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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-16-1065-PHX-DLR

INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION ON POLLING PLACE ALLOCATION AND PROVISIONAL BALLOT CLAIMS

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The relief sought by Plaintiffs' Joint Motion for Preliminary Injunction on Polling Place Allocation and Provisional Ballot Claims (the "Motion") (Docs. 72, 73) is nothing short of extraordinary. First, Plaintiffs ask the Court to vaguely order the Maricopa County Defendants to "obey the law" in their ongoing process of designating polling places for the November 8, 2016 General Election or face the threat of judicial punishment if they do not comply with this open-ended directive. In support, Plaintiffs offer bare speculation that voters *could* be subject to long lines, notwithstanding the lack of any evidence that such lines have resulted in past general elections conducted with the exact same precincts, same rules requiring voters to vote at their assigned polling place, and Department of Justice ("DOJ") preclearance requirements.

Second, and in an about-face of their purported concern about long lines and completely ignoring the extensive get-out-the-vote marketing efforts by governmental entities and numerous options provided to cast votes in Arizona, Plaintiffs ask the Court to overturn Arizona's historical, reasonable, and legitimate practice of allowing counties to require voters to vote at their assigned polling places, for those voters who choose to vote in-person on Election Day. Despite the fact that Plaintiffs fail to challenge the actual statutes at issue, such as A.R.S. §§ 16-411 and 16-584, and even ignoring the enormous administrative and financial burden this relief would impose in the short time before the General Election, Plaintiffs fail to establish a likelihood of success on the merits of their statutory and constitutional claims relating to these issues. The Motion should be denied.

I. Factual Background

Since 2011, the State has allowed each county to choose whether to conduct elections under a precinct model or "vote center" system. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (April 29, 2011) (amending A.R.S. § 16-411). In a precinct model, which Arizona and multiple other states have long used successfully, voters must vote within their designated precinct for their votes to be counted. (*See* Ariz. Elections Procedure Manual ("Manual"), relevant portions attached as Exhibit 1, at 185–86); *see also* A.R.S. §§ 16-584(C), -584(E); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 568

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& n.1 (6th Cir. 2004) ("at least 27 of the states using a precinct voting system"). If a voter declines to go to the correct polling place and instead demands to cast a provisional ballot outside his or her precinct in a county using a precinct model, that provisional ballot will not be counted. *See* Ex. 1, at 149–50, 185–86. Plaintiffs admit that out-of-precinct provisional ballots have been rejected in Arizona since at least 2006. (*See* Doc. 73, at 6.)

Under a vote-center system, voters are permitted to vote at any designated vote center in the county in which they live and "receive the appropriate ballot." A.R.S. § 16-411(B)(4). In this relatively new and untested model, each vote center must be equipped to print a specific ballot depending on the voter's particular district that includes all races in which that voter is eligible to vote. (*See* Decl. of B. Gates, Ex. 2, ¶ 13.) The vote-center model thus creates administrative and logistical burdens not associated with the traditional precinct model. (*See id.*, ¶¶ 12–14, 17.) Indeed, a bipartisan federal commission has recommended treading lightly before moving to vote centers, which "are not appropriate for every jurisdiction." *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (Jan. 2014), Ex. 6, at 36.

In fact, the March 22, 2016, presidential preference election ("PPE") was the first time Maricopa County used vote centers. (*See* Decl. of T. Rivero, Ex. 3, ¶ 17; Decl. of D. Lesko, Ex. 4, ¶¶ 18, 20.) Much of Plaintiffs' evidence concerns the burdens that Plaintiffs or other voters allegedly faced in the PPE, such as long lines at the centers.

As previously planned, Maricopa County will revert to a precinct model for the General Election, with 724 separate precincts and a polling place for each precinct. (Doc. 73, at 5.) Maricopa County used identical precincts in the 2012 and 2014 general elections, with no more than one polling place per precinct. (*See* Decl. of B. Johnson, Ex. 5, ¶¶ 4–6.) As the County's evidence shows, a significant majority of the actual polling places will also be the same. (*See* Decl. of K. Osborne, ¶¶ 26, 30). Because these precincts have been in place for several years, they received DOJ approval. (*See* Doc. 12, ¶ 3 (DOJ oversight in Arizona from 1975 to 2013); *Huerena, et al. v. Reagan, et al.*, No. CV2016-007890 (Maricopa Cty. Super. Ct.), July 29, 2016 Minute Entry, Ex. 7, at 4.)

