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

STATE DEFENDANTS/APPELLEES' BRIEF

Mark Brnovich
Attorney General
Kara M. Karlson (AZ 029407)
Karen J. Hartman-Tellez (AZ 021121)
Assistant Attorneys General
1275 W. Washington Street
Phoenix, AZ 85007

Telephone: 602.542.4951
Facsimile: 602.542.4385
kara.karlson@azag.gov
karen.hartman@azag.gov

Attorneys for State Defendants

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1357, as well as 42 U.S.C. §§ 1983 and 1988. The district court entered the Order on appeal on October 11, 2016, and Plaintiffs filed their Notice of Appeal on October 15, 2016. (ER0001-17); Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this interlocutory order denying Plaintiffs' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES[1]

1. Did the district court abuse its discretion in concluding that Plaintiffs are not likely to succeed on the merits of their claim that Arizona's rejection of out-of-precinct ("OOP") ballots violates § 2 of the Voting Rights Act, 52 U.S.C. § 10301(b)?

2. Did the district court abuse its discretion in concluding that Plaintiffs are not likely to succeed on the merits of their claim that Arizona's rejection of OOP ballots violates the Fourteenth Amendment by (a) imposing an unconstitutional burden on the right to vote or (b) allowing counties to choose a precinct-based model or a vote-center model for elections?

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

[1] Because the Court ordered simultaneous briefing, the State Defendants do not know how Plaintiffs will frame the issues to be decided in this appeal and thus assume that Plaintiffs will raise the issues raised below. Plaintiffs waive any issues not raised in their Brief. *See, e.g., Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988).

STATEMENT OF THE CASE

I. Procedural History

On April 15, 2016, the Democratic National Committee, the Democratic Senatorial Campaign Committee, the Arizona Democratic Party, Kirkpatrick for U.S. Senate, and several Arizona voters (collectively, "Plaintiffs") filed a lawsuit challenging the State's practice of not counting provisional ballots cast in the wrong precinct.[2] (ER0018-69, ¶¶ 115, 126, 131). Plaintiffs asserted these claims against the Arizona Secretary of State's Office and Secretary of State Michele Reagan (collectively, the "State Defendants"), as well as the Maricopa County Board of Supervisors, its members, Maricopa County Recorder Helen Purcell, and Maricopa County Elections Director Karen Osborne (collectively, the "County Defendants"). (ER0058, 61, 64). Plaintiffs did not sue any officials from the other Arizona counties that use precinct-based polling places.[3] On June 10, 2016, nearly two months after Plaintiffs filed their Complaint, they filed a motion for preliminary injunction. (ER0126-62). Plaintiffs did "not seek an order requiring all counties to use vote centers or to count OOP ballots for all races." (ER0003). Instead, they sought "a mandatory preliminary injunction preventing Arizona from rejecting OOP ballots for the races in which the voter is eligible to vote." (*Id.*).

After briefing and oral argument, the district court denied Plaintiffs' Motion for Preliminary Injunction on Provisional Ballot Claims on October 11, 2016.

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[2] The Plaintiffs were joined shortly thereafter by Hillary for America and Intervenor-Plaintiff Bernie 2016, Inc.

[3] Plaintiffs moved to dismiss the County Defendants after reaching a settlement concerning other claims. (*See* Doc. 2, at iii n.1).

(ER0001-17). The district court concluded that (1) "OOP ballot rejection likely has no meaningful impact on the opportunities of minority as compared to white voters to elect their preferred representatives" (ER0008); (2) Plaintiffs had not "adequately linked the observed disparities to the challenged practice, itself, or to historical discrimination in Arizona" (ER0010); (3) rejecting OOP ballots imposes "only minimal burdens on voters" (ER0012-13); (4) "Arizona's prohibition on counting OOP ballots is one mechanism by which Arizona enforces and administers this precinct based system and, therefore, is sufficiently justified in light of the minimal burdens imposed" (ER0013); (5) Plaintiffs' Equal Protection theory was not coherent and the relief they sought would not remedy the inequality identified (ER0014); (6) Plaintiffs' long delay in challenging the State's more than 40-year practice of not counting OOP ballots "implies a lack of urgency and irreparable harm" (ER0015); and (7) the balance of hardships and public interest tip in the Defendants' favor because "requiring county election officials to institute a new procedure for counting OOP ballots for the upcoming general election would impose substantial costs on elections officials and could heighten the risk of human error in vote tabulation." (ER0016).

II. Factual Background

Arizona law allows counties to select from different voting models, a precinct-based model or a vote-center model, or a combination of the two. Ariz. Rev. Stat. ("A.R.S.") § 16-411(B). In the precinct-based model, in-person Election Day voters must vote in their assigned precinct, because only that precinct will have the appropriate ballot for the voter—a ballot that includes all the races and

issues on which the voter is entitled to vote, and no races or issues on which the voter is not entitled to vote. *See* A.R.S. § 16-122; (ER2979, ¶ 16). Under the vote-center model, in-person Election Day voters may go to any voting center in the county; voting centers are equipped to print and tabulate the appropriate ballot for every voter in the county. (ER2292; ER2321, ¶¶ 9-12). Before the March 2016 Presidential Preference Election, the only Arizona counties to use voting centers for countywide elections were Graham, Yavapai, and Yuma—with approximately 18,000, 130,000 and 77,000 active registered voters, respectively. (ER2325, ¶¶ 3-6; ER2327).

