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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Leslie Feldman, et al., Plaintiffs, v. Arizona Secretary of State's Office, et al., Defendants.	Case No. CV-16-01065-PHX-DLR **SECRETARY OF STATE MICHELE REAGAN'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OF POLLING PLACE ALLOCATION AND PROVISIONAL BALLOT CLAIMS**

For more than forty years, Arizona has followed the well-recognized rule that votes cast out-of-precinct ("OOP") are not counted. Plaintiffs seek to enjoin that practice with only months remaining before the general election, arguing that Arizona must adopt a new rule for counting OOP votes.[1] As will be shown below, Plaintiffs do not offer any kind of compelling justification for such a radical change in the law. And Plaintiffs fall far below the threshold necessary to justify a mandatory injunction requiring this Court to create a new procedure for processing OOP votes. The Secretary therefore requests that this Court deny Plaintiffs' motion for preliminary injunction.[2]

I. Background

A. Out of Precinct Voting

States have long required voters to cast their ballots in their assigned precincts. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 567 (6th Cir. 2004) ("[I]n almost every state [ ]voters are required to vote in a particular precinct."). And at least two dozen states enforce the precinct-based system by counting only those ballots cast in the correct precincts. *See* Ex. 1;[3] *see also Sandusky*, 387 F.3d at 567 ("[I]n at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct.").

Arizona has followed this common rule since at least 1970. A.R.S. §§ 16-122, -135, -584; Ex. 19. As Plaintiffs' expert acknowledged, this precinct-based system is necessary because of the many different overlapping jurisdictions involved in elections and because the offices and issues for which a person is entitled to vote are tied to his or her residential address. Ex. 14 at 40:7-25; *see also* Ex. 3, ¶¶ 7-8. Accordingly, to have

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[1] Plaintiffs also challenge Maricopa County's allocation of polling places. The Secretary joins the County Defendants' response on that claim.

[2] Attorney General Mark Brnovich is not named as a Defendant in any of the claims included in this motion for preliminary injunctive relief. *See* Dkt. No. 12, at 41-48. To the extent that a claim against the Attorney General is implied, he joins this response.

[3] All references to numbered exhibits are to the exhibits attached to the Second Declaration of Karen J. Hartman-Tellez, submitted herewith.

the opportunity to vote for the offices and issues associated with a voter's residential address—and none that are not associated with that address—the voter must receive the correct ballot. Ex. 3, ¶¶ 41-42.

In 2002, Congress passed the Help America Vote Act ("HAVA"), which required states to accept provisional ballots. 52 U.S.C. § 21082. Earlier, unenacted versions of HAVA would have required states to accept OOP—and out of county—votes. *Colo. Common Cause v. Davidson*, 04CV7709, 2004 WL 2360485, at *11 (Colo. Dist. Ct. Oct. 18, 2004) (citing H.R. 3295, § 502(3) (adopted December 12, 2002)). But the Senate rejected that version, *id.*; as one Senator observed, HAVA was "in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered." *Sandusky*, 387 F.3d at 575 (quoting 148 Cong. Rec. S10488, S10493 (daily ed. Oct. 16, 2002)). HAVA also created the Election Assistance Commission ("EAC"), which collects data on provisional votes. *See* 52 U.S.C. §§ 20921, 20926. EAC data shows that the national rate of rejection for provisional ballots is higher than it is in Arizona. *See* Ex. 6, ¶¶ 33, 35. While the EAC also reports the reasons States rejected provisional ballots, the differences in the reported reason for rejection between particular States may well be due to differences in state reporting practices. *Id.* Moreover, comparing like elections, the percentage of provisional ballots rejected in Arizona has declined since 2008. *Id.*, ¶¶ 32-33.