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On August 3, 2016, the Maricopa County Board of Supervisors ("Board of Supervisors") held a formal meeting in which it discussed, among other things, proposed polling locations for the 724 precincts for the 2016 Primary and General Elections. The Board of Supervisors approved these locations for the Primary Election. (Video of Board of Supervisors' August 3 Formal Meeting ("Meeting"), *available at http://maricopa.siretechnologies.com/sirepub/mtgviewer.aspx?meetid=3005&doctype=AGENDA*, at 53:43–54:00.). For the General Election, however, the Board of Supervisors recommended that the Maricopa County Elections Department continue to locate additional polling places to decrease the number of precincts using the same physical location as another precinct. (*Id*. at 34:08–35:56.) Maricopa County Recorder Helen Purcell is engaged in ongoing efforts to find such locations for the General Election and is "using the same criteria . . . used under the Justice Department pre-clearance." (*Id*. at 34:38–34:58, 35:11–35:17.) As a result, the General Election polling places are not yet final but will derive from previous election plans that received DOJ preclearance.

II. Plaintiffs are Not Entitled to a Preliminary Injunction.

A. Jurisdictional and other threshold issues preclude Plaintiffs' Motion.

Plaintiffs' claims suffer from incurable jurisdictional defects and other threshold issues, all of which make a preliminary injunction improper. (*See generally*, Doc. 108.)

1. Plaintiffs lack standing to challenge polling place decisions.

As discussed in the Intervenor Defendants' Motion to Dismiss, no Plaintiff has standing to assert claims relating to Maricopa County's designation of polling places in the General Election. (*See id*. at 4–6.) Article III standing requires injury in fact, i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotations omitted). Here, Plaintiffs could have not suffered any "actual" injury in the General Election that is yet to take place. Nor does any Plaintiff currently face any "imminent" threat of injury since the General Election polling places are not yet final. (*See* Meeting, at 50:35-52:20

(acknowledging possibility of new locations and other changes for General Election)); *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013) (to be imminent, injury must be "certainly impending") (quoting *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990)).[1]

Plaintiffs speculate that voters *may* encounter burdens in the General Election, stating: "[Maricopa] County has not provided the public with any reason to believe that the same faulty assumptions [from the PPE] will not again form the basis of its allocation decisions." (Doc. 73, at 26.) Plaintiffs similarly rely on "appearances" and "assumptions" that PPE lines "could" be repeated in the General Election. (Doc. 73, at 5, 22, 26; *see also id.* at 6 n.4 (on available information, "*it is nearly impossible to determine* whether the County's" General Election polling places "will be adequate") (emphasis added.)

These speculations and scare tactics do not establish injury in fact. First, the actual facts reveal Maricopa County's clear and legitimate plan to use the precinct model for the General Election, with the same 724 precincts that previously received DOJ preclearance. (Doc. 73, at 5; Ex. 7, at 4.) Plaintiffs provide no evidence to suggest that Maricopa County's historical use of the precinct model, with no more than one polling place per precinct, has led to systemic issues with long lines or travel distances to polling places. Instead, a Plaintiff confirms that, aside from the PPE, she "never had to wait in line before" in order to vote in-person in Maricopa County. (Decl. of L. Feldman (Doc. 74), ¶ 7; *see also* Decl. of S. Klapp, Ex. 8, ¶ 14 (not aware of wait-time issues in previous Maricopa County general elections); Ex. 3, ¶¶ 9–10 (similar); Ex. 4, ¶¶ 12–13 (similar).)

Second, Plaintiffs do not suggest that Maricopa County, the Arizona Secretary of State, the City Clerks, the Arizona Citizens Clean Elections Commission or any other entity have denied them any information relating to General Election polling place decisions. *See Envt'l Integrity Project v. McCarthy*, 139 F. Supp. 3d 25, 36 (D.D.C. 2015) (denial of information only creates injury in fact if plaintiff denied information to which it

[1] Because Maricopa County is still in the process of selecting polling places for the General Election, Plaintiffs' claims on this issue are also unripe. *See Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2005) ("judicial action should be restrained when other political branches have acted or will act"); (Doc. 108, at 5–7.).

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is entitled under statute). Plaintiffs do not contend they attempted to obtain information on this issue through document requests or depositions. Nor did Plaintiffs raise concerns at, let alone attend, the August 3, 2016, Board of Supervisors meeting.

Third, Plaintiffs' argument that Maricopa County must provide information to prove that they will *not* be injured in the General Election confuses the burden of proof. Plaintiffs bear the burden to prove the existence of injury in fact at all stages, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), which they cannot do.