Arizona law bars counting of OOP ballots because the offices and issues for which a voter is entitled to vote are tied to the voter's residential address. A.R.S. §§ 16-122, -584; (ER2382 at 7-25; ER2201-02, ¶¶ 7-8). In a precinct-based model, to ensure that a voter receives the correct ballot, the voter must vote in his or her assigned precinct. (*Id*.); *see Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 567 (6th Cir. 2004) ("[I]n almost every state [ ]voters are required to vote in a particular precinct."). And, like Arizona, at least two dozen states enforce the precinct-based system by counting only those ballots cast in the correct precincts.[4] (ER2176).

[4] *See* Ala. Code § 17-10-3 ; Conn. Gen. Stat. § 9-232n; Del. Code Ann. tit. 15, § 4948; Fla. Stat. § 101.048; Haw. Rev. Stat. § 11-21; 10 Ill. Comp. Stat. 5/18A-15; Ind. Code §§ 3-11.7-5-3, 3-11.7-5-5; Iowa Code § 49.81; Ky. Rev. Stat. An. § 117.245; Mich. Comp. Laws § 168.813; Miss. Code Ann. § 23-15-573; Mo. Ann. Stat. 115.430; Mont. Code Ann. § 13-15-107; Neb. Rev. Stat. § 32-1002(5); Nev. Rev. Stat. § 293.3085; N.C. Gen. Stat. § 163-182.2; Ohio Rev. Code Ann. § 3505.183; Okla. Stat. Ann. Tit. 26, § 7-116.1; S.C. Code Ann. § 7-13-710; S.D. Codified Laws § 12-20-5.1; Tenn. Code Ann. § 2-7-112; Tex. Elec. Code Ann. §

The State and County Defendants provide multiple means for voters to find their precinct polling place. The Secretary of State's Office provides three websites with polling place information, responds to questions from voters, and mails a publicity pamphlet to voters with information on how to locate the correct polling place for General Elections. (ER2195-96, ¶¶ 3-7). County recorders also provide information to voters on polling places through social media and reach out to local English- and Spanish-language media to spread information about polling place locations. (ER2211, ¶ 31(e)-(f); ER2218, ¶¶ 7-9). The County Defendants mail sample ballots to all households with at least one voter who does not receive an early ballot. (ER2877-78). The sample ballots provide the address and a map for the voter's polling place and state "TO CAST YOUR VOTE, make sure you go to the polling place address indicated on the mailing label of this sample ballot." (*Id*. (emphasis in original)). Finally, poll workers are trained to notify voters when they are at the wrong polling place and to provide information on their correct polling place. (ER2220, ¶¶ 16-17; ER2231, 2236, 2241).

In addition to voting at polling places on Election Day, the State permits early voting during the 27 days before an election. A.R.S. § 16-542. The county recorders accept early ballots delivered by mail up until 7:00 pm on Election Day. A.R.S. § 16-548(A). Also, a voter may return his or her sealed ballot to any polling place in the county while the polls are open. *Id*. In the 2014 General Election, approximately 77% of voters voted by early ballot. (*See* ER2256

65.054; Vt. Stat. Ann. Tit 17, § 2563; Va. Code Ann. § 24.2-653; Wis. Stat. § 7.52; Wyo. Stat. Ann. §§ 22-1-102, 22-15-105.

(1,182,149 total early ballots counted); ER2266 (1,537,671 total ballots counted).

STANDARD OF REVIEW

This Court reviews the district court's decision not to enter an injunction for abuse of discretion. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). That review should be "limited and deferential" and does not include "review [of] the underlying merits of the case." *Id*. The district court's interpretation of the law is reviewed de novo. *Id*. This Court "review[s] 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 v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc).

Plaintiffs sought a preliminary injunction—"an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Indeed, with respect to OOP ballots, Plaintiffs sought a mandatory injunction that would go "well beyond maintaining the status quo pendent lite," by changing how Arizona has counted votes for more than forty years. "[C]ourts should be extremely cautious about issuing a preliminary injunction" in these circumstances. *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

In order to justify such extraordinary relief, Plaintiffs must show that they (1) are "likely to succeed on the merits," (2) they are "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tip[ ] in [their] favor, and (4) an injunction is in the public interest." *Farris v. Seabrook*,

677 F.3d 858, 864 (9th Cir. 2012). The less certain "the likelihood of success on the merits, the more plaintiffs must convince the [ ] court that the public interest and balance of hardships tip in their favor." *Sw. Voter Registration*, 344 F.3d at 918.

SUMMARY OF THE ARGUMENT

For more than forty years, Arizona has followed the well-recognized rule that votes cast out-of-precinct are not counted. Now, two weeks before the General Election, Plaintiffs ask this Court to enjoin that practice and craft a new procedure for counting OOP ballots. But the district court correctly determined that Plaintiffs had not met their burden to obtain a mandatory injunction that would require the majority of Arizona's counties, most of which are not parties to this lawsuit, to develop and implement a new procedure for counting OOP ballots. Because the district court did not abuse its discretion when it denied Plaintiffs' requested injunction, this Court should affirm.

