Brett W. Johnson (#021527)
Sara J. Agne (#026950)
Colin P. Ahler (#023879)
Joy L. Isaacs (#030693)
SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
Telephone: 602.382.6000
Facsimile: 602.382.6070
E-Mail: bwjohnson@swlaw.com
sagne@swlaw.com
cahler@swlaw.com
jisaacs@swlaw.com

Timothy A. La Sota (#020539)
TIMOTHY A. LA SOTA, PLC
2198 E. Camelback Road, Suite 305
Phoenix, Arizona 85016
Telephone: 602.515.2649
E-Mail: tim@timlasota.com

Attorneys for Intervenor-Defendants Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Leslie Feldman, et al.,

Plaintiffs,

v.

Arizona Secretary of State's Office, et al.,

Defendants.

No. CV-16-01065-PHX-DLR

INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

(Oral Argument Requested)

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Pursuant to Fed. R. Civ. P. 12(b)(1), (6), and (7), Intervenor-Defendants Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko and Tony Rivero move to dismiss Plaintiffs' Second Amended Complaint (Doc. 233) in its entirety.[1]

I. Plaintiffs' Claims and Pleading Suffer from Multiple Defects.

Without dwelling on the procedural defects of Plaintiffs'[2] pleading,[3] Intervenor-Defendants note that this Court may not "consider the merits of [Plaintiffs'] claim[s] or the propriety of the relief requested," unless Plaintiffs are "entitled to invoke the judicial process," which means they must have standing. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616 (1973).

///

[1] Intervenor-Defendants have not filed a Notice and Certification of Conferral in regard to this new Motion, as they did with the original motion in Doc. 109. The parties conferred concerning Intervenor-Defendants' previously filed Motion to Dismiss (Doc. 108) and were unable to agree that the pleadings could be cured by permissible amendment. The Second Amendment Complaint also fails to cure the issues raised herein, and this Motion adheres to the scope of the narrowed issues set forth on the record during the proceedings resulting in the Court's Minute Entry on November 1, 2016 (Doc. 222). Therefore, and pursuant to the Court's subsequent Minute Entry (Doc. 231) ordering this Motion, the Intervenor-Defendants file it without conferring.

[2] Intervenor-Defendants note that Intervenor-Plaintiff Bernie 2016, Inc., has not filed an amended complaint-in-intervention, nor has it joined in Plaintiffs' Second Amended Complaint. To the extent Bernie 2016, Inc.'s original Complaint-in-Intervention remains a live pleading, Intervenor-Defendants respond by re-urging the portions of their original Motion to Dismiss (Doc. 108) applicable to it and also moving to dismiss it for the reasons stated herein applicable to it.

[3] The allegations in paragraphs 20, 32, 33, 36, 59, and 61, for example, cannot be said to "be simple, concise, and direct" and so violate Rule 8(d)(1), Fed. R. Civ. P. Certain parts of Plaintiffs' pleading also contain redundant and immaterial matter subject to being stricken. With the knowledge that an appellate court has directed that proceedings in this case be expedited, Intervenor-Defendants do not move to strike those parts under Rule 12(f), Fed. R. Civ. P., but note them for this Court, which has broad case management discretion. *See, e.g., United States v. Doe*, 627 F.2d 183-84 (9th Cir. 1980) ("The trial court's power to administer the court calendar and to control the time and conduct of trial is broad. Scheduling of discovery, motions, and trial must be left to the discretion of trial judges.").

Snell & Wilmer
L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

A. Plaintiffs' Out-of-Precinct ("OOP") Claims Are Not Fairly Traceable to Defendants' Conduct and Not Redressable, So Plaintiffs Lack Standing.

To have standing, (1) a party must have suffered concrete injury to a protected interest, (2) the injury must be traceable to the defendants' conduct and not a non-party's conduct, and (3) any relief requested must be likely to redress the injury. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008) (internal citations and some quotation marks omitted)*; see also Ne. Fla. Chap. of Assoc. Gen'l Contractors v. City of Jacksonville*, 508 U.S. 656, 663 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs have "the burden of establishing the existence of an actual case or controversy." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)).

Plaintiffs here object to what allegedly results when various counties choose to use precinct-based voting. Because the remaining named Defendants (the Arizona Secretary of State and her office, along with the Arizona Attorney General) have no control over the counties in making that choice, Plaintiffs' Second Amended Complaint still fails the traceability and redressability standing requirements. Specifically, the standing doctrine requires a connection between the injury and the conduct: "the injury has to be fairly . . . traceable to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Redressability is "an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). If, as here, the requested relief will not resolve the injury, a plaintiff does not have standing to bring the claim. *See id.*

In connection with the OOP claims raised in Counts I-II, Plaintiffs seek relief including an injunction barring Defendants from "implementing, enforcing, or giving any effect to A.R.S. § 16-122, § 16-135, or § 16-584 to the extent that they require Defendants to reject provisional ballots in their entirety solely because they were cast in the wrong

precinct." (Doc. 233, at 42.) As deemed appropriate by the Ninth Circuit Court of Appeals, A.R.S. § 16-411 designates *the counties* as the local jurisdictions best suited to coordinate local election activities. *See Public Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1021 (9th Cir. 2016) (recognizing the various benefits of allowing local jurisdictions to select diverse methods of administering elections). Arizona law also makes *counties independently responsible for counting votes* after elections. *See*, *e.g.*, A.R.S. §§ 16-531; 16-584(E), 16-601. County officials determine whether to count or reject provisional ballots cast within their jurisdiction. *See* A.R.S. § 16-584(E); *Arizona Election Procedures Manual*, at 182 (Rev. 2014) ("*Manual*").[4] An injunction applying to the Defendants will not redress Plaintiffs' claimed injuries, as Defendants are not the ones rejecting provisional ballots cast in the wrong precinct—counties are.[5]

In addition, and despite their new notices of challenges to the constitutionality of those statutes[6] (Doc. 235), Plaintiffs' requested relief does not seek a declaratory order finding the actual statutes unconstitutional. Rather, it is just the "practice" of rejecting OOP ballots that Plaintiffs seek to enjoin, while they continue to leave unchallenged the specific language of the statutes at issue. (Doc. 233, at 42.) Because the individual counties charged with the actual counting or rejecting of provisional ballots remain absent from this matter, Plaintiffs' request for statewide injunctive relief relating to OOP voting should be denied. Plaintiffs cite to no Arizona authority that allows the Defendants to

[4] The *Manual* has the force of law, A.R.S. § 16-452, and can be found at: https://www.azsos.gov/sites/azsos.gov/files/election_procedure_manual_2014.pdf.