2. Plaintiffs cannot specify any particular acts to be enjoined.

The requested injunction relating to polling-place designation fails to comply with Federal Rule of Civil Procedure 65(d), which requires Plaintiffs to "describe in reasonable detail . . . the act or acts sought to be restrained." This mandate is "no mere technical requirement[]." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.*

Here, because Plaintiffs have not suffered an injury in fact from General Election polling place decisions, they cannot identify any specific acts to be restrained. Plaintiffs do not, for example, identify any specific Maricopa County precincts that allegedly need more than one polling place, the total number of polling places that should be provided, or any specific locations that Plaintiffs believe are inadequate. (*See* M. Yang Depo., Ex. 9, at 7:6–13, 64:5–65:5, 82:18–84:12, 86:7–13 (Plaintiffs' expert has not opined on these issues).) Plaintiffs also fail to show that they tried to provide such data to election officials during the planning phase and that their efforts were rejected. Plaintiffs instead request a hopelessly vague injunction to "require [Maricopa] County to make those decisions in accordance with the [Voting Rights Act] and the Constitution." (Doc. 73, at 1, 10.)

"A general injunction which in essence orders a defendant to obey the law is not permitted." *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). Such an injunction fails to provide "a clear idea of what conduct is prohibited," *Daniels*, 742 F.2d at 1134, in violation of "basic principles of due process." *E.E.O.C. v. AutoZone, Inc.*,

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707 F.3d 824, 842 (7th Cir. 2013); *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1263–64 (9th Cir. 1989) (injunction on "future similar violations of the Federal Election Campaign Act" was "impermissibly vague for the purposes of Rule 65(d)").

Plaintiffs cite two decisions in support of their requested preliminary injunction: *Melendres v. Arpaio* ("*Melendres I*"), 695 F.3d 990 (9th Cir. 2012), and *Melendres v. Arpaio* ("*Melendres II*"), 784 F.3d 1254 (9th Cir. 2015). But those decisions involved a quite specific injunction restraining the Maricopa County Sheriff's Office from detaining individuals based solely on immigration status suspicions. *See Melendres I*, 695 F.3d at 1000–01; *Melendres II*, 784 F.3d at 1257. By comparison, Plaintiffs here are unable to articulate what Maricopa County must do, or refrain from doing, to avoid possible sanctions. In effect, Plaintiffs request that this Court act like an immediate monitor to run back to when they are not subjectively satisfied with administration of a standard election. This does not comply with Rule 65(d), and the Motion must be denied.

3. Plaintiffs have failed to name necessary parties.

With regard to out-of-precinct voting, Plaintiffs have failed to name the necessary Arizona county parties to obtain *statewide* relief on this issue. (*See* Doc. 108, at 4.). Federal courts are "powerless" to issue preliminary injunctions against non-parties. *Citizens Alert Regarding the Env't v. EPA*, 259 F. Supp. 2d 9, 17 n.7 (D.D.C. 2003). Accordingly, "[i]n the absence of . . . a necessary party under Rule 19(a) of the Federal Rules of Civil Procedure, the merits may not be reached and a preliminary injunction may not be granted." *Boat Basin Inv'rs, Inc., v. First Am. Stock Transfer, Inc.*, No. 03 Civ. 493, 2003 WL 282144, at *1 (S.D.N.Y. Feb. 7, 2003).[2]

As stated, A.R.S. § 16-411 designates the counties as the jurisdictions best suited to coordinate local election activities, and Arizona law also makes the counties responsible for counting provisional ballots. *See* A.R.S. §§ 16-531, 16-601, 16-584(E); (*see also*

[2] *See also Stevenson v. Blytheville Sch. Dist. No. 5*, 955 F. Supp. 2d 955, 970 (E.D. Ark. 2013) ("This Court does not have before it the parties necessary to grant through [sic] preliminary injunction the relief plaintiffs seek."); *Escamilla v. M2 Tech.*, No. 4:11CV516, 2012 WL 4506081, at *6 (E.D. Tex. July 6, 2012) (similar).

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Ex. 1, Manual, at 182.) Plaintiffs do not object to these laws or otherwise argue that the State should retain all centralized authority. *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"). Because the county parties that will actually count or reject General Election provisional ballots are absent, Plaintiffs' request for statewide injunctive relief relating to out-of-precinct voting should be denied.

4. Laches bars Plaintiffs' out-of-precinct claims.

As discussed in the Motion to Dismiss, Plaintiffs' request for a preliminary injunction requiring all Arizona counties (most of which are not parties to this case) to count out-of-precinct provisional ballots is barred by laches. (*See* Doc. 108, at 9–10); *Ariz. Libertarian Party v. Reagan*, --- F. Supp. 3d ---, 2016 WL 3029929, at *2 (D. Ariz. May 27, 2016) (discussing application of laches in election matters). Despite admitting that the out-of-precinct voting restriction has been in place since at least *2006*, (Doc. 73, at 6), Plaintiffs' Motion provides no justification for the years of delay in raising this issue.