Arizona and its counties make every effort to provide voters information on their polling places. The Secretary's Office provides three websites with polling place information, responds to questions from voters, and mails a publicity pamphlet to voters with information on how to locate the correct polling place for General Elections. Ex. 2, ¶¶ 3-7. Counties send sample ballots with polling place information to voter households with at least one voter who has not requested an early ballot. Ex. 4, ¶ 4. They also provide online polling place locators. Ex. 2, ¶ 4; Ex. 3, ¶ 31(a); Ex. 4, ¶ 7. County Recorders also provide information to voters on polling places through social media and reach out to local English- and Spanish-language media to spread information about

finding polling place locations. *See* Ex. 3, ¶ 31(e)-(f); Ex. 4, ¶¶ 7-9. Finally, poll workers are trained to tell voters if they are at the wrong polling place and to provide information on the voter's correct polling place. *See* Ex. 4, ¶ 16; *see also* Ex. 5.

B. Vote Centers

Beginning in 2003, jurisdictions around the country began experimenting with vote centers, which allow voters to "cast their ballots on Election Day at any vote center in the jurisdiction, regardless of their residential address." Ex. 7. As of October 2015, "[e]leven states now either permit jurisdictions to replace precincts with vote centers, or have authorized vote center pilot projects in selected jurisdictions." *Id.* No state requires vote centers to be used in all of its jurisdictions. *See id.* In 2011, the Legislature amended A.R.S. § 16-411(B) to allow counties to use vote centers. Ex. 8. The amendment received broad bipartisan support. Ex. 9. It passed the Senate unanimously and the House by a vote of 59-1. *Id.*

Yavapai County was one of the first counties in Arizona to use vote centers. Ex. 10, ¶ 8. It chose to do so because of precipitous declines in in-person voting and based on the county's geography, population, and ability to obtain the proper technology. *Id.* ¶ 7. In order to operate a vote center, a county must be able to supply at least two e-poll books to each vote center as well as technology that allows the voter to vote on the appropriate ballot for his or her precinct. *Id.* ¶¶ 7-10; *see also* Ex. 7. Compared to precinct-based polling places, it can be difficult for counties to predict the number of voters at each vote center. *See* Ex. 10, ¶ 13. Before the 2016 Presidential Preference Election, the only counties to use vote centers for countywide elections were Graham, Yavapai, and Yuma—with approximately 18,000, 130,000, and 77,000 active registered voters, respectively. Ex. 11, ¶¶ 3-6; Ex. 12.

II. Legal Standard

The standard that Plaintiffs must meet to receive a preliminary injunction is set forth in the State Defendants' previous response. Dkt. No. 153 at 3. To meet that standard, Plaintiffs must make a "clear showing" that they are entitled to the

"extraordinary remedy." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). With regard to OOP voting, Plaintiffs must meet an even higher standard. Plaintiffs seek a mandatory injunction to change the way that Arizona counties have counted ballots for decades. Where "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319-20 (9th Cir. 1994).

III. Plaintiffs Have Not Shown a Likelihood of Success on the Merits.

A. Plaintiffs Have Not Carried the Burden on Their Section 2 Claim.

Section 2 requires the Plaintiffs to demonstrate the "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). As articulated in the State Defendants' previous response, Dkt. No. 153, at 4-5, Plaintiffs must therefore show (1) a discriminatory impact and (2) a causal connection to discrimination. *Id*. Plaintiffs fail on both counts. Plaintiffs have not identified a single voter who will be unable to vote in the correct polling place in the upcoming election, and the expert report they rely on does not show a statistically significant impact on minority voters statewide. Plaintiffs also cannot show that any impact from OOP voting occurs on account of race or color. Plaintiffs therefore have not met their burden to show a likelihood of success on their Section 2 claim.[4]

[4] Plaintiffs again have failed to name the correct defendants. Arizona charges its counties with the processing and counting of ballots generally, A.R.S. §§ 16-531, -604, and with the counting of provisional votes specifically, A.R.S. § 16-584(E). Indeed, Plaintiffs' Amended Complaint notes that the county recorder "is responsible for . . . determining whether provisional ballots are acceptable." Dkt. No. 12, ¶ 36. The Plaintiffs have named only one county as a Defendant here, and thus have not named defendants necessary to obtain their proposed relief.