[5] Plaintiffs do not claim that the State somehow retains all centralized authority, however. *See Bush v. Gore*, 531 U.S. 98, 109 (2000) (not questioning that "local entities, in the exercise of their expertise, may develop different systems for implementing elections"); *see North Carolina Right to Life Political Action Comm. v. Leake*, 872 F. Supp. 2d 466, 475 (E.D.N.C. 2012) (dismissal of North Carolina Attorney General in election suit necessary, ultimate enforcement a local issue); *cf. League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008) (proper party must have "authority to control" the local jurisdictions carrying out elections).

[6] Plaintiffs never noticed compliance with A.R.S. § 12-1841 (Parties; notice of claim of unconstitutionality) as to H.B. 2023.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

independently order the counties to take action pursuant to A.R.S. § 16-122, § 16-135, or § 16-584.[7] *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976) (asserted injury must be a consequence of the defendants' actions).

Plaintiffs' actions have specifically recognized the necessity of the counties being parties in this matter. Plaintiffs' first subpoenas[8] since filing their Second Amended Complaint—which are among the excessive and disproportionate amount of discovery[9] Plaintiffs have served since then—were not directed at the Defendants. Instead, they were directed at all of the counties seeking specific information related to OOP practices *by those* counties. Plaintiffs' strategic choice to omit the counties as parties, while seeking relief that renders those counties necessary and indispensable parties, puts the named

[7] Unlike other states, Arizona does not grant the Defendants here discretionary authority to direct counties as to how to carry out elections. The closest supervisory authority is provided in the *Manual*, which is promulgated in two steps: (1) consultation with the counties and (2) approval by the Secretary of State, Governor, and Attorney General. A.R.S. § 16-452(A), (B). Of note, Plaintiffs do not take issue with the language contained in the *Manual*. And they fail to plead a single instance where the Defendants have directed a county to carry out an action resulting in Plaintiffs' alleged injuries.

[8] As an example, Plaintiffs' subpoena to Maricopa County is attached as Exhibit 1. Maricopa County officials were dismissed as defendants in this matter *with prejudice*. (Docs. 203, 233, 234.)

[9] Just since January 6, 2017, Plaintiffs have served subpoenas on each of 15 county recorders in Arizona, with 19-20 categories of documents demanded in each subpoena. Plaintiffs have further demanded 19 categories of documents from the Cochise County Election Director via subpoena, and noticed subpoenas demanding multiple categories of documents from Representative Michelle Ugenti-Rita, Speaker of the House and Representative J.D. Mesnard, Senator Don Shooter, the Yuma County Elections Director, and the Arizona Republican Lawyers Association. The subpoenas to non-parties are in addition to the *more than 200* requests for production Plaintiffs have now served to parties since May 2016. Even without counting subparts, which this Court's standard case management order directs should be counted, Plaintiffs have now propounded more than 80 requests for production. This is double the limit provided in the Court's standard case management order and violates the sensible limits of proportionality in Rule 26, Fed. R. Civ. P. *See, e.g.*, *Skinner v. Ryan*, CV-12-1729-PHX-SMM(LOA), 2014 WL 3064897, at *2 (D. Ariz. July 7, 2014) ("All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). . . These limitations reflect that, in addition to being relevant, discovery must also be proportional to the issues and needs of the case.")

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Defendants and this Court in a quandary. Without the counties' participation as parties, the Court will not hear the counties' potential defenses to Plaintiffs' claims arising from rejection of OOP ballots or the local rationales for making such a choice. Instead, Plaintiffs appear to want the remaining Defendants to somehow defend the actions and independent decisions of individual counties that are not parties to the case—including those counties who never have been. This is simply inappropriate.

With the dismissal of Maricopa County from this action,[10] Plaintiffs have not named *any* county official as a defendant in this case. Simply, it is not the Defendants that are charged with implementing or enforcing OOP compliance, it is the counties—and Plaintiffs have never challenged the State law providing as much. A.R.S. § 16-411 (charging the county boards of supervisors with that responsibility). Plaintiffs have been on notice since the beginning of this case that to claim such relief, they need to bring this action against the individual counties specifically authorized to, and who choose to, follow a precinct voting method. (*See* Doc. 71, Tr. of Proceedings, dated 5/10/16, at 23:23–24:1.) It remains the case that "Plaintiffs' requested injunction[, which remains the same in the Second Amended Complaint,] would not remedy the inequities they have identified." (Doc. 214, at 14 (Court's Order denying preliminary injunction).) Despite this Court's clear Order, Plaintiffs still "have not advanced a coherent theory, and . . . the relief they seek [still] does not remedy the inequality they have identified." *Id.* Without the counties actually engaged in the practice of rejecting ballots cast OOP—and they are the only entities engaged in that practice in Arizona—Plaintiffs cannot satisfy the redressability element of standing. *See Sprint Commc'ns Co.*, 554 U.S. at 273-74 (redressability requires that it be "'likely' and not merely 'speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit") (internal citations

[10] Maricopa County is the main and most populous county at issue as to OOP claims, and it cannot be brought back before the Court, having apparently been dismissed with prejudice at Plaintiffs' agreement, request, and pleading—its status as a dismissed defendant is *res judicata*. (Docs. 203, 233, 234.)

Snell & Wilmer L.L.P. LAW OFFICES One Arizona Center, 400 E. Van Buren, Suite 1900 Phoenix, Arizona 85004-2202 602.382.6000

and quotation marks omitted). Due to Plaintiffs' failure to include the correct parties, this Court has no ability to order any counties to count OOP provisional ballots. It cannot grant Plaintiffs the OOP relief they seek.

B. Plaintiffs Have Failed to Join Necessary and Indispensable Parties; Their OOP Claims are Subject to Rule 12(b)(7) Dismissal.