B. Plaintiffs are not likely to succeed on the merits of their claims.

1. Plaintiffs' § 2 claim (Count I) will not succeed.

Plaintiffs' first claim seeks a preliminary injunction based on alleged violations of § 2 of the Voting Rights Act ("VRA"). A Plaintiff bringing a § 2 claim must establish two elements: (1) an election standard, practice, or procedure prevents a protected class from having the same opportunity to participate in the political process; and (2) this burden is caused by a social and historical climate of discrimination. *See* 52 U.S.C. § 10301; *Gonzalez v. Ariz.*, 677 F.3d 383, 405–06 (9th Cir. 2012). Neither element is present here.

a. Polling place designation

Plaintiffs have not established a likelihood of success in proving that Maricopa County has violated, or will violate, § 2 in its ongoing process of designating polling places for the General Election. They provide no evidence that this designation, when finalized, will impose a discriminatory burden on any minority group, and their experts have not analyzed this issue. (*See* Ex. 9, at 7:6–13, 87:2–18, 94:17–97:11 (Dr. Yang does

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not know assumptions underlying General Election polling place decisions and has not opined on selection of specific locations); Dr. Rodden Depo., Ex. 10, at 202:24–203:12, 204:3–15 (has not analyzed minority travel times or distances to General Election polling places).) Without a discriminatory result, Plaintiffs cannot show any causal link to a "social and historical climate of discrimination." *Gonzalez*, 677 F.3d at 406.

Rather than providing any evidence to establish an actual or imminent § 2 violation in connection with the *General Election*, Plaintiffs argue that Maricopa County violated § 2 through its use of vote centers in the *PPE*. (Doc. 73, at 13.) This argument and supporting evidence is irrelevant since, by Plaintiffs' own admission, "the injuries suffered by voters in the 2016 PPE *cannot be rectified*." (*Id*. at 10 (emphasis added).)[3]

The concluded PPE provides no basis for prospective relief either; as Plaintiffs recognize, the General Election will use a different precinct model. (*See* Doc. 73, at 5; Ex. 9 at 89:19–23.) Section 2 applies to an election "standard, practice, or procedure," 52 U.S.C. § 10301(a), not *one-time* events like the PPE. And Plaintiffs have *never* argued Maricopa County violated § 2 in designating polling places for the 2012 and 2014 general elections that used the same 724 precincts pre-cleared by DOJ, with no more than one polling place per precinct. (Ex. 5, ¶¶ 4–6). Nor have Plaintiffs ever challenged the precinct boundaries, (*see* Ex. 9 at 76:7–10), or identified any issues with the polling places for the May 2016 special election or the primary election. Because Plaintiffs can only speculate Maricopa County will use "faulty assumptions" to the detriment of minority voters, (Doc. 73, at 22), they fail to show a likelihood of success on their § 2 claim.

b. Out-of-precinct voting

Arizona's longstanding restriction on out-of-precinct voting does not violate § 2. The first element of a § 2 claim, discriminatory burden, requires a burden that "results in a denial or abridgement" of the opportunity to participate in the political process. 52 U.S.C. § 10301(a). Minimal inconveniences on voting are insufficient. *See, e.g.*, *Lee v. Va. State*

[3] Plaintiffs also have not proven that the burdens of the PPE were disproportionately felt by minorities. As discussed *infra*, Dr. Rodden's opinions on this issue are unreliable.

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Bd. of Elections, --- F. Supp. 3d ---, 2015 WL 9274922, at *9 (E.D. Va. 2015) (dismissing § 2 claim based on alleged inconvenience of long lines at polling places). "Otherwise § 2 will dismantle every state's voting apparatus." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). In *Frank*, the court explained that unless the State of Wisconsin made it "*needlessly* hard" to obtain the requisite photo identification for voting, this requirement did not result in a "'denial' of anything by Wisconsin, as § 2(a) requires." *Id*. at 753.[4]

Similarly, Arizona extends to all voters the equal opportunity to identify and vote at their assigned polling place, without making it "needlessly hard." (*See* Decl. of R. Valenzuela (Doc. 152-8), ¶ 17 (sample ballot mailed by Maricopa County includes polling place information); Ex. 8, ¶ 10 (polling place information available online); Ex. 3, ¶ 15 (discussing various ways voters can locate polling place); Ex. 4, ¶ 16 (same).)[5] Simply, voters who go to the wrong location are not denied an equal opportunity to participate in the political process. Plaintiffs' § 2 claim thus fails at the first step.