1. Plaintiffs Have Not Shown a Racially Discriminatory Impact from OOP Voting.

The crux of a Section 2 claim is the effect of the challenged voting practice on the ability of minority voters to elect representatives of their choice. *See Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992). Here, Plaintiffs have not established that the challenged law resulted in minority voters "having less opportunity to elect legislators of their choice." *Id.* at 891; *see also Chisom v. Roemer*, 501 U.S. 380, 397-98 (1991). And Plaintiffs have not shown "a statistically significant disparate impact" on minority voters. Ex. 13, at 42.

Plaintiffs argue that Arizona's treatment of OOP votes disproportionately impacts Hispanic, African-American, and Native American voters. Dkt. No. 73, at 7. But Plaintiffs use an unreliable analysis of the race of the affected voters and artificially inflated numbers to prove this alleged impact. Moreover, Plaintiffs have not identified a voter who was unable to vote in his assigned precinct because of Defendants' practices.[5]

Plaintiffs rely on their expert, Dr. Rodden, to show a statewide disparate impact, but Dr. Rodden analyzed only (1) the 2012 general election in Maricopa County, (2) the 2010, 2012, and 2014 general elections in Pima County, and (3) the historically low-turnout 2014 general election in Coconino County. Dkt. No. 73, at 6; Dkt. No. 177-1, at 43-44. Arizona has treated OOP votes consistently for decades, but Dr. Rodden analyzed only parts of three elections. Even assuming Dr. Rodden could limit his analysis to those elections, he did not conduct similar analyses for the remaining 12 Arizona counties, including Apache and Navajo Counties, which have large Native American populations, or Cochise, Graham, Pinal, Santa Cruz, or Yuma Counties, which have large Hispanic populations. Ex. 6, Table 1. Dr. Rodden's focus on this extraordinarily limited data set

[5] Dr. Rodden asserted that elections officials "falsely disenfranchised" voters who voted OOP, even though their registration showed that their residential addresses were within the precinct where they voted. *See* Dkt. 177-1, at 3. In fact, those voters had moved, and their current addresses were not within the precinct where they voted. Ex. 6, ¶¶ 52-54.

renders his conclusions unreliable. *Johnson v. Mortham*, 926 F. Supp. 1460, 1475 (N.D. Fla. 1996) (criticizing plaintiffs' expert who "disregarded a number of congressional elections that are highly relevant"); *see also Sanchez v. Bond*, 875 F.2d 1488, 1496 (10th Cir. 1989) (noting that "the limited number of elections underlying the plaintiffs' claim" supported the "trial court's finding that plaintiffs failed to meet their burden of proof").

Dr. Rodden also did not reliably assign race to the voters in the elections he analyzed. Dr. Rodden used an algorithm to assign race to each OOP voter based on the voter's surname and race statistics for the voter's census block group. Ex. 6, ¶ 39. But Dr. Rodden appears to have been unable to match voters' surnames to eleven percent of the OOP votes in the study, and he provides no explanation for how he treated those voters. *Id.* Further, when his estimates for each ethnicity are combined, it accounts for only 6,731 of the 7,525 rejected OOP ballots—and miscalculates the total ballots cast at the polling place by approximately eight percent.[6] *Id.*, ¶ 51. "[W]ith such a large undercount of ballots, it is possible that the conclusions drawn by Dr. Rodden would be greatly reduced or eliminated if the race and ethnicity coding were more accurate." *Id.*