In addition to failing multiple standing requirements, Plaintiffs' action is also barred by Rules 12(b)(7) and 19(a), Fed. R. Civ. P., which require dismissal or amendment of any action if missing parties are "necessary" because complete relief cannot be accorded in their absence or their interest may be impaired or impeded. 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, yet both are here. Rule 19's two-step evaluation framework, as to whether a party is (1) necessary and (2) indispensable, requires dismissal of Plaintiffs' claims. *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1022 (9th Cir. 2002) (holding that action must be dismissed on threshold ground of absent necessary and indispensable parties).

Again, the necessity of these absent parties is especially telling concerning the relief requested here, which is directed at the Defendants' implementation and enforcement of the OOP laws at issue. (Doc. 233, at 42.) As Defendants are not charged with implementing or enforcing the OOP laws at issue, they cannot be presumed to adequately represent the counties interests in this matter. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999) (non-parties must be represented by named parties adequately to overcome Rule 19). Only the counties can provide that relief, and the fact that those independent jurisdictions that would be subject to and affected by such injunctive relief are absent warrants dismissal. 43A C.J.S. Injunctions § 326; *see also Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1381 (S.D. Fla. 2004); *Westchester Disabled on the Move, Inc. v. Cty. of Westchester*, 346 F. Supp. 2d 473, 479-80 (S.D.N.Y. 2004)

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

(failure to join local jurisdictions responsible for carrying out election mandates dismissal); *cf. Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976) (valid claim for a constitutional violation under § 1983 requires alleged specific injury as a result of the *specific conduct of a defendant*). As Plaintiffs have continued to refuse to add the necessary counties and in fact have settled claims against and arranged for the dismissal *with prejudice* of the Maricopa County defendants (Doc. 203, at 2), the Second Amended Complaint should be dismissed. The Court is being asked to adjudicate the rights of the counties as to their OOP systems without those counties properly before it. This is impermissible. *Cf. Ash Grove, Texas, L.P. v. City of Dallas*, 3:08-cv-2114-O, 2009 WL 3270821, at *15 (N.D. Tex. Oct. 9, 2009) (dismissing claim for relief requiring nullification of contracts held by absent third parties under Rule 12(b)(7)).

C. Laches Bars Plaintiffs' Fifteenth Amendment Claim, Which Does Not Relate Back.

The laches doctrine is another jurisdictional bar, particularly to Plaintiffs' 15th Amendment claim regarding H.B. 2023, brought in Count IV of the Second Amended Complaint. "In the context of election matters, the laches doctrine seeks to prevent dilatory conduct and will bar a claim if a party's unreasonable delay prejudices the opposing party or the administration of justice." *Ariz. Libertarian Party v. Reagan*, --- F. Supp. 3d ---, 2016 WL 3029929, at *2 (D. Ariz. May 27, 2016) (quoting *Ariz. Pub. Integrity All. Inc. v. Bennett*, CV-14-01044-PHX-NVW, 2014 WL 3715130, at *2 (D. Ariz. June 23, 2014)). As is apparent from the face of the Second Amended Complaint, there has been unreasonable delay and thus resulting prejudice here to both the opposing party and the administration of justice. Despite the two telephonic status conferences dedicated to amendments to Plaintiffs' pleading, held on November 1, 2016 (Doc. 222), and December 15, 2016 (Doc. 231), Plaintiffs never broached the subject of a new intentional discrimination claim under the Fifteenth Amendment with the Court or Parties

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

prior to bringing it in the Second Amended Complaint.[11] Nor did they move the Court to allow a new claim. *See* Rule 15(a)(2), Fed. R. Civ. P.

This is particularly troubling because Plaintiffs allege this claim for the very first time after nearly nine months of litigation and base their allegations of intent solely on information related to a completely separate and different legislation enacted five years before H.B. 2023. (Doc. 233, at ¶¶ 69-70.) This other legislation was never enforced and shortly thereafter repealed, as Plaintiffs admit. (Doc. 233, at ¶ 71.) The alleged intent behind long-past other legislation is immaterial to the intent with which H.B. 2023 was enacted, and H.B. 2023 itself has been in effect, with a single, brief exception, since August 6, 2016, including through both primary and general elections in Arizona. Plaintiffs brought their initial claims as to it on April 15, 2016, and throughout preliminary injunction—including expert discovery—and appellate proceedings, they never alleged intentional discrimination. Defendants, as well as the "voters of Arizona" will suffer significant prejudice if the Court were to proceed with Plaintiffs' Fifteenth Amendment claim and enjoin H.B. 2023 on intentional discrimination grounds belatedly and defectively raised. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 910-11 (D. Ariz. 2005) (dismissing case, including on grounds that Fifteenth Amendment claim was barred by laches).

Furthermore, under Rule 15(c)(1)(B), Fed. R. Civ. P., Plaintiffs' Fifteenth Amendment claim does not relate back to the dates of their earlier pleadings, as to do so, it would need to arise "out of the conduct, transaction, or occurrence set out . . . in the original pleading[.]" Nowhere in Plaintiffs' original, operative Amended Complaint (Doc. 12) is the prior legislation or the circumstances of its passage mentioned in relation to H.B. 2023; neither do any allegations of conduct susceptible to intentional discrimination

[11] Plaintiffs also unilaterally amended their pleading to dismiss parties that originally brought suit and, in the case of the Maricopa County defendants, that were originally sued, despite not complying with Rule 41(a)(1)(A)(ii), as they had previously done when dismissing parties. (Doc. 59.)

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

on the basis of race or color appear. Simply, the new allegations and claim related to the Fifteenth Amendment do not arise out of the conduct, transactions, and occurrences set out in the original pleading and therefore do not relate back. Fed. R. Civ. P. 15(c)(1)(B). As it is barred by laches and the subject of an improper amendment, Plaintiffs' Fifteenth Amendment claim must be dismissed. It, along with the remainder of Plaintiffs' claims, is also subject to dismissal under Rule 12(b)(6), Fed. R. Civ. P.

II. Plaintiffs Do Not State Any Claim Upon Which Relief Can Be Granted.

To survive a 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Each of Plaintiffs' claims fail to meet this standard.[12]

A. Plaintiffs Fail to State a Valid § 2 Claim Under the VRA (Counts I, III).

Count I asserts a claim under the 'effect prong' of § 2 of the Voting Rights Act ("VRA") based on what Plaintiffs call "Arizona's [r]ejection" of OOP provisional ballots. Section 2 states "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Meanwhile, Count III alleges that H.B. 2023 violates both the 'purpose and effect prongs' of the same statute. Whether Plaintiffs' concerns are considered individually or collectively, they fail to state a § 2 claim.