Even if a restriction on out-of-precinct voting denied an equal opportunity to vote—and it does not—Plaintiffs have failed to prove that any alleged burden is disproportionately felt by minorities. Plaintiffs rely on the expert report of Dr. Jonathan Rodden, a political scientist, to show that minorities are allegedly more likely to vote out-of-precinct, (*see* Doc. 73, at 16–17), but Dr. Rodden admits the documents he reviewed did not actually identify voters' race. (Ex. 10, at 172:3–11.) Dr. Rodden thus predicted each voter's race by using a statistical algorithm available online that he had *no part* in

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[4] *See also Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (Section 2 requires "a denial of '*meaningful* access to the political process'") (quoting *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004)) (emphasis added); *Glover v. S.C. Democratic Party*, No. C/A 4–04–CV–2171–25, 2004 WL 3262756, at *6 (D.S.C. Sept. 3, 2004) ("difficulty voting" not sufficient to support § 2 claim).

[5] Several of Plaintiffs' declarants admit they located polling place information for past elections through Maricopa County mailings or its website. (*See, e.g.*, Decl. of L. Magallanes (Doc. 83), ¶ 7 (voting location listed on sample ballot received in mail); Decl. of M. Hymes (Doc. 81), ¶¶ 5–6 (used Maricopa County Recorder's website to determine PPE locations); Decl. of S. Shapiro (Doc. 77), ¶¶ 4–5 (similar).)

developing. (*See id*. at 172:12–17, 173:20–25, 175:9–18, 181:4–13.)[6] Dr. Rodden has not provided any information on the algorithm's margin of error or attempted to verify its accuracy as to Arizona voters. (*Id*. at 177:19–22, 178:9–17.) And the individuals who did create the algorithm have not offered any evidence in this case to establish its reliability.

Dr. Rodden cannot serve as the spokesman for a statistical formula that is not his own, and his disparate-impact opinions should be stricken. "The expert witness must in the end be giving his own opinion. He cannot simply be a conduit for the opinion of an unproduced expert." *Malletier v. Dooney & Bourke, Inc*., 525 F. Supp. 2d 558, 664 (S.D.N.Y. 2007) (individual's "occasional use of statistics in his daily life simply does not qualify him as an expert on that complex subject").[7] With no other evidence on disparate impact, Plaintiffs' § 2 claim necessarily fails.[8]

Plaintiffs also fail to establish the second element of a § 2 claim: that a disparate burden is caused by a "social and historical climate of discrimination." *Gonzalez*, 677 F.3d at 406. Like in *Gonzalez*, which addressed similar arguments related to Arizona's history, Plaintiffs offer no evidence that discrimination, by the State of Arizona or otherwise, has made it more difficult for minority voters to find their polling place. *See Frank*, 768 F.3d at 753 (only state discrimination can give rise to § 2 claim). Plaintiffs

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[6] Although Dr. Rodden contends he sometimes uses statistics in his work, he does not have a statistics degree, last took a formal statistics course about 16 years ago, does not describe himself professionally as a statistician, and is not a member of the American Statistical Association, the "[p]rofessional association for people who focus on statistics as their profession." (*Id*., at 8:1–3, 169:1–170:2.)

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

[8] Dr. Rodden also compares the locations of out-of-precinct votes to racial data at the census block level, but he admits this analysis "may fall prey to so-called aggregation bias." (Doc. 101-6, at 34). The other evidence cited by Plaintiffs for an alleged disparate impact, (Doc. 73, at 17), does not provide data on out-of-precinct provisional ballots. (*See* Doc. 101, Ex. 29, at 13 (hearsay evidence relating to total number of rejected provisional ballots); Doc 101, Ex. 34, at 11 (statistics on total number of provisional ballots cast).)

argue that minorities must "reeducate themselves about their new voting location" if they move, (Doc. 73, at 17), but that burden is shared by *any* voter who moves to a different precinct, regardless of race. *See id*. at 754 ("It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command.").

Plaintiffs may argue that the Fourth Circuit's recent decision in *N. Carolina State Conference of NAACP v. McCrory*, --- F.3d ---, 2016 WL 4053033 (4th. Cir. 2016) supports their § 2 claim. Such reliance would be misplaced. First, the Ninth Circuit's opinion in *Gonzalez*, which actually addresses Arizona's election system, is controlling. Furthermore, in *McCrory*, the Fourth Circuit held that North Carolina acted with a *racial discriminatory intent* in enacting a multitude of voting restrictions shortly after the Supreme Court nullified DOJ preclearance. *See McCrory*, 2016 WL 4053033, at *2–4. Here, by contrast, Plaintiffs have not asserted any racial intent claims or even challenged A.R.S. § 16-411 as being contrary to law. Nor can they dispute that Arizona's out-of-precinct voting restriction was in place during DOJ oversight. (*See* Doc. 12, ¶¶ 3, 4.) Plaintiffs cannot show this restriction has caused any prohibited discriminatory result.

c. Plaintiffs fail to establish the presence of the Senate Factors.