Plaintiffs do not have a likelihood of success on the merits of their claim under § 2 of the Voting Rights Act. As the district court found, the relative rarity of OOP ballots makes their impact on an election so minimal that they do not have a discriminatory impact on the opportunity of minority voters to participate in elections and elect representatives of their choice. (ER0007-08). While the lack of discriminatory impact alone is sufficient to defeat Plaintiffs' § 2 claim, the district court also found that Plaintiffs had not proved a causal connection between racial discrimination and the State's practice of not counting OOP ballots. (ER0009-10).

Plaintiffs similarly lacked evidence to show a severe burden on the right to vote for any voter or group of voters, regardless of race. In view of the many ways that Arizona election officials inform voters of the location of their polling place, determining where to vote is, at most, a minimal burden. (ER0011-12). Because there is a minimal burden, the State's important interests in maintaining the precinct system to keep its elections orderly and fair far outweighs the burden on voters. Rejecting OOP ballots "is one mechanism by which Arizona enforces and administers th[e] precinct-based system." (ER0013). Accordingly, the practice is "justified in light of the minimal burdens imposed." (*Id*.)

In view of Plaintiffs' failure to demonstrate a likelihood of success on the merits of their § 2 and constitutional claims, they cannot show that they are likely to suffer irreparable harm, or that the balance of hardships tip in their favor. (ER0014-16). Indeed, they have not shown harm or hardship at all. The State Defendants, on the other hand, can clearly demonstrate that an injunction would harm elections officials, down-ballot candidates, and voters as a whole, and that the public interest militates against directing Arizona counties to count OOP ballots. The public interest would not be served by changing the rules relating to OOP ballots two weeks or less before Election Day. *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006); *Sw. Voter Registration,* 344 F.3d at 919. Creating and implementing a procedure to count OOP ballots—which at this late date would be a manual process—would be very costly, injects the possibility of human error into the ballot tabulation process, and is very likely to cause elections officials to miss statutory deadlines for counting ballots and reporting results. (ER0015-16).

For these reasons, the district court did not abuse its discretion in denying Plaintiffs' request for a mandatory injunction directing that OOP ballots be counted. This Court should affirm that decision.

ARGUMENT

I. Plaintiffs Did Not Show a Likelihood of Success on Their Voting Rights Act Section 2 Claim.

To establish a violation of § 2 of the Voting Rights Act ("VRA"), Plaintiffs must show that:

> "[B]ased on the totality of circumstances . . . the political processes leading to nomination or election in the State . . . are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice."

Gonzalez, 677 F.3d at 405 (quoting § 2, now 52 U.S.C. § 10301(b)). "[P]roof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." *Id.* (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist*, 109 F.3d 586, 595 (9th Cir. 1997)). Consistent with the analysis this Court applied in *Gonzalez*, courts in other circuits have refined their review of the totality of the circumstances into a two-step process. First, they look to the evidence of disparate impact—*i.e.*, evidence showing that minority voters have less of an opportunity to participate effectively in the political process than white voters. *See, e.g., Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *13 (6th Cir. August 23, 2016); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); *League of Women Voters of N.C.("LOWV") v. N.*

Carolina, 769 F.3d 224, 240 (4th Cir. 2014). Second, they determine if the evidence presented, including evidence of the Senate Factors,[5] establishes the necessary causal connection between the challenged practice and a discriminatory result. *Ohio Democratic Party*, 2016 WL 4437605, at *13; *Veasey*, 830 F.3d at 244; *LOWV*, 769 F.3d at 240.

Here, the district court conducted this analysis and found that Plaintiffs had not shown a likelihood of success at either step. Plaintiffs did not show that rejecting OOP ballots had a statistically significant effect on minority voters' opportunity to participate in the political process and elect representatives of their choice. (ER0008). Nor did Plaintiffs establish the necessary causal connection between "social and historical conditions that have produced discrimination" and the "observed disparities in minority OOP voting." (ER0009).

Accordingly, the district court did not abuse its discretion in concluding that Plaintiffs had failed to show a likelihood of success on the merits of their § 2 claim. Plaintiffs do not argue that the district court used the wrong legal standard. Instead, they object to the district court's factual findings and how it applied the law to the facts. Because in a § 2 case, the "district court's examination . . . is 'intensely fact based and localized,'" this Court must "'[d]efer[ ] to the district court's superior fact-finding capabilities.'" *Gonzalez*, 677 F.3d at 406 (quoting

[5] In *Thornburgh v. Gingles*, 478 U.S. 30, 44 (1986), "the Supreme Court cited a non-exhaustive list of nine factors (generally referred to as the 'Senate Factors' because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider" in assessing the totality of the circumstances. *Gonzalez*, 677 F.3d at 405.

Smith, 109 F.3d at 591 (alteration in original)). Here, the district court's factual findings were not clearly erroneous and are entitled to deference on appeal. *Id.*; *see also Sw. Voter Registration*, 344 F.3d at 918.