In addition to using an unreliable algorithm to assign race to OOP voters, Dr. Rodden conducted additional, similarly unreliable, analyses of the concentration of OOP votes in Maricopa County and their relation to the racial makeup of census block groups. *Id.*, ¶¶ 42-49. These analyses do not include all of the census block groups in the County because any census block that had no OOP votes dropped from his analysis. *Id.*, ¶ 44. He also used the voting age population instead of the citizen voting age population, which leads to an overestimate of the effect on Hispanic voters. *Id.*, ¶ 45. Indeed, none of the characteristics that Dr. Rodden analyzed explains an increase in OOP votes. *Id.*, ¶¶ 46-49, Table 10 (showing that 95-99% of the variation in the share of OOP votes is not

[6] Further proof of the unreliability of Dr. Rodden's analysis comes from the ethnicity estimates he assigns to 2,088 registered Republicans in his sample. Dr. Rodden assigns a significantly higher probability that the voter is African-American to those voters than is supported by data on partisan affiliation in Arizona. Ex. 6, ¶ 41.

explained by any of the factors that Dr. Rodden analyzed).

Even assuming *arguendo* that Dr. Rodden had reliably assigned race to OOP voters, Plaintiffs still have not identified a statistically significant impact. Dr. Rodden inflates the impact of OOP voting on minority voters by comparing OOP ballots only to ballots cast in person. As early, mail-in ballots have increased, the number of voters going to a polling place on Election Day has decreased, skewing the percentages cited by Plaintiffs. In the 2012 general election, rejected provisional ballots were only 1.4 % of ballots that Arizonans cast, and those rejected for being cast in the wrong precinct were only 0.5 %. *Id*., Tables 6, 9. Based on Dr. Rodden's assignment of race to OOP voters, White voters cast more than half of those OOP ballots, accounting for 0.30% of the votes cast. *Id.*, ¶ 40. Hispanic OOP votes, meanwhile, accounted for only 0.13% of the votes cast. *Id*. African-American voters cast less than a quarter as many OOP ballots as White voters, accounting for 0.07% of the votes cast.[7] *Id*. Moreover, since the EAC began compiling and reporting data regarding provisional ballots in 2008, the percentage of provisional ballots and OOP provisional ballots has steadily decreased. *Id.*, Table 6. Thus, even assuming that Dr. Rodden correctly identified OOP ballots cast by minority voters, those votes are such a small portion of all ballots cast that the effect on their ability to elect representatives of their choice is negligible. *See* Ex. 13, at 41-42.

In fact, Dr. Rodden's analysis of OOP ballots cast in Maricopa County in the 2012 general election demonstrates that minority voters in Maricopa County have not been denied the opportunity to elect representatives of their choice by the prohibition on counting OOP ballots. The "hottest" parts of Dr. Rodden's heat map—*i.e.*, the parts of the County with the highest concentration of OOP ballots—cover areas in Congressional

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[7] Dr. Rodden also looked at OOP votes in Pima County in 2010, 2012, and 2014. Dkt. No. 177-1, at 43. While he asserted that the rates of OOP voting for African-American and Hispanic voters were "significantly higher" than for White voters in 2010 and 2012, he did not provide the percentage of OOP voters by race or data sufficient to verify his conclusions. *Id*. Based on the data provided, it is impossible to determine what percentage of ballots cast were OOP ballots cast by minority voters. *See also* Ex. 6, ¶ 58.

Districts 3, 6, 7, and 9 and State Legislative Districts 4, 20, 24, 26, 27, 28, 29, and 30. Ex. 15. Among those filling the Congressional seats are three Democrats, two of whom are Hispanic, including declarant Ruben Gallego. Ex. 16. The Legislative seats for those districts are filled by nineteen Democrats, nine of whom are Hispanic and one of whom is African-American, and five Republicans. *Id.* These legislators include declarants Ken Clark, Charlene Fernandez, and Martín Quezada. *Id.* Declarant Steve Gallardo's County Supervisorial district 5 also includes some of the "hot" areas identified by Dr. Rodden. Ex. 15. Consequently, even with a higher concentration of OOP ballots, minority communities have been able to elect the representatives of their choice.

