.g.*, A.R.S. § 16-531; A.R.S. § 16-584(E); A.R.S. § 16-601; ER2656. Yet, Plaintiffs have not named *any* county officials as defendants for purposes of their OOP claims, despite being placed on notice of this failure as early as May 2016 in the district court proceedings. *See* ER3956-57.

Plaintiffs' proposed mandatory preliminary injunction will directly

[29] In their Reply in Support of Their Motion for Injunction Pending Appeal (Doc. 2-1, at 7 n.4), Plaintiffs cite an Article III standing case from another circuit to counter the point that they have sued the wrong defendant. Yet *American Civil Liberties Union v. Florida Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993), states that the rule Plaintiffs cite applies "when a plaintiff *challenges the constitutionality of a . . . law*." *Id.* (emphasis added). Here, as repeatedly raised before the district court, Plaintiffs have not challenged the constitutionality of any particular Arizona law.

impair the interests of the absent counties. Specifically and most significantly, Plaintiffs ignore that the counties—and not the State—would bear the administrative burden and expense of implementing such an injunction. As the district court recognized (and Plaintiffs do not dispute), these costs will be "substantial" and are likely not covered by the counties' established election budgets. ER0015-16. Nor can this Court award the "complete relief" that Plaintiffs seek, *i.e.*, an injunction pending appeal requiring Arizona counties to count OOP ballots. Simply, federal courts are "powerless" to issue injunctions against non-parties. *Citizens Alert Regarding the Env't v. EPA*, 259 F. Supp. 2d 9, 17 n.7 (D.D.C. 2003).

VII. CONCLUSION

The district court did not abuse its discretion at any point in the proceedings below. Arizona's regulation of OOP voting has been in place for nearly five decades, and—especially with a General Election imminent—Plaintiffs present no reason to upend it. The district court was right, and this Court should decline to reverse its decision.

VIII. STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Intervenor

states it is aware of Case No. 16-16698 pending before this Court, in which Plaintiffs appealed the district court's September 23, 2016, order denying them preliminary injunctive relief on their claims related to H.B. 2023. That appeal was argued and submitted on October 19, 2016.

Dated: October 24, 2016

Respectfully submitted,

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IX. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,346 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Century font size 14.

Dated: October 24, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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.

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