A. Plaintiffs Did Not Show a Racially Discriminatory Impact.

In the district court, Plaintiffs relied on the report of their expert, Dr. Rodden, to attempt to demonstrate that the State's treatment of OOP ballots caused a racially discriminatory impact. (*See* ER0006-07). To determine the race of OOP voters, Dr. Rodden used a computer program that analyzed surname and census block group data to assign race to an individual. (ER0007). The district court "credit[ed] Dr. Rodden's assignment of race to OOP voters," but nevertheless found that his analysis created a false understanding of OOP voting's impact. (*Id.*)[6]

The district court stated that "a cognizable disparity results 'in an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.'" (ER0007 (quoting *Gingles*, 478 U.S. at 47)). The evidence the

[6] As the State Defendants' expert explained, Dr. Rodden's methodology for determining the race of OOP voters easily leads to false results. (ER2266-68). Dr. Rodden appears to have been unable to match voters' surnames to eleven percent of the OOP votes in the study, and he provides no explanation for how he treated those voters. (*Id.*) Further, when his estimates for each ethnicity are combined, it accounts for only 6,731 of the 7,525 rejected OOP ballots—and miscalculates the total ballots cast at the polling place by approximately eight percent. (ER2273-74). Perhaps most importantly, Dr. Rodden did not report the margin of error for the assignment of race to OOP voters. (*Id.*) Due to OOP voters representing an extremely small percentage of voters and the unknown but obvious margins of error, the differences in OOP voting between white and minority voters "are subsumed by the uncertainty associated with the original identification of who is and is not [a minority voter]." (ER2370-71 (*Gonzalez v. Ariz.*, No. CV06-01268-PHX-ROS, Findings of Fact and Conclusions of Law, at 41-42 (D. Ariz. Aug. 20, 2008))).

district court received did not show such a disparity. Dr. Rodden's analysis focused only on *in-person* voting, but Arizona has a robust mail-in and early voting program. (ER0008). As the district court recognized, two-thirds of the 2,323,579 total ballots cast in 2012 were early ballots. (*Id*.) Dr. Rodden's analysis looked only at the OOP ballots as a share of the one-third of ballots cast in person, which "distorts the practical effect of the observed disparities in OOP voting on the overall electoral opportunities enjoyed by minority as compared to white voters." (*Id*.) The court correctly noted that those OOP ballots were not statistically significant, because the vote totals were too small to have prevented minority voters from having equal opportunity to elect the representatives of their choice. (*Id*.)[7]

Even if Dr. Rodden's analysis of the race of OOP voters were correct, the OOP ballots cast by Hispanic voters were only 0.13% of the total vote, while those cast by African American voters were only 0.07%. (*Id*.) These totals were simply too small to have any statistical effect on the 2012 election. (*Id*.) As a result, the court held "that OOP ballot rejection likely has no meaningful impact on the opportunities of minority as compared to white voters to elect their preferred representatives." (*Id*.) The district court took a similar approach in *Gonzalez,*

[7] Plaintiffs argue that the State Defendants' expert, Dr. Thornton, "repeatedly acknowledged that Dr. Rodden's findings were 'statistically significant.'" (Doc. 2, at 11). In fact, that language comes from parts of Dr. Thornton's report in which she criticized Dr. Rodden's regression analyses regarding the relationship between polling location and OOP ballots, because even though the effects are "tiny," Dr. Rodden found them statistically significant due to the high number of observations. This was one of the reasons that Dr. Thornton stated that "the analyses provided by Dr. Rodden are not reliable and are not informative." (ER2275).

which this Court approved. (ER2370-71); *Gonzalez*, 677 F.3d at 406 (affirming district court's conclusion that the observed disparities between Latino and white voters were not statistically significant).

Plaintiffs argue that the district court should have looked only at in-person voting to analyze the allegedly discriminatory impact of Arizona's practice of not counting OOP ballots. (*See* Doc. 2, at 10-11). But this argument does not demonstrate that the court clearly erred. The focus of the § 2 analysis is equal electoral opportunities, and the district court correctly considered the totality of the circumstances—*i.e.*, the many different ways in which voters can cast a ballot in Arizona.[8] The district court did not abuse its discretion when it concluded that the minimal effect of OOP voting on an election is insufficient to show a cognizable disparate impact under § 2.

B. Plaintiffs Did Not Show a Causal Connection.

Plaintiffs also failed to show a causal connection, which requires them to connect the specific challenged practice to the alleged discriminatory impact. The district court correctly ruled that "[e]ven if the disparities observed by Dr. Rodden are cognizable under § 2, Plaintiffs have not shown that [the] challenged practice, itself, likely caused those disparities." (ER0008). This connection is essential to a § 2 claim. As this Court explained, "proof of causal connection between the

[8] The State Defendants presented evidence to the district court that the areas where Dr. Rodden had identified the greatest concentration of OOP voting were also areas where the voters had elected minority representatives. (ER2154-55, 2411-21). Thus it appears that any disparity did not affect their ability to elect candidates of their choice.

challenged voting practice and a prohibited discriminatory result is crucial." *Gonzalez*, 677 F.3d at 405 (internal quotation marks omitted); *see also Smith*, 109 F.3d at 595 (holding that plaintiffs "must establish [the challenged practice] results in discrimination on account of race or color") (internal quotation marks omitted).

Plaintiffs failed to establish this necessary causal connection in two ways. First, they have not shown that racial discrimination is a substantial cause of minorities' lower rates of home ownership and consequent higher rates of residential mobility. (ER0009 (stating that "Plaintiffs cite no evidence of private or state-sponsored discrimination in housing")). Second, Plaintiffs' evidence of general socioeconomic disparities between minorities and whites is insufficient to show the causal connection necessary to establish a § 2 violation.