The Court need not reach the Senate Factors because Plaintiffs have not demonstrated the two critical elements of a § 2 claim. If the Court considers the factors, the Intervenor-Defendants previously addressed the many defects in Plaintiffs' selective evidence. (*See* Doc. 152, at 7–8.) And, as discussed below, the government's interests in polling place locations and out-of-precinct voting (Senate Factor 9) are far from tenuous.

2. Plaintiffs *Anderson-Burdick* claim (Count II) will not succeed.

Plaintiffs' second claim alleges violations of the 14th Amendment, arguing that voters will face "undue" burdens in the General Election. (Doc. 73, at 24.) This argument—often referred to as an *Anderson-Burdick* claim—requires courts to "weigh the character and magnitude of the asserted injury to" the right to vote "against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 729 (9th Cir. 2015) (internal citation and

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quotations omitted). Absent a "severe" burden, a state's "important regulatory interests" over elections are sufficient to justify election regulations. *Id.* at 730; *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 761 (9th Cir. 1994) (slight burdens subject to rational basis review). Plaintiffs here fail to establish any unjustified burden on voting.

a. Polling place designation

Plaintiffs do *not* contend that Maricopa County has violated the 14th Amendment in its ongoing process of selecting General Election polling places. They instead seek to restrain an alleged possibility of *future speculative* constitutional violations based on burdens allegedly imposed in the vote-center-based PPE. (*See* Doc. 73, at 25–26.). Plaintiffs' singular reliance on the PPE to establish injury in the General Election fails. The correct points of comparison are the previous general elections in which Maricopa County used the same 724 precincts precleared by DOJ, and Plaintiffs have made no showing of injury in those elections. (*Cf.* Ex. 7, at 4 (state court order denying requested preliminary injunction for oversight of Maricopa County's General Election polling places when "Plaintiffs have pointed to no difficulties concerning wait times . . . during the 2012 and 2014 primary and general elections that preceded the PPE.").)[9] Plaintiffs instead assert that Maricopa County must prove it will not use "faulty assumptions," (Doc. 73, at 26), but Defendants do not have the burden to *disprove* Plaintiffs' claims.

There is no dispute that Maricopa County has "important regulatory interests," *Ariz. Libertarian Party*, 798 F.3d at 730, as Plaintiffs concede that "the County undoubtedly enjoys great discretion in making elections allocation decisions." (Doc. 73, at 26.) Because Plaintiffs cannot demonstrate any imminent threat of a severe burden that outweighs the government's legitimate interest on this issue, the Motion must be denied.

[9] Plaintiffs' same PPE-related concerns were also rejected in another case before the Maricopa County Superior Court. (*See* Apr. 27, 2016 Order in *Brakey v. Reagan et al.*, CV2016-002889 (Maricopa Cty. Super. Ct), Doc. 108, Ex. B, at 7–8.); *cf. Wilson v. Askew*, 352 F. Supp. 227, 229–30 (M.D. Fla. 1972) (as matter of comity, state courts should have first opportunity to interpret issues relating to state election code).

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b. Out-of-precinct voting

Plaintiffs have not shown that Arizona's longstanding restriction on out-of-precinct voting imposes any severe burden, or even any moderate burden, on voting. They do not provide a single declarant who states they are unable to determine their assigned location or travel to that location to vote. The record evidence instead shows that voters can easily obtain information concerning their polling place in many different ways, such as by reading the material mailed by Maricopa County, making a simple phone call, or checking online. (*See* n.5, *supra*; Doc. 152-8, ¶ 17; Ex. 8, ¶ 10; Ex. 3, ¶ 15; Ex. 4, ¶ 16.)[10]

Plaintiffs suggest that the quantity of previously rejected out-of-precinct ballots, in and of itself, establishes a severe burden, arguing that "the pertinent question is not the extent to which [an election measure] burdens those individuals impacted by it." (Doc. 73, at 25 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).) But that is not correct. In *Crawford*, the Supreme Court *did* assess the burden on individual voters of a voter-ID law, concluding that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198; *Ariz. Libertarian Party*, 798 F.3d at 729 (courts assess "the severity of the burden the election law *imposes on the plaintiff's rights*") (internal quotations and citation omitted; emphasis added). *Crawford* thus upheld more onerous burdens than the slight inconvenience of ascertaining and traveling to an assigned polling place. *See Crawford*, 553 U.S. at 198.