2. Plaintiffs Have Not Shown a Causal Connection.

Even if Plaintiffs had shown a discriminatory impact, they must still show a causal connection. To show causation, the Plaintiffs must connect the specific challenged practice to the alleged discriminatory impact. *Smith v. Salt River Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (holding that plaintiffs "must establish [the challenged practice] results in discrimination on account of race or color") (internal quotation marks omitted). Indeed, "proof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (internal quotation marks omitted). Plaintiffs have not shown causation here.

Plaintiffs here made the same errors in causation as the plaintiffs in *Gonzalez*. In *Gonzalez*, "[p]laintiffs had not adduced any evidence that the observed difference in voter registration and voting rates of Latinos is substantially explained by race, as opposed to factors independent of race." Ex. 13, at 47. The Ninth Circuit affirmed, noting that, even with the presence of some Senate Factors, the district court had not erred in holding that the plaintiffs had not proven causation. *Gonzalez*, 677 F.3d at 407. Plaintiffs here similarly cite to alleged statistical disparities without demonstrating a causal link to race. They attempt to do so by noting that OOP votes are most common in "corridors with more renters, and less common in areas with high rates of home ownership," and then

asserting that "[m]inorities, *as a result of Arizona's discriminatory history*, are far more likely to rent than own a home." Dkt. No. 73, at 17 (emphasis added). But Plaintiffs have not shown a discriminatory history in housing or a statistically significant relationship between renting and casting OOP votes, and Plaintiffs' expert on the Senate Factors conceded that he had not identified any discriminatory policy in housing in Arizona.[8] Ex. 6, ¶¶ 47-49, Table 10; Ex. 17, at 214:4-21. Plaintiffs therefore have not shown that race explains the alleged disparity in OOP votes.

The Senate Factors do not fill the gap in Plaintiff's analysis of causation. Just as the Plaintiffs did not connect the alleged impact to race, Plaintiffs have not sufficiently linked the Senate Factors to Arizona's treatment of OOP votes. *See Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003) (requiring evidence that "a challenged voting practice interacts with surrounding racial discrimination in a meaningful way"); *see also Ortiz v. Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 316 (3d Cir. 1994) (rejecting claim where "the record reveals no link between the societal conditions and factors . . . and the electoral practice"). And, as articulated in the State Defendants' and Intervenor-Defendants' responses, Plaintiffs' analysis of those factors is replete with errors.[9] Dkt. No 152, at 7-9; Dkt. No. 153, at 7-10.

Plaintiffs make additional arguments on two Senate Factors: Senate Factor 5 (social and economic disparities) and Senate Factor 9 (tenuousness). But Plaintiffs fail to make a sufficient showing under either factor. With regard to social and economic disparities, Plaintiffs assert that health disparities affect the ability of minority voters to visit the correct polling place, but they ignore that Arizona permits voters to vote by mail or, if ill or disabled, with a special election board. *See* Dkt. No. 153 at 2-3. Plaintiffs also speculate that voters who rely on public transit cannot get to the correct polling

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[8] Plaintiff's expert on Arizona's history was similarly silent on housing. *See generally* Dkt. No. 101-1.

[9] The Secretary incorporates the earlier responses here by reference.

place, but they offer no evidence that transit access causes OOP voting.[10] Finally, they speculate that educational and linguistic differences may make it difficult to determine the correct polling place, but they do not show that the many ways that counties inform voters of their polling places, in English and in Spanish, are undermined by these alleged disparities. Ex. 2, ¶¶ 3-7; Ex. 3, ¶¶ 17-21; Ex. 4, ¶¶ 3-10.

Plaintiffs' showing of "tenuousness," is even more flawed. Plaintiffs assert that Arizona law does not require counties to reject OOP votes. But A.R.S. § 16-122 clearly states that, subject to certain exceptions, "[n]o person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register." *See also* A.R.S. §§ 16-135(B) (limiting voter to precinct for the "new residence address"), -584(A) (allowing a qualified voter to vote with a recorder's certificate "showing that the elector is entitled by law to vote in the precinct"), -584(B) (allowing address correction at the polling place only where "[t]he residence address [is] within the precinct in which the voter is attempting to vote"), -584(E) (providing for counting a provisional vote after verifying registration based on, among other things, "a sworn or attested statement of the elector that the elector resides in the precinct").