The district court characterized Plaintiffs' argument as follows: historical discrimination in employment, income, and education causes minority voters to be more likely to rent homes instead of owning them, which in turn causes greater residential mobility, which in turn makes minority voters more likely to vote OOP. (ER0009).[9] The district court correctly concluded that "if the requisite causal link under § 2 could be established primarily by pointing to socioeconomic disparities between minorities and whites, then nearly all voting regulations could conceivably violate the VRA because nearly all costs of voting are heavier for socioeconomically disadvantaged voters." (ER0010).

[9] Plaintiffs' expert assumed that residential mobility caused OOP voting, but his analyses did not prove it. Dr. Thornton explained that Dr. Rodden's models related to a changed polling place showed only an infinitesimal increase in OOP ballots. (ER2276-77).

Plaintiffs argue that the presence of socioeconomic disparities, alone, is sufficient to establish the requisite causal connection. (Doc. 2, at 15).[10] But as the district court recognized, if all that is necessary to establish a § 2 claim is a showing that socio-economic disparities exist, "a plaintiff [could] 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); *see also Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (stating that if socioeconomic factors were enough "[m]otor-voter registration . . . would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses").

The district court's findings regarding the insufficiency of socioeconomic disparities are consistent with this Court's direction. In *Gonzalez*, socioeconomic disparities by themselves did not show the necessary causal link. 677 F.3d at 406

[10] Plaintiffs cite several recent cases to support their argument that socioeconomic disparities are enough to prove causation. (Doc. 2, at 15 (citing *LOWV*, 769 F.3d at 240; *Veasey*, 830 F.3d at 259; *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016))). The cited cases do not support this argument. The page from *LOWV* that Plaintiffs cite contains only the Fourth Circuit's two-part formulation of the § 2 analysis and lists the Senate Factors. 769 F.3d at 240. In *Veasey*, the State did not challenge the district court's findings of persistent socioeconomic disparities, but the court stated that the inquiry "is whether the vestiges of discrimination *act in concert* with the challenged law to impede minority [voting] participation." 830 F.3d at 259. In *McCrory*, the 4th Circuit reversed the district court because it found that the legislature had acted with discriminatory *intent* when it rolled back voting procedures that were used by minority voters, which differs from the causation analysis for a law that causes discriminatory *results*. 831 F.3d at 233.

(accepting the district court's findings of a history of discrimination and socioeconomic disparities). The plaintiffs in *Gonzalez* alleged that the challenged voter identification provision created a racially discriminatory impact because Latinos were less likely to possess the required forms of identification. *Id*. at 407. Like the Plaintiffs here, the plaintiffs in *Gonzalez* relied on the Senate Factors to attempt to show a causal connection between the challenged law and the allegedly discriminatory impact. *Id*. at 406. On appeal, this Court credited evidence presented below that some of the Senate Factors were met, and that there were socio-economic disparities between Arizona's Latinos and whites. *Id*. But that, by itself, was not enough to establish a § 2 violation. The Court affirmed the district court's finding that "there was no proof of a causal relationship between [the voter identification law] and any alleged discriminatory impact on Latinos. *Id.*

Plaintiffs have similarly failed to establish a causal connection here. They have not shown that lack of home ownership, residential mobility, or vehicle access cause OOP voting. Moreover, they have not shown that the small number of OOP ballots cast by minority voters shows that minority voters are less able than white voters to participate in the political process and elect representatives of their choice. As such, the district court did not abuse its discretion when it concluded that Plaintiffs had not established a likelihood of success on their § 2 claim. This Court should give deference to the district court's factual findings and affirm its ruling.

II. Plaintiffs Did Not Show a Likelihood of Success on Their Constitutional Claims.

A. Plaintiffs Did Not Show a Violation of the Right to Vote.

The district court did not abuse its discretion when it concluded that Arizona laws that bar the counting of OOP ballots do not unconstitutionally restrict the right to vote. As the district court recognized, the *Anderson-Burdick* test applies to Plaintiffs' claim that rejecting OOP ballots burdens the right to vote under the Fourteenth Amendment—*i.e.*, the court must "weigh the nature and magnitude of the burden imposed by the law against the state's interests in and justifications for it." (ER0011 (citing *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008))). The extent of the burden on the asserted rights determines the level of scrutiny. Where the burden is severe, the law is subject to strict scrutiny. (*Id*.) Where the burden is not severe, courts "apply less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (internal quotation marks omitted).

The district court concluded that not counting OOP ballots does not impose a severe burden on the right to vote. (ER0011-13). Plaintiffs assert that the State's treatment of OOP ballots imposes two severe burdens: (1) "voters must determine their correct precinct," and (2) voters who do not find their correct precinct the first time "must find and timely travel to their correct precinct." (ER0011). But the State's law prohibiting counting OOP ballots "does not make it any more difficult for voters to locate their correct precinct." (*Id*.) As a result, the court concluded

that any burdens associated with rejecting OOP ballots were minimal. (ER0012-13).