Without challenging any specific law, such as A.R.S. § 16-411, Plaintiffs also

[10] Plaintiffs' evidence of sporadic instances in which voters allegedly received incorrect polling place information are irrelevant to the *Anderson-Burdick* test. *See Lee v. Va. State Bd. of Elections*, --- F. Supp. 3d ---, 2016 WL 2946181, at *25 (E.D. Va. 2016) (limited number of "burdened individuals would not be sufficient for this Court to conclude that [election regulation] imposed excessively burdensome requirements on any class of voters"); *Ron Barber for Congress v. Bennett*, 4:14-cv-02489-CKJ, 2014 WL 6694451, at *7 (D. Ariz. Nov. 27, 2014) (finding "no case where scattered election-procedure violations regarding a small number of voters was found to raise a constitutional violation warranting a federal court's entry into the details of the administration of an election.").

contend that Arizona's election administration is "highly confusing" due to changes in polling locations, the distinction between vote center and precinct-based voting, and the physical placement of polling places. (Doc. 73, at 27.) Plaintiffs do not dispute, however, that Arizona voters can ascertain their correct voting location with minimal effort.

Moreover, Plaintiffs' "voter confusion" argument is unsupported by evidence. Plaintiffs again rely on Dr. Rodden, but he has not analyzed (1) the different methods voters can learn their voting location, (Ex. 10 at 183:11–184:12); (2) whether Arizona has more polling place turnover than other states, (*id*. at 188:21–184:2); (3) the extent to which General Election polling places in 2016 will be the same as previous elections, (*id*. at 202:24–203:12, 204:8–15); (4) how many times Maricopa County has switched to or from a precinct model, (*id*. at 47:5–14); or (5) where any specific polling places should be placed to allegedly avoid confusion. Dr. Rodden's conclusions regarding voter confusion are also based on a false assumption that the City of Phoenix will be holding its 2016 general election at different locations than Maricopa County. *Id*. at 77:21–79:18.[11]

The "significant and numerous" advantages of the precinct system far outweigh any minimal burdens it imposes on voters. *Sandusky*, 387 F.3d at 569. The system (1) enhances predictability by "cap[ping] the number of voters attempting to vote in the same place on election day"; (2) "allows each precinct ballot to list all of the votes a citizen may cast for all pertinent [elections]"; (3) allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing"; (4) "makes it easier for election officials to monitor votes and prevent election fraud"; and (5) "generally puts polling places in closer proximity to voter residences." *Id.*; *see also* Ex. 6, at 36 ("[V]ote centers are not appropriate for every jurisdiction" and can lower turnout.).

[11] Dr. Rodden's analysis is also severely constrained by the fact that many of his opinions are based solely on data from a single Maricopa County election, rather than statewide data showing trends. (*See id*. at 190:18–191:15, 192:15–194:14, 195:20–197:1). Also, Dr. Rodden recently submitted a "corrected" report with entirely different statistics on rejected out-of-precinct ballots. (*See* Doc. 177, Appendix A). This is not the first time Plaintiffs' experts made major, substantive report revisions under the guise of a "Notice of Errata," just a few days before Defendants' deadline to respond. (*See* Doc. 141).

The same advantages apply to Arizona's restriction on out of-precinct voting. (*See* Ex. 2, ¶¶ 13–14, 17.) While Plaintiffs express concern about disenfranchisement, they ignore that requiring voters to go to an assigned location eases this concern by ensuring voters receive correct ballots with *all* races in which they are eligible to vote. (*See* Ex. 8, ¶¶ 17–19; Ex. 4, ¶ 21; Ex. 2, ¶¶ 18–20).[12] Plaintiffs further ignore that allowing voters to vote at any county location could *increase* wait times—the very issue Plaintiffs are allegedly seeking to avoid. (*See* Ex. 6 at 36 (vote centers can "increase, rather than decrease, voter wait times"); Ex. 2, ¶ 14; Ex. 9, at 111:23–112:6, 113:12–114:4 (due to uneven distribution of voters, vote centers can contribute to long lines).)

3. Plaintiffs' disparate treatment claim (Count III) will not succeed.

Plaintiffs also assert a "disparate treatment" Equal Protection claim, arguing that if some Arizona counties allow out-of-precinct voting through voting centers, then *all* counties *must* count votes cast out of precinct. (*See* Doc. 73, at 27–28.) Plaintiffs do not actually challenge the validity, however, of the statute (A.R.S. § 16-411) that allows counties to choose between vote centers or the precinct model. Regardless, the claim fails.

In *Bush v. Gore*, the Supreme Court held that states "may not, by . . . *arbitrary* and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05 (emphasis added). Permitting county jurisdictions to decide for themselves whether to use vote centers or the precinct model is not "arbitrary." This flexibility allows each county to consider its unique registered voter population; population density; geography; available funding, staff, equipment, and other resources; and other factors that inevitably vary by county. (*See* Ex. 6 at 36 ("[E]lection authorities need to take a number of key factors into account" before implementing vote centers, which are "not appropriate for every jurisdiction")); *Bush*, 531 U.S. at 109 (local entities have expertise to develop their own election systems). Not surprisingly, several other states allow local governments to

[12] Plaintiffs incorrectly assert the restriction on out-of-precinct voting is not required by Arizona law. (Doc. 73, at 23.) Plaintiffs do not cite A.R.S. § 16-584(E), which requires a voter casting a provisional ballot to provide "a sworn or attested statement of the elector that the elector *resides in the precinct*." (Emphasis added.)