1. Out-of-Precinct Voting (Count I)

Plaintiffs claim that rejecting OOP votes disproportionately impacts minority voters. (*See* Doc. 233, ¶ 91.) As discussed above, the counties that do any actual rejecting

[12] Intervenor-Defendants take Plaintiffs' factual allegations as true for purposes of this Motion only and continue to reserve the right to challenge them should this litigation proceed. *See Wyman v. Wyman*, 109 F.2d 473, 474 (9th Cir. 1940).

Snell & Wilmer L.L.P. LAW OFFICES One Arizona Center, 400 E. Van Buren, Suite 1900 Phoenix, Arizona 85004-2202 602.382.6000

are necessary and indispensable—yet absent—parties relevant to this claim. But Plaintiffs do not even state the essential elements of a § 2 claim in any event. First, regardless of the facts alleged, the alleged restriction on voting does not deny or abridge a voter's equal opportunity to vote, which is a necessary element of § 2. *See* 52 U.S.C. § 10301(a); *see also Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 583-84 (E.D. Va. 2015) (dismissing § 2 claim when "there is no plausible contention that" election practice that may have inconvenienced voters "denied the opportunity to vote"). Voters can have their vote counted by simply traveling to the correct polling place. Voters who go to the wrong location are not denied an equal opportunity to participate in the political process. *See id.*; *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (rejecting § 2 claim when Wisconsin "extend[ed] to every citizen an equal opportunity to get a photo ID," leaving no "'denial' of anything by Wisconsin, as § 2(a) requires").

Second, a § 2 plaintiff must allege with sufficient facts a "discriminatory burden" on the ability to participate equally in the political process that is, at least "in part," "caused by or linked to 'social and historical conditions' that have or currently produce discrimination." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). Critically, only discrimination *by a state* can give rise to a § 2 claim. *Frank*, 768 F.3d at 753. "That's important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Id.* (citing *Milliken v. Bradley*, 418 U.S. 717 (1974)). Here, Plaintiffs fail to allege facts showing discrimination *by the State of Arizona* caused the alleged rates of OOP provisional ballot rejection among certain voters in counties that use precinct-based systems. (Doc. 214, (Court's Order) at 9 ("[I]t is circular to argue that minority voters are disproportionately rejected for being cast OOP because Arizona rejects OOP ballots.").) Just as they were before, vague allegations of socioeconomic disparities between minority and majority voters remain insufficient to establish the necessary causal link and are thus insufficient to state a § 2 claim. *See id.*

///

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

2. H.B. 2023 (Count III)

Plaintiffs assert that H.B. 2023—a sensible and narrowly drawn law in effect for nearly half a year at this point—was enacted with a discriminatory purpose and will disproportionately impact minority voters. (*See* Doc. 233, ¶ 100.) Plaintiffs fail to plead facts, however, to establish that a limited criminal restriction on ballot harvesting denies or abridges an equal opportunity to vote, as required for a § 2 claim. *See* 52 U.S.C. § 10301(a). All voters can continue to participate in early voting by mailing or turning in the ballot themselves or having a family member, household member, or caregiver do so. (*See* Doc. 233, ¶ 74.) And H.B. 2023 does not restrict any voter from casting their ballot in person on Election Day. Allegations that some voters may be inconvenienced by limiting who can collect early ballots do not give rise to a § 2 claim. *See Lee*, 155 F. Supp. 3d at 583-84 (dismissing § 2 claim based on alleged inconvenience to voters).

B. Plaintiffs Fail to State a Valid Equal Protection Claim Based On "Severe Burden" (Counts II, V).

Count II alleges that the longstanding restriction on OOP voting severely burdens "Plaintiffs' and their constituencies', members' and adherents' First and Fourteenth Amendment rights." (Doc. 233, ¶ 97.) Meanwhile, Count V alleges in part that H.B. 2023 "substantially burdens the right to vote without sufficient justification." (Doc. 233, ¶ 111.) Plaintiffs fail to plead sufficient facts to support either of these assertions.

1. Out-of-Precinct Voting (Count II)

Plaintiffs contend that their right to vote, along with that of their constituencies, members, and adherents, is "severely burdened by the unjustified rejection of OOP provisional ballots." (Doc. 233, ¶ 97.) As discussed above, the Court should decline jurisdiction because Plaintiffs fail to satisfy standing requirements for their OOP claims, which are also brought against the wrong parties. In any event, a facially plausible Equal Protection claim based on an alleged severe burden must contain factual allegations showing such a burden. As Plaintiffs admit, non-discriminatory restrictions on the right to vote, like Arizona's OOP restriction, may be "justified by an important state regulatory

interest." (Doc. 233, ¶ 96) (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

All agree on the relevant *Anderson-Burdick* balancing test, under which this Court must "weigh 'the character and magnitude of the asserted injury to the rights'" that Plaintiffs seek 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'" Plaintiffs' rights. *See Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see also Pub. Integrity All., Inc.*, 836 F.3d at 1024 (discussing the appropriate balancing and "means-end fit analysis"). Where the restrictions are severe, however, "'the regulation must be narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). Plaintiffs make no facially plausible showing of severe burden.

Requiring voters to cast ballots within their designated precinct does not severely burden the right to vote and the minimal burden imposed easily satisfies the more relaxed standard.[13] It could not be otherwise, when the Supreme Court has vetted more demanding restrictions—like a government identification requirement—and found them not to meaningfully burden the right to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197-200 (2008). Appearing at the proper polling location is in some way always inherent to in-person voting, whether a precinct-based or vote-centers model is used. *See Colo. Common Cause v. Davidson*, 2004 WL 2360485, at *14 (D. Colo. 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."); *see also Service Emps. Int'l Union Local v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (finding it illogical to absolve voters "of all responsibility for voting in the correct precinct or correct polling place by assessing voter burden solely on the basis of outcome—i.e., the state's ballot validity determination").

[13] (Doc. 214 (Court's Order), at 13 (noting that "more than two dozen other states enforce precinct-based systems by rejecting OOP ballots").)