The district court's analysis was correct. Plaintiffs' theory, that Arizona may not require voters to cast their ballots in their proper precinct, "absolves voters 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." *Serv. Emps. Int'l Union Local 1 v. Husted* ("*SEIU*"), 698 F.3d 341, 344 (6th Cir. 2012). Instead, the burden must be determined based on the voter's ability to take the steps necessary to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (holding that the steps necessary to get a voter ID did not constitute a severe burden). As the district court recognized, Arizona "employs a variety of methods to educate voters about their correct precincts." (ER0012); *see supra*, at 5. "[A] voter who fails to utilize these tools [for locating the correct polling place] and arrives at the wrong polling location cannot be said to be blameless." *SEIU*, 698 F.3d at 344; *see also Colo. Common Cause v. Davidson*, 04CV7709, 2004 WL 2360485, at **14 (Colo. Dist. Ct. Oct. 18, 2004) ("[I]t does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place.").[11]

[11] Plaintiffs cite an Arizona superior court decision as evidence that Maricopa County poll workers failed to notify voters that their OOP ballots would not be counted. (Doc. 2, at 11). But this "evidence" was not presented to the court below and cannot be considered for the first time on appeal. *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (holding that evidence not submitted to the district court cannot be part of the record on appeal). And Plaintiffs fail to

Moreover, Plaintiffs' own argument shows that the burden is minimal. Plaintiffs have cited testimony from a hearing in the district court in *McCrory*. (See Doc. 11, at 7). The witness served as the director of a county board of elections in North Carolina. Specifically, Plaintiffs assert that "[w]hen people came to the wrong polling place, . . . [w]e would explain to them that . . . they needed to go . . . to the correct polling place where they could vote for a full ballot" and "we were successful in convincing most people to go to the correct precinct." (*Id.*) Polling place workers in Arizona do the same. (ER2219-20, ¶¶ 14-19; ER2231, ER2236, ER2241). Plaintiffs' citation of this testimony from North Carolina here belies their argument that it is a severe burden for OOP voters to locate their polling place or travel to the correct one if they initially go to the incorrect polling place.

In view of the minimal burden, the district court correctly concluded that the state's important regulatory interests justified the prohibition on counting OOP ballots. (ER0013). As the district court recognized:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.

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address the State's and counties' many methods of instructing voters about polling place location.

(*Id*. (quoting *Sandusky Cty.*, 387 F.3d at 569)). Indeed, even Plaintiffs' expert acknowledged the important state interests behind the precinct-based system when he wrote that "precincts must be created, and ballots printed, so that the residential address of every voter is connected to the right bouquet of local elected officials." (ER1770).

Plaintiffs also argue that their requested preliminary injunction will not deprive the State of these advantages because it can continue to maintain the precinct system, so long as the top-of-the-ballot votes on OOP ballots are counted. (Doc. 2, at 17-18). But that argument ignores the district court's finding that "Arizona's prohibition on counting OOP ballots is one mechanism by which Arizona *enforces* and *administers* this precinct-based system." (ER0013 (emphasis added)). If voters were allowed to go to any polling place and have their votes—for at least some races—counted, this would directly harm the interests that the district court identified. Moreover, contrary to Plaintiffs' assertions, Arizona's treatment of OOP ballots is well within the norm. (*See id.* at n.6); *supra* n. 4; *see also Ohio Democratic Party*, 2016 WL 4437605, at *6 ("[C]ourts routinely examine the burden resulting from a state's regulation with the experience of its neighboring states.").

In view of the minimal burden of timely locating one's assigned polling place, and the important interests in maintaining the precinct-based voting system, the district court did not abuse its discretion when it found that Plaintiffs did not demonstrate a likelihood of success on their Fourteenth Amendment claim.

B. Plaintiffs Did Not Show a Violation of Equal Protection.[12]

Plaintiffs asserted that rejection of OOP ballots violates the Fourteenth Amendment's equal protection guarantee because it affects only voters in counties using precinct-based systems. (ER0150-53). But Plaintiffs did not challenge A.R.S. § 16-411(B) (the law that allows Arizona's counties to choose between a vote-center model and a precinct-based one). A challenge to that law would be extremely unlikely to prevail, because counties are allowed to select among approved voting systems. *See Sw. Voter Registration*, 344 F.3d at 918.

Plaintiffs relied exclusively on *Bush v. Gore*, 531 U.S. 98 (2000), to argue that the Equal Protection Clause bars states from allowing counties to choose a precinct-based model or vote-center model for elections. But in *Bush*, the Court expressly declined to extend its reasoning to situations where, as here, "local entities, in the exercise of their expertise, [ ] develop different systems for implementing elections." *Id.* Plaintiffs have not shown that the discretion given to counties is arbitrary. *See id*. at 105 (holding state recount procedures unconstitutional because they did not "satisfy the minimum requirement for nonarbitrary treatment of voters"). Indeed, § 16-411(B)(4) is not arbitrary. It allows counties to choose a system that fits their specific characteristics, such as population size, the capabilities of existing voting equipment, and the number of ballot styles needed for a particular election. "[I]t is the job of democratically-

[12] Plaintiffs did not raise their Equal Protection claim in their Motion for Injunction Pending Appeal (Doc. 2). Due to the simultaneous briefing ordered here, it is unclear whether Plaintiffs have abandoned this claim. *Collins*, 841 F.2d at 339 (stating that claims not addressed in brief are abandoned).

elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003).

Because Plaintiffs did not challenge the law authorizing Arizona's counties to choose between vote centers and precinct-based models, Plaintiffs' requested injunctive relief could not remedy their alleged harms. Their basic assertion is that voters in counties with vote centers are treated more favorably than voters in counties using a precinct-based system. And their requested relief would require precinct-based counties to count any races on OOP ballots for which the voter is eligible to vote. But as the district court recognized, "voters in counties that administer elections under a vote center model still would be treated more favorably than voters in counties that use precincts." (ER0014). They can go to any vote center in the county and receive a ballot containing every race in which they are eligible to vote, whereas voters in precinct-based systems can only receive the proper ballot by going to their assigned polling place. (*Id*.)