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decide whether to use vote centers or precinct-based systems. *See* Ark. Code § 7-1-113; Ind. Code §§ 3-11-18.1-1 *et seq*.; Tex. Elec. Code § 43.007; Utah Code § 20A-3-703; Wyo. Stat. § 22-1-102(xlix).

Plaintiffs rely on *Public Integrity Alliance, Inc. v. City of Tucson*, 805 F.3d 876 (9th Cir. 2015), (Doc. 73, at 28), a decision that "shall not be cited as precedent by or to any court of the Ninth Circuit." *Pub. Integrity All., Inc. v. City of Tucson*, 820 F.3d 1075, 1076 (9th Cir. 2016) (approving rehearing en banc). Regardless, *Public Integrity Alliance* is easily distinguished. The case involved Tucson's "unusual" system for electing city council members with "ward-based primaries" and "at-large general elections," which prevented "five-sixths of Tucson's voters" from "participating in the primary that will, for all practical purposes, determine who will represent them in the city council." *Public Integrity Alliance*, 805 F.3d at 878–80. Here, by comparison, all Arizona voters can vote for their elected representatives by simply locating and traveling to their polling location in precinct-based counties. Plaintiffs cannot prevail on their Equal Protection claim.[13]

C. Plaintiffs cannot demonstrate irreparable harm.

Plaintiffs cannot make the required showing that it is "likely" they will suffer irreparable harm. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). They have not offered any evidence that any voter will have their exercise of the franchise truly burdened. Irreparable harm is "the *sine qua non* for all injunctive relief," *Frejlach v. Butler*, 573 F.2d 1026, 1027 (8th Cir. 1978), and mere inconvenience is not enough.

D. The balance of equities favors Defendants.

The balance of equities weighs heavily in Defendants' favor. Although the Intervenor-Defendants defer to the State and Maricopa County on the specific burdens they face, changing the long-standing practice of rejecting out-of-precinct ballots seems

[13] Other authorities cited by Plaintiffs for the disparate treatment claim are irrelevant. One case involved a redistricting challenge, *Ariz. Minority Coal for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337 (App. 2005); another involved a challenge to vote counting methods. *See Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002).

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likely to impose huge logistical and financial burdens and may not even be feasible in the limited time before the General Election. (*See* Ex. 3, ¶ 16; Ex. 4, ¶¶ 19, 22.)

Moreover, as candidates for local office, the individual Intervenor-Defendants will be directly harmed if out-of-precinct voting is allowed. If voters have their ballots counted for national, statewide, and countywide races, even if they vote in the wrong precinct, they will have much less incentive to vote in their assigned precinct and may decide (or be nefariously directed) to vote elsewhere. (*See* Ex. 3, ¶ 18; Ex. 4, ¶ 21; Ex. 8, ¶¶ 17–18.) Other voters may incorrectly believe, if Plaintiffs' requested relief is granted, that they can vote at any location and receive the correct ballot. (*See* Ex. 8, ¶ 17, Ex. 4, ¶ 19.) Under either scenario, many voters will likely not receive the correct ballot with *all* races in which they are eligible to vote, including "down ballot" races. (*See* Ex. 3, ¶ 18; Ex. 4, ¶ 21; Ex. 2, ¶¶ 18–20; Ex. 8 ¶¶ 16–18.)[14] Individual Intervenor-Defendants' chances of election will be impacted, and they will have to expend additional resources to educate voters on voting within their precincts. (*See* Ex. 2, ¶¶ 19, 21.)

E. Denying Plaintiffs' requested relief is in the public interest.

Plaintiffs' requested injunction is contrary to the public's interest. Voters have an important interest in having their voice heard in *all* races in which they are eligible to vote, including "down ballot" races. But if Plaintiffs' requested relief is granted, many voters will not receive the correct ballot, resulting in them being disenfranchised in the elections for the local officials that will represent them or on other important local issues. In addition, many voters will likely face longer wait times to vote without a restriction on out-of-precinct voting. (*See* Ex. 2, ¶ 14; Ex. 6 at 36.)

III. Conclusion

The Plaintiffs' Motion should be denied.

[14] Contrary to Plaintiffs' assumption, this would include the City of Phoenix election that is relying on the Maricopa County election system. (*See* Ex. 10 at 77:21–79:18.)

DATED this 22nd day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, 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

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