Plaintiffs ignore all of these provisions and rely only on A.R.S. § 16-584(B), which states that a voter may cast a provisional ballot after "signing an affirmation that states that the elector is a registered voter in that jurisdiction and is eligible to vote in that jurisdiction." This language is required by—and essentially mirrors—HAVA. *See* 52 U.S.C. § 21082(A)(2). The language in HAVA, however, refers to the ability to cast a ballot; it does not require states to count OOP votes. *Sandusky*, 387 F.3d at 578; *see also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1170–71 (11th Cir. 2008). Arizona's treatment of OOP votes clearly follows state law, and, as discussed more fully below, Arizona's interests in those laws are compelling and well recognized.

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[10] Dr. Rodden's report discusses reliance on public transit only in conjunction with the 60 vote centers that Maricopa County used in the 2016 PPE, not with respect to a precinct-based election with over 600 polling places in the County. *See* Dkt. No. 177-1, at 65-67.

3. Plaintiffs Have Not Shown a Cumulative Impact.

Plaintiffs also incorrectly assert that the combination of the polling place allocation in the March Presidential Preference Election and OOP voting violates Section 2. Plaintiffs have made no showing of a disparate impact from the combination of these practices, and the claim should fail on that basis alone.

Even ignoring that fundamental flaw, Plaintiffs attempt to combine apples and oranges: their polling place claim is specific to Maricopa County, while their OOP claim is statewide. Unless Plaintiffs seek to enjoin Arizona's longstanding practice for OOP votes in Maricopa County only, Plaintiffs have not articulated a claim with a cognizable cumulative impact. Plaintiffs also argue that a Phoenix election will cause confusion because it will use different polling places on Election Day. Dkt. No. 73, at 24. Not only have Plaintiffs not challenged municipal polling place allocation, the relevant Phoenix election will use Maricopa County polling places. Ex. 3, ¶ 35. Plaintiffs next argue that changing from PPE vote centers to general election polling places will cause confusion—but Plaintiffs ignore the August 30 primary, which will use precinct-based polling places. *Id*., ¶ 27. Plaintiffs also disregard Arizona's long history of not counting OOP votes and assert that voters will be confused by this practice. Dkt. No. 73, at 24. But Plaintiffs have not identified any voter who considers the voting system when identifying a polling place, and, should a voter go to the wrong location, poll workers will instruct the voter to go to the correct polling place. Ex. 4, ¶ 17; Ex. 5. Finally, Plaintiffs do not articulate a causal connection between the alleged impact of these practices and race.[11]

Thus, taken separately or together, Plaintiffs failed to show a disparate impact, and they failed to show that any impact occurred on account of race. Given these deficiencies, Plaintiffs have not shown a likelihood of success on their Section 2 claim.

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[11] Plaintiffs briefly assert that HB 2023 should be considered in a cumulative analysis, but they again fail to show either a disparate impact or a causal connection when the practices are viewed as a whole.

B. Plaintiffs Are Not Likely to Succeed on the Merits of Their Constitutional Claims.

Plaintiffs assert that Arizona, one of many states that does not count OOP votes, is violating the Constitution. First, they argue that not counting OOP votes burdens the right to vote. Dkt. No. 73, at 26-27. Second, they argue that the Equal Protection Clause bars counties from choosing between a precinct-based system and a voting-center system. *Id.* at 27-28. Plaintiffs fail to show a likelihood of success on either claim.