Snell & Wilmer L.L.P. LAW OFFICES One Arizona Center, 400 E. Van Buren, Suite 1900 Phoenix, Arizona 85004-2202 602.382.6000

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Moreover, on the counterweight side of the balancing test, "[t]he advantages of the precinct system are significant and numerous." *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004.) Among other things, the system (1) "caps 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) helps prevent election fraud; and (4) "puts polling places in closer proximity to voter residences." *Id.* As a matter of law, the facts alleged by Plaintiffs fail to state a claim for severe burden related to OOP voting.

2. H.B. 2023 (Count V)

Plaintiffs claim in Count V that H.B. 2023 will severely and unjustifiably burden their right to vote. (Doc. 233, ¶ 109.) Even assuming the Second Amended Complaint's factual allegations are true, the contention is implausible on its face. H.B. 2023 has no impact whatsoever on voters' ability to vote in person on Election Day. *See* A.R.S. § 16-1005(H), (I) (codification of H.B. 2023's provisions). That is significant because, although the right to vote is fundamental, there "is no constitutional or federal statutory right to vote by absentee ballot." *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 414 (9th Cir. 2016) (order enjoining H.B. 2023 stayed by *Arizona Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016)) (dissenting op. of Bybee, J., joined by O'Scannlain, J., Clifton, J., Callahan, J., and N.R. Smith, J.) (citing *McDonald v. Bd. of Election Comm'rs of Chic.*, 394 U.S. 802, 807-08 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots . . . ."). Similarly, there is no fundamental right to have a person of one's choosing—or, more specifically here, a particular person who solicits to do so—return one's early voted ballot. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting claim of a blanket right to vote by absentee ballot).

Based on the facts as Plaintiffs' allege them, H.B. 2023 does not impose any severe burden on early voting either. (Doc. 204, at 19.) Early ballots still can be returned in a variety of ways, including by mail or by hand delivery to a county recorder's office or a

polling place. (*See* Doc. 233, ¶ 74.) Voters can also continue to use household members, family members, and caregivers to assist them. *See id*. Given that voters *receive* early ballots by mail, A.R.S. § 16-542(C), requiring that such voters return the ballot in the same manner (or by hand delivery) is not unreasonable.[14] The absence of a severe burden is further illustrated by the fact *not one* individual Plaintiff, declarant, or deponent has still ever alleged that H.B. 2023 will prevent or has prevented them from voting. *See Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1199 (Ill. App. 2004) (concluding that "the burden placed upon absentee voters by the restriction on who may mail an absentee ballot . . . is slight," and furthers "important state interest" in "safeguard[ing] the integrity of the election process"); (Doc. 204, at 19 (noting Plaintiffs' failure to produce a single declaration from a voter severely burdened by H.B. 2023).)

Because H.B. 2023 does not impose a severe burden, sufficiently weighty, relevant and legitimate state interests justify it. *See Crawford*, 553 U.S. at 191; *see also Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Here, the Legislature identified important interests to justify the bill—namely, preventing fraud that undermines the public's confidence in the electoral system and the integrity of its results. (*See* Doc. 233, ¶ 82); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *Frank*, 768 F.3d at 750 (courts must accept legislative finding that regulation promotes public confidence in electoral system). As no facts can overcome the State's recognized interest in election integrity, Plaintiffs fail to state a claim.

[14] Plaintiffs' allegations in paragraph 79 include paraphrased statements of a state senator who explained, prior to H.B. 2023's passage, that some rural residents of her district "do not receive home delivery of their mail and are therefore unable to rely on mail services to transmit their ballot to and from their home." (Doc. 233, ¶ 79.) Given that those voters already were unable to rely on mail services prior to H.B. 2023 taking effect, the law has no bearing on their right to vote or chosen method of doing so. (*See* Doc. 204 (Court's Order), at 16 (H.B. 2023 "does not eliminate or restrict any method of voting [.]").)

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

C. Plaintiffs Do Not Advance a Valid Associational Rights Theory (Count V).

Count V further contends that H.B. 2023 "infringes upon the First Amendment associational rights of Plaintiffs, whose purpose—at least in part—is to encourage and facilitate voting." (Doc. 233, ¶ 112.) Plaintiffs' claim of "real and substantial burdens" on their associational rights fails because they fail to show any burden on their right to associate. (*See id.* at ¶ 114.) Specifically, Plaintiffs only claim that one of them has engaged in ballot harvesting in the past, without explaining how ballot harvesting prohibited by H.B. 2023 is expressive conduct inherent to the "right of political parties and their members to organize and engage in legitimate election-related political activity." (*See id.*, ¶¶ 20, 114); (*see also* Doc. 204, at 22 ("[Plaintiffs] have not shown ballot collection is protected First Amendment activity").)

Plaintiffs also continue to fail to allege sufficient facts to show that H.B. 2023 imposes any *real* burden on the right to associate. (*See* Doc. 204, at 22-23.) Plaintiffs instead continue to rely on strained and inapplicable analogies to cases involving restrictions on political parties' internal policies and procedures or voter registration activities. (*See* Doc. 233, at ¶ 113.) Voter registration concerns a central function of a political organization—to ensure that individuals who may support that organization are *eligible* to vote, and even then, not all activities related to it are expressive conduct. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 392 (5th Cir. 2013). The act of physically delivering a completed ballot to a mailbox, county recorder's office, or polling place, meanwhile, is clerical. *See Rumsfeld v. Forum for Academic and Instit. Rights, Inc.*, 547 U.S. 47, 66 (2006) ("First Amendment protection [extends] only to conduct that is inherently expressive."); *Barrow v. Detroit Election Comm'n*, 854 N.W.2d 489, 502 (Mich. App. 2014) ("mailing of ballots" by city clerk is a "perfunctory, administrative task[]"). When Arizona has simply become one of the majority[15] of states that restrict

[15] Twenty-six other states restrict this activity in some form. *See, e.g.*, Cal. Elec. Code § 3017 (2016); Colo. Rev. Stat. Ann. § 1-7.5-107; Nev. Rev. Stat. §§ 293C.330, 293C.317; N.M. Stat. Ann. §§ 1-6-10.1, 1-20-7, 3-9-7; Ala. Code § 17-11-18; Ark. Code §§ 7-5-403,

third-party collection of ballots—and is now among fifteen states that attach felony penalties[16] to their restrictions—it is difficult to cognize that such sensible, administrative restrictions tread on the First Amendment.