The district court correctly found that Plaintiffs failed to articulate a "coherent theory" on their equal protection claim and that the relief they seek would "not remedy the inequality that they have identified." (*Id.*) Accordingly, it did not abuse its discretion when it concluded that Plaintiffs were not likely to succeed on the merits of their equal protection claim. (*Id*.)

III. Plaintiffs Have Not Established the Remaining Factors Supporting a Preliminary Injunction.

A. Plaintiffs Will Not Suffer Irreparable Harm.

The district court did not abuse its discretion in finding that because Plaintiffs had not demonstrated that they were likely to succeed on the merits, they could not show a likelihood of irreparable harm. (ER0014-15 (citing *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986)). The district court also noted that Plaintiffs failed to explain why they waited until the eve of the election to challenge a practice that had been in place for more than forty years. (*Id*.) Plaintiffs' delay "implies a lack of urgency and irreparable harm." (ER0015 (quoting *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985))). The district court explained that Plaintiffs waited until April 2016 of an election year to bring suit, and until June 2016 to move for a preliminary injunction, even though: (1) "Arizona has required voters to cast ballots in their assigned precinct since at least 1970"; (2) "all parties agree that OOP provisional ballots have been rejected since at least 2006"; and (3) data on rejected OOP ballots in Arizona goes back to at least 2008. (ER0014-15). Plaintiffs do not challenge these findings or explain their reason for delaying.

Plaintiffs instead argue that delay only matters for purposes of a requested preliminary injunction when the complained-of harm has already occurred. (Doc. 2, at 18). But that argument confirms that a preliminary injunction is improper. Plaintiffs do not dispute that the alleged harm they complain of—OOP provisional ballots not being counted—has already occurred in multiple election cycles in

Arizona going back to at least 2006. (ER0014). Plaintiffs further argue that their years of delay should be excused because they have asserted a constitutional claim. (Doc. 2, at 18). Setting aside Plaintiffs' failure to show a likelihood of success on that claim, courts frequently reject requests for interim relief in election matters when a plaintiff fails to timely assert constitutional claims. *See Ariz. Libertarian Party v. Reagan*, No. CV-16-01019-PHX-DGC, 2016 WL 3029929, at *2 (D. Ariz. May 27, 2016) (denying motion for temporary restraining order and preliminary injunction under laches doctrine in action challenging constitutionality of Arizona election statutes); *Ariz. Pub. Integrity All. Inc. v. Bennett*, No. CV-14-01044-PHX-NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014) (same).

The Plaintiffs have not shown irreparable harm, "the *sine qua non* for all injunctive relief." *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978).

B. The Balance of Hardships and Public Interest Weigh Heavily in Favor of the State and County Defendants.

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

Plaintiffs do not, however, dispute any of the district court's factual findings on this issue, all of which reflect a likely administrative and financial nightmare.

The district court credited a declaration from a county election director who explained that, in order to count OOP ballots for the specific races in which the voter is eligible to vote, "counties likely would use a *manual* approach" that "could take up to fifteen minutes *per* OOP ballot." (ER0016 (emphasis added)). This new manual process "would impose *substantial costs* . . . and could heighten the risk of human error in vote tabulation." (*Id.* (emphasis added)). In addition, "'the elections budgets for counties are likely already set and do not necessarily include funds to cover the additional labor and duplicate ballots that would be required to count OOP ballots.'" (ER0015 (quoting ER2196)). And the district court also explained if counties are forced to institute new counting procedures for OOP ballots, this will "'likely put the counties and the state past the statutory deadlines'" to complete and verify the canvass for the General Election. (*Id.*)[13]

Instead of confronting these factual findings, Plaintiffs assert that "Arizona would hardly be a pioneer in counting OOP ballots" because other states purportedly count these ballots. (Doc. 2, at 19). Yet, the district court noted that "more than two dozen other states enforce precinct-based systems by rejecting OOP ballots. (ER0013, at n.6; *see also* ER2176). Regardless, Plaintiffs'

[13] Plaintiffs argue that "Defendants previously assured the court that the extended briefing schedule that they requested would not result in a ruling too late to be effective." (Doc. 2, at 19 n.5). The parties anticipated that the district court would rule shortly after the September 2, 2016 hearing. (*See* ER0939, at 14-16 (counsel for the County Defendants stated that poll worker training begins in early October)). Moreover, this isolated statement does not show that the counties, most of which are absent from this case, could implement procedures or locate resources for such a massive endeavor in the very short time remaining before the General Election.

contention that Arizona *could* count OOP ballots does not negate the substantial burden and costs that would be required. Plaintiffs provided no evidence below on the processes used by other states for counting OOP ballots, which might inform this Court about such issues as whether those states (unlike Arizona) have automated processes in place for counting these ballots. The district court thus had no way of telling how other state processes could be implemented in Arizona for the General Election.