1. Plaintiffs Have Not Shown a Violation of the Right to Vote.

Plaintiffs acknowledge that the *Anderson*/*Burdick* framework applies, but they do not carry their burden under that framework. *See* Dkt. No. 73, at 24-27. As set out in the State Defendants' earlier response, the *Anderson*/*Burdick* framework is clear: "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433(1992). The burden on the Plaintiffs' rights determines the level of scrutiny. The Ninth Circuit applies strict scrutiny if an election law "imposes a severe burden." *Nader v. Brewer*, 531 F.3d 1028, 1035 (9th Cir. 2008). But rational basis review applies when there is only a de minimis burden. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 (9th Cir. 2015). And the Plaintiffs must offer specific evidence to demonstrate the severity of the burden.[12] *Id.* at 731. Where rational basis review applies, the Plaintiffs also must show that there is no rational basis for the challenged law. *Id.* at 732. Courts "may look to any conceivable interest promoted by the challenged procedures, whether or not the state cited that interest in its briefs." *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 763 (9th Cir. 1994).

Plaintiffs have not shown a severe burden on the right to vote. Plaintiffs argue that

[12] In assessing a claim under this framework, the Court may also look to practices in other states. *See, e.g., Green Party of Ark. v. Martin*, 649 F.3d 675, 685 (8th Cir. 2011) ("[W]e note that Arkansas's ballot access scheme, while unique in its particulars, is common in its approach"); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006) (comparing state practice to that in other states).

the fact that OOP votes are not counted by itself is a severe burden, but Plaintiffs' theory "absolves voters of all responsibility for voting in the correct precinct or correct polling place by assessing voter burden solely on the basis of the outcome—*i.e.*, the state's ballot validity determination." *SEIU v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012). Instead, the burden must be determined based on the voter's ability to take the steps necessary to vote. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (holding that the steps necessary to get a voter ID did not constitute a severe burden). And the Sixth Circuit held that "a voter who fails to utilize these tools [for locating the correct polling place] and arrives at the wrong polling location cannot be said to be blameless." *SEIU*, 698 F.3d at 344; *see also Colo. Common Cause v. Davidson*, 04CV7709, 2004 WL 2360485, at **14 (Colo. Dist. Ct. Oct. 18, 2004) ("[I]t does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place."). Arizona provides voters with a variety of ways to obtain correct polling place information.[13] Ex. 2, ¶¶ 3-7; Ex. 3, ¶ 31; Ex. 4, ¶¶ 3-7, 17. Arizona also provides for voting by mail and in-person early voting for those voters who may be concerned about the proper polling place. Dkt. No. 153, at 2-3. The Plaintiffs thus have shown no more than a de minimis burden.

Plaintiffs must therefore show there is no rational basis for rejecting OOP ballots. *See Ariz. Libertarian Party*, 798 F.3d at 732. Even if a more rigorous level of scrutiny applies, the Plaintiffs offer only the conclusory statement that that "there is no legitimate justification" for following A.R.S. § 16-122. Dkt. No. 73, at 27. But Plaintiffs ignore the well-recognized state interests behind this practice. Arizona's treatment of OOP voting is directly related to precinct-based voting. *See, e.g.*, Ex. 3, ¶¶ 7-8. Plaintiffs do not—and cannot—seriously challenge the state interests behind precinct-based voting:

> The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows

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[13] The Plaintiffs themselves also engage in voter education on appropriate voting practices that should mitigate any risk of voter confusion. *See, e.g.*, Ex. 18, at 98:25-99:2.

> each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud, and it generally puts polling places in closer proximity to voter residences.

Sandusky, 387 F.3d at 569. Based on these interests, more than two dozen states do not count ballots cast out of precinct. Ex. 1.