In addition, while the practice of ballot harvesting is not similar to voter registration efforts, H.B. 2023 itself is similar to other Arizona laws that reasonably restrict association with individuals actively engaged in the voting process. For example, Arizona law prevents electioneering within 75 feet of a polling place, A.R.S. § 16-515, and only allows one person per voting booth at a time, with limited exceptions. A.R.S. § 16-580. These laws do not violate the First Amendment. *Cf. PG Publ'g Co. v. Aichele*, 705 F.3d 91, 113 (3d Cir. 2013) ("there is no protected First Amendment right of access to a polling place"); *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 748 (6th Cir. 2004).

Because H.B. 2023 does not impose a severe burden on the right to associate, it easily hurdles the balancing test at issue. *See Green Party of Ark. v. Daniels*, 733 F. Supp. 2d 1055, 1059-60 (W.D. Ark. 2010). Again, any burden imposed by H.B. 2023 is minimal and easily justified by the State's regulatory interests. *See Feldman*, 843 F.3d at 418 (Smith, N.R., J., dissenting from order enjoining H.B. 2023) (order stayed by 137 S. Ct. at 446); (Doc. 204, this Court's order denying Plaintiffs' requested preliminary injunction, at 22-23.) Plaintiffs admit to the precise State interests at issue—preventing voter fraud that undermines public confidence in the electoral system—and the State is not required to use

---

7-5-411; La. Stat. Ann. § 18-1308 (2015); Me. Stat. tit. 21-A §§ 753-b, 754-A, 791; Mass. Gen. Laws ch. 54 § 92; Miss. Code Ann. § 23-15-719; N.H. Rev. Stat. Ann. § 657:17; N.J. Rev. Stat. §§ 19:63-27, 19:63-16; 25 Pa. Stat. and Cons. Stat. Ann. § 3146.6; S.C. Code Ann. §§ 7-15-310, 7-15-385; Tenn. Code Ann. § 2-6-202; Va. Code Ann. §§ 24.2-705, 24.2-707, 24.2-709(A); W. Va. Code § 3-3-5.

[16] *See* Ark. Code § 7-1-104; Cal. Elec. Code § 18403; Conn. Gen. Stat. § 9-359; Ga. Code Ann. § 21-2-574; Ind. Code § 3-14-2-16(4); Mich. Comp. Laws § 168.932; Mo. Rev. Stat § 115.304; N.C. Gen. Stat. § 163-226.3; Nev. Rev. Stat. § 293C.330; N.J. Rev. Stat. § 19:63-28; N.M. Stat. Ann. §§ 1-6-9, § 1-6-10.1, § 1-20-7; Ohio Rev. Code § 3599.21; 26 Okla. Stat. Ann. § 16-102.1; Tex. Elec. Code Ann. § 86.006(g).

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

Plaintiffs' means or the 'least-burdensome' means of vindicating its interests with valid legislation. (*Contra* Doc. 233, ¶ 82.) Plaintiffs have thus failed to state a claim.

D. Plaintiffs Do Not State a Valid Fifteenth Amendment Claim (Count IV).

Count IV of the Second Amended Complaint fails to state a claim for intentional discrimination as to H.B. 2023. The Fifteenth Amendment was "not designed to punish for the past; its purpose is to ensure a better future." *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2629 (2013). Plaintiffs' allegations regarding H.B. 2023 itself are not even "susceptible of an inference of discriminatory intent." *Cf. Varela v. Perez*, CV-08-2356-PHX-FJM, 2009 WL 3157162, at *4 (D. Ariz. Sept. 28, 2009). Importantly, "[d]iscriminatory purpose is an essential element of a Fifteenth Amendment claim." *Arizona Minority Coal. for Fair Redistricting*, 366 F. Supp. 2d at 911, 911 n.23 (dismissing plaintiffs' Fifteenth Amendment claim as both "barred by laches" and "not cognizable" under Rule 12(b)(6)). Instead, Plaintiffs rely heavily on prior legislation and items from a no-longer-in-effect federal preclearance process in an attempt to plead intentional discrimination; this is unavailing, as this Court noted in its prior Order. (Doc. 204, 12-14 (noting Plaintiffs' tendency to isolate quotes and take items out of context).)

Moreover, the Fifteenth Amendment "applies only to practices that directly affect access to the ballot." *See id.* (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). H.B. 2023's sensible restrictions on who may return an early voted ballot do not restrict ballot or voting access based on race or color, intentionally or otherwise. *See McDonald*, 394 U.S. at 807-08. Plaintiffs' allegations fail to state differently, and their Fifteenth Amendment claim should be dismissed under Rule 12(b)(6), Fed. R. Civ. P.

Conclusion

Plaintiffs' claims all have serious defects: in one instance a claim is asserted too late, in others, claims are brought against non-joined but necessary and indispensable parties, and, overall, Plaintiffs' claims are not accompanied by the requisite factual support that attends plausible claims for relief. The Second Amended Complaint should be dismissed in its entirety and with prejudice.

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

DATED this 17th day of January, 2017.

Respectfully submitted,

SNELL & WILMER L.L.P.

By: */s/ Brett W. Johnson*

Brett W. Johnson
Sara J. Agne
Colin P. Ahler
Joy L. Isaacs
One Arizona Center
400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202

Timothy A. La Sota
2198 E. Camelback Road, Suite 305
Phoenix, Arizona 85016

Attorneys for Intervenor-Defendants Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants.

/s/ Tracy Hobbs

Snell & Wilmer L.L.P.
LAW OFFICES
One Arizona Center, 400 E. Van Buren, Suite 1900
Phoenix, Arizona 85004-2202
602.382.6000

EXHIBIT 1

UNITED STATES DISTRICT COURT

for the

Arizona Democratic Party, et al.
Plaintiff
v.
Arizona Secretary of State's Office, et al.
Defendant

Civil Action No. CV-16-01065-PHX-DLR

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Adrian Fontes, Maricopa County Recorder, 111 South Third Avenue, Phoenix, AZ 85003

(Name of person to whom this subpoena is directed)

☒ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

See Attachment A

Place:	Date and Time:
Maricopa County Recorder, 111 South Third Avenue, Phoenix, AZ 85003	January 25, 2017 5:00 p.m.