Plaintiffs' proposed relief would likely lead to more disenfranchisement, particularly if it is instituted this close to Election Day. If voters are not required to vote in their assigned precincts, then they will not have an opportunity to vote on down-ballot candidates and issues. (ER2978, ¶ 13). If the counties are directed to count OOP provisional ballots, it is likely that many voters would be unaware that casting an OOP ballot would deprive them of the opportunity to vote for all the candidates and issues for which they are eligible to vote. Even though the only votes that would count from an OOP provisional voter would be state- and county-wide races, the voter would be able to vote the full ballot not knowing their votes for local candidates would not count. Such a system is sure to lead to voter confusion, which is exacerbated by the fact that there is insufficient time to provide notice to voters given the very late date of this appeal. *See Purcell*, 549 U.S. at 4 ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion . . . ."). This harms the voter, who is partially disenfranchised, the candidates and supporters of issues for whom the voter could have voted if in the correct precinct, and the local government entities that may

have to hold run-off elections that would not be required if OOP ballots were not counted. (*See* ER2978, ¶¶ 13-14; ER2984, ¶ 27(b)).

The burden to Plaintiffs, meanwhile, is slight. State and county elections officials provide numerous ways of informing voters of the location of their polling place—through the mail, online, and by telephone. (ER2195-96, ¶¶ 3-7; ER2210, ¶ 30; ER2218-20, ¶¶ 3-19) This information is provided in English and Spanish. (ER2218, ¶ 7). In the event that a voter does not initially find the correct polling place, poll workers are trained to notify voters when they are at the wrong polling place and to provide the address and in some cases a map of their correct polling place. (ER2219-20, ¶¶ 14-19; ER2231, ER2236, ER2241).

This Court has held that the "law recognizes that election cases are different from ordinary injunction cases," because "hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration*, 344 F.3d at 919. "Given the deep public interest in honest and fair elections and the numerous available options for the interested parties to continue to vigorously participate in the election, the balance of interests falls resoundingly in favor of the public interest." *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012).

Plaintiffs seek an injunction against an election law, and the "State indisputably has a compelling interest in preserving the integrity of its election process." *See Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 203. Enjoining election laws on the eve of elections can "result in voter confusion and consequent

incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. This danger increases the closer in time to the election the injunction issues. *Id.*

IV. Plaintiffs Failed to Name Necessary Parties, Making a Preliminary Injunction Inappropriate.

Because the district court properly determined that Plaintiffs failed to make the necessary showing for a preliminary injunction, it declined to consider whether Plaintiffs had named the necessary defendants to obtain *statewide* relief relating to the counting of OOP ballots. (ER0002 at n.1). If the district court had reached the issue, it would have denied the preliminary injunction motion under Fed. R. Civ. P. 19(a). *See, e.g., Stevenson v. Blytheville School Dist. No. 5*, 955 F. Supp. 2d 955, 970 (E.D. Ark. 2013) (denying preliminary injunction when the "[c]ourt does not have before it the parties necessary to grant through preliminary injunction the relief plaintiffs seek."). Rule 19(a) requires a party to be joined if necessary to "accord complete relief among existing parties." Fed. R. Civ. P. 19(a)(1)(A), or if the action may "as a practical matter impair or impede the [party's] ability to protect [its] interest." Fed. R. Civ. P. 19(a)(1)(B). Only one of these factors is required; both are present here.

The counties are responsible for counting (or rejecting) votes after general elections, including provisional ballots cast within their jurisdiction. *See, e.g.*, A.R.S. §§ 16-531, -584(E), -601; (ER2656). Yet, Plaintiffs have not named *any* county officials as defendants for purposes of their OOP claims.[14]

[14] Plaintiffs recently moved to dismiss the Maricopa County Defendants after reaching a settlement concerning other claims. (*See* Doc. 2, at iii n.1).

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

Plaintiffs assume that the Secretary of State could somehow order the counties to count all OOP ballots. But the Secretary does not have the ability to "direct" actions in violation of Arizona law. (ER3890-93). The Secretary has authority to prescribe rules that the counties must follow, but that authority is limited to rule-making through the Arizona Election Procedures Manual. A.R.S. § 16-452. To issue the Procedures Manual, the Secretary of State must consult with "each county board of supervisors," and the Manual must be approved by the Governor and Attorney General. A.R.S. § 16-452(A)-(B). Because the Secretary of State cannot comply with the procedures for updating the Election Procedures Manual before the statutory deadlines for counting ballots, the Secretary cannot ensure the compliance of the non-party counties if this Court were to enter an injunction. In addition, the absent counties should have an opportunity to provide the district court with facts regarding its interests in maintaining precinct-based voting and the burdens each county would face if ordered to count OOP ballots. For these additional reasons, this Court should affirm the district court's denial of a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's denial of Plaintiffs' Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED this 24th day of October, 2016.

MARK BRNOVICH
Attorney General

By: *s*/ Karen J. Hartman-Tellez
Kara Karlson
Karen J. Hartman-Tellez
Assistant Attorneys General
1275 West Washington Street
Phoenix, Arizona 85007
Attorneys for State Defendants

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by Ninth Circuit Rule 32(a)(7). The Brief contains 8,178 words, 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/ Karen J. Hartman-Tellez

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the State Defendants state that they are aware of Case No. 16-16698 pending before this Court, in which Plaintiffs appeal the district court's September 23, 2016, order denying them preliminary injunctive relief on their claims related to H.B. 2023.

s/ Karen J. Hartman-Tellez

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 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.

s/ Phylis Durbin