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 1/4/2017

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Arizona Democratic Party, et al., who issues or requests this subpoena, are:

Sarah R. Gonski, 2901 N. Central Avenue, Suite 2000, Phoenix, AZ 85012, sgonski@perkinscoie.com, 602-351-8170

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. CV-16-01065-PHX-DLR

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

ATTACHMENT A

For a statement of your obligation in producing documents under this subpoena see Federal Rules of Civil Procedure 45(d), (e), and (g), which appear on the final page of the subpoena. Documents are to be produced within twenty one (21) days of receiving this subpoena. For any questions regarding method and means of production, please contact Melinda Manchester at 602-351-8194. Where possible, documents should be produced electronically. If you prefer to produce physical documents, Ms. Manchester will arrange for a receipt messenger to pick up the documents, or for another form of mutually agreeable delivery. Your production should be made pursuant to the Definitions and Instructions below.

DEFINITIONS

Except as specifically defined below, the terms used in this subpoena shall be construed and defined in accordance with the Federal Rules of Civil Procedure, wherever applicable. Any terms not defined shall be given their ordinary meaning.

1. "Any" and "all" mean "any and all."

2. "Arizona State Legislature" means the House of Representatives and the Senate of the State of Arizona, and includes the members of both the House and Senate, their employees, staff, agents, and representatives, as well as all employees, staff, agents, and representatives of either the Arizona State House of Representatives, the Arizona State Senate, or the legislative body as a whole.

3. "Arizona Republican Party" means the state committee, as defined by 52 U.S.C. § 30101(15) and A.R.S. §§ 16-801, *et seq*. involved with working to elect Republican candidates to elected offices.

4. "Ballot collection" means the return of, possession of, or receipt of a voted early ballot by a person other than the voter who cast the ballot.

5. "Communication" means any transfer of information of any type, whether written, oral, electronic, or otherwise, and includes transfers of information via email, report, letter, text message, voicemail message, written memorandum, note, summary, and other means.

6. "County," when capitalized, means Maricopa County, Arizona, as well as all employees, staff, agents, and representatives of the County, including, but not limited to, the Board of Elections, the Elections Department, the Recorder's Office, or any other entity responsible for conducting or supervising elections in the County.

7. "Date" means the exact day, month, and year, if ascertainable, or, if not, the best available approximation (including relationship to other events).

8. "Document" is synonymous in meaning and scope to the term "document" as used under Federal Rule of Civil Procedure 34 and the phrase "writings and recordings" as defined in Federal Rule of Evidence 1001, and includes, but is not limited to, records, reports, lists, data, statistics, summaries, analyses, communications (as defined above), any computer discs, tapes, and printouts, emails, databases, and any handwritten, typewritten, printed, electronically recorded, taped, graphic, machine-readable, or other material, of whatever nature and in whatever form, including all non-identical copies and drafts thereof, and all copies bearing any notation or mark not found on the original.

9. "Duplication Board" means a the two member board responsible for duplicating ballots as described in the Arizona Elections Procedures Manual published by Arizona's Office of the Secretary of State.

10. "Election" means any statewide primary or general election.

11. "HB2023" means House Bill 2023 which was enacted March 9, 2016 and codified as A.R.S. § 16-1005 (H-I).

12. "HB2305" means House Bill 2305 which was enacted June 19, 2013 and subsequently repealed by the Arizona State Legislature in 2014.

13. "Including" means "including but not limited to."

14. "Out-of-Precinct Provisional Ballot" means a provisional ballot cast by a voter who voted in a precinct other than the one to which that voter was assigned.

15. "Person" means not only natural persons, but also firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, trusts, groups, and organizations; federal, state, or local governments or government agencies, offices, bureaus, departments, or entities; other legal, business, or government entities; and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof or any combination thereof.

16. "Relating to," "regarding," or "concerning" and their cognates are to be understood in their broadest sense, and shall be construed to include pertaining to, commenting on, memorializing, reflecting, recording, setting forth, describing, evidencing, or constituting.

17. "SB1412" means Senate Bill 1412 which was enacted on or April 13, 2011, codified as part of A.R.S. § 16-1005(D) in 2011, and subsequently repealed in 2012 by the Arizona State Legislature.

18. "Secretary of State" means the current Arizona Secretary of State, her predecessors, and their employees, staff, agents, and representatives.

19. "Special Election Board" means the board appointed by a county recorder or other officer in charge of elections to assist a qualified elector who becomes ill or disabled with voting, as defined and set out by A.R.S. § 16-549.

20. "Voter" means any registered voter in Arizona and all persons who may properly register to vote in Arizona by the close of discovery in this case.

21. "You" and "your" means the County Recorder and all of his or her employees, staff, agents, and representatives. This term includes, without limitation, the county elections department and all employees, staff, agents, and representatives thereof.

INSTRUCTIONS

1. You should produce all documents available to you or subject to your access or control that are responsive to the following document production topics. This includes documents in your actual or constructive possession or control, as well as that of your attorneys, investigators, experts, and anyone else acting on your behalf.

2. Documents are to be produced as they are kept in the ordinary course of business. Accordingly, documents should be produced in their entirety, without abbreviation, redaction, or expurgation; file folders with tabs or labels identifying documents responsive to this subpoena should be produced intact with the documents; and documents attached to each other should not be separated.

3. All documents are to be produced in electronic form. Documents that are produced electronically should be produced in native format with all metadata intact.

4. Each document produced should be categorized by indicating the number of the document production topic in response to which it is produced.

5. The singular form of a noun or pronoun includes the plural form, and the plural form includes the singular.

6. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of a document production topic all responses that otherwise might be construed to be outside its scope.

7. A reference to an entity in this subpoena shall be construed to include its officers, directors, partners, members, managers, employees, representatives, agents, consultants, or anyone acting on its behalf.

8. The document production topics apply to the period from 2008 through the present, unless otherwise limited or expanded by a particular topic description.

9. If any otherwise responsive document was, but is no longer, in existence or in your possession, custody, or control, identify the type of information contained in the document, its current or last known custodian, the location/address of such document, and the identity of all persons having knowledge or who had knowledge of the document, and also describe in full the circumstances surrounding its disposition from your possession or control.

10. With respect to any document withheld from production on a claim of privilege or work product protection, provide a written privilege log identifying each document individually and containing all information required by Rule 26(b)(5) of the Federal Rules of Civil Procedure, including a description of the basis of the claimed privilege and all information necessary for Plaintiffs to assess the claim of privilege.

11. If you object to any part of a request, set forth the basis of your objection and respond to all parts of the request to which you do not object.

12. Each request and subparagraph thereof is to be answered separately. If there are no documents responsive to a particular request, so indicate.

13. To the extent that any document responsive to the requests herein was previously produced in response to the Plaintiffs' expedited discovery requests, served via electronic mail on May 16, 2016, the County need not reproduce that document in response to these requests. If this is the case, please so indicate in your response to this production request.

DOCUMENT PRODUCTION TOPICS

1. All documents identifying voters who cast provisional ballots for the 2016 primary and general elections. This includes all documents that contain, or that would assist a reasonable person in deciphering, such data by any or all of the following: (1) voter name; (2) voter date of birth; (3) voter race; (4) voter ethnicity; (5) voter gender; (6) voter partisan affiliation (7) voter address; (8) precinct to which the voter was assigned; (9) precinct in which the ballot was cast; (10) voter identification number or, if unavailable, other such numerical identifier personal to the voter, such as the last four digits of the voter's social security number; (11) date the provisional ballot was cast; (12) reason the provisional ballot was cast; (13) whether the provisional ballot was counted; and (14) if the provisional ballot was not counted, the reason it was rejected. This request includes all information available at the individual level, precinct level, and county level, regarding the numbers, locations, reasons for, and demographics about voters casting provisional ballots. If the information is available at both the state-wide level and broken down by county, precinct, and/or by polling location, you should produce it on each of these levels. In addition, for provisional ballots cast because the voter was in the right county but attempted to vote in a precinct other than the one to which he or she was assigned (i.e., "out-of-precinct" provisional voting), please

provide any documents or data identifying the voter's county, the voter's assigned precinct, and the precinct in which the voter cast the out-of-precinct provisional ballot.

2. All documents regarding voters who left polling locations without voting in the 2008, 2010, 2012, 2014, and/or 2016 elections because they had presented to vote at a precinct other than that to which they were assigned. This includes documents regarding the number of voters who did so as well as all documents that contain, or that would assist a reasonable person in deciphering, such information by any or all of the following: (1) voter name; (2) voter's assigned precinct; (3) precinct where the voter presented to vote; (4) voter age; (5) voter race; (6) voter ethnicity; (7) voter gender; and/or (8) voter partisan affiliation. This request also includes any documents indicating whether you do or do not have any records reflecting this information, and/or any means of recording this information.

3. All documents related to the reassignment of voters among and between polling locations for each statewide election held since January 1, 2008, including any plans or efforts to educate voters about any such changes.

4. All documents relating to any training, instruction, or direction to elections administrators and/or poll workers regarding interactions with or instructions given to voters who attempt to vote at a precinct other than that to which they are assigned.

5. All documents relating to plans and efforts to contact, inform, educate, or communicate with voters regarding out-of-precinct provisional voting. This includes any marketing, outreach or public education plans or campaigns.

6. All studies, reports, presentations, and analyses that the County has conducted, authorized or considered in relation to the casting and/or rejection of provisional ballots in the County and/or statewide since May 1, 2016.

7. All documents relating to any training, instruction, or direction to elections administrators and/or poll workers regarding ballot collection or any changes in election procedures pursuant to HB2023.

8. All documents relating to ballot collection for each election, including special elections, held since January 1, 2008. This includes, but is not limited to, documents indicating the number of ballots turned into election officials by ballot collectors, documents regarding persons collecting ballots or turning them in to elections officials, any records regarding voters who turned in their ballot via a collector, and any records of voters who called the Recorder's office for assistance in turning in their ballots.

9. Any communications with the Arizona State Legislature, the Arizona Attorney General's Office, the Arizona Secretary of State's Office and/or any representative of a political party related to ballot collection.

10. All documents regarding the number of ballots rejected because they were received after the mail-in deadline in any election, including any special elections, held since January 1, 2008.

11. All documents relating to any plans or efforts to contact, inform, educate, or communicate with voters regarding ballot collection or HB2023. This includes any marketing, outreach or public education plans or campaigns.

12. All documents related to any meeting regarding ballot collection, HB2023, HB2305, SB1412, or any changes in election procedures made pursuant to HB2023, HB2305, SB1412, including but not limited to meeting agendas, notes, and minutes. This includes all documents relating to your plans and efforts to enforce or not enforce HB2023, HB2305, and SB1412.

13. All documents regarding reports, investigations, and/or prosecutions of fraud in connection to ballot collection in the County and/or statewide since January 1, 2008.

14. All documents communicated between or among you, the Secretary of State, the Arizona State Legislature, the Arizona Attorney General, and/or the Arizona Republican Party regarding or related to any of the following topics:

a. HB2023

b. HB2305

c. SB1412

d. Ballot Collection

e. Out-of-Precinct Provisional Ballots

15. Digitized boundaries of all precincts in the County for each of the 2008, 2010, 2012, 2014, and 2016 elections in shapefile format.

16. Any election results for all precincts in the County for the 2000, 2004, 2008, 2010, 2012, 2014, and 2016 primary and general elections. This includes the total number of registered voters, the total number of votes cast, and the total number of votes cast for each candidate in each precinct (i.e., precinct-level results). This further includes all documents that contain, or that would assist a reasonable person in deciphering, a breakdown of the same by age, race, ethnicity, gender, and/or partisan affiliation.

17. All documents regarding demographic information of the voting age population for all precincts in the County from January 1, 2008 through the date of this subpoena. This includes all documents that contain, or that would assist a reasonable person in deciphering, a breakdown of the same by age, race, ethnicity, gender, and/or partisan affiliation.

18. All documents related to the use, composition of and publication of the availability of the Special Election Board in the County, including requests by voters or persons assisting voters for use of the Special Election Board, the identity of the current Board members, any outreach to the public educating, promoting or advertising the availability of voting by use of the Special Election Board, and the identities of all voters who voted by use of the Special Election Board in each of the 2008, 2010, 2012, 2014, and 2016 elections.

19. All documents related to the use and composition of the duplication board, including information that would assist a reasonable person in deciphering the number of times that the duplication board has been used in all primary and general elections since 2008, the time it takes for the duplication board to duplicate a ballot, the number of ballots duplicated in each election, the reasons for which ballots were duplicated, and the identity of the current members of the duplication board.