Allowing OOP voting in a precinct-based system also "partially disenfranchises voters" because voters would be "permitted to vote in state-wide races, [but] not permitted to vote in precinct-specific contests for which they would otherwise have been eligible had they only appeared at their assigned precinct." *N.C. State Conf. of the NAACP v. McCrory*, 2016 WL 1650774, at *113 (M.D.N.C. Apr. 25, 2016) *rev'd on other grounds*, 2016 WL 4053033 (4th Cir. July 29, 2016). At least one other state has seen "political organizations intentionally transport[ ] voters to the wrong precinct" when the ban on OOP votes was removed. *Id.*

Arizona therefore has compelling interests in not counting OOP votes: it preserves precinct-based election administration, it avoids the partial disenfranchisement of voters, and it minimizes the incentive for misdirection from third parties. The Plaintiffs do not address any of these interests, much less demonstrate the absence of a rational basis. They thus have not shown a likelihood of success on this claim.

2. The Plaintiffs Have Not Shown a Likelihood of Success on Their Equal Protection Claim.

Plaintiffs rely on *Bush v. Gore*, 531 U.S. 98 (2000), to argue that the Equal Protection Clause bars states from allowing counties to choose a precinct-based model or vote-center model for elections. *Bush* cannot be stretched that far, and Plaintiffs have not shown they can succeed on their Equal Protection claim.

First, the Plaintiffs err by relying solely on *Bush*. Not only did the Supreme Court famously limit its decision to the circumstances then before the Court, *id.* at 109, the Court expressly declined to extend its reasoning to situations where "local entities, in the

exercise of their expertise, [ ] develop different systems for implementing elections." *Id.* The en banc Ninth Circuit relied upon that language as it held that a district court did not abuse its discretion in denying a preliminary injunction against a law that allowed counties to select voting technologies from an approved list. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc).

Even if *Bush* did apply, Plaintiffs have not shown that the discretion given to counties is arbitrary. *See Bush*, 531 U.S. at 105 (holding state recount procedures unconstitutional because they did not "satisfy the minimum requirement for nonarbitrary treatment of voters"). Section 16-411(B)(4) is not arbitrary; instead, it allows counties to choose a system that fits their specific characteristics. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems. So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003). The Ninth Circuit thus held that "California made a reasonable, politically neutral and non-discriminatory choice to certify touchscreen systems as an alternative to paper ballots. Likewise, Riverside County in deciding to use such a system. Nothing in the Constitution forbids this choice." *Id.* Plaintiffs similarly have not shown the discretion given to counties here is arbitrary.

Plaintiffs' claim also fails under the *Anderson*/*Burdick* framework. *See Dudum v. Arntz*, 640 F.3d 1098, 1105-09 (9th Cir. 2011) (applying framework to equal protection claim). As demonstrated above, the Plaintiffs have not shown a severe burden. The alleged burden occurs only where the voter (1) ignores mail identifying the proper polling location, (2) does not look up the polling place on the Secretary's or county recorder's website or call the county for polling place information, and (3) ignores the directions to the proper polling location provided by poll workers. And, to the extent that Plaintiffs again argue that the number of OOP votes not counted constitutes a burden, only 0.5% of voters in Maricopa County had their votes rejected for voting OOP. Ex. 6, Table 9. This is simply not enough to demonstrate a severe burden. *See SEIU*, 698 F.3d at 344.

Plaintiffs also have not shown the lack of a rational basis for this law. There are advantages and disadvantages to vote centers, Ex. 7, and Arizona allows its counties to choose between the two. Based on factors including cost, population, voting behavior, and technology, the counties have made those choices. Ex. 10, ¶ 7. Section 16-411(B)(4) serves Arizona's legitimate interest in its counties choosing the most effective voting system—and in encouraging innovation in voting systems. *See Weber*, 347 F.3d at 1107.

IV. Plaintiffs Have Not Shown Irreparable Harm.

Because Plaintiffs have not demonstrated a likelihood of success, they have not shown an irreparable harm. *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986). Plaintiffs' delay also counsels against finding an irreparable harm. *See, e.g., Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). Arizona's law on OOP votes has been consistent for decades, and Plaintiffs do not appear to have challenged these practices before. Similarly, the amendment to § 16-411 in 2011 passed with only a single nay vote, some of Plaintiffs' declarants voted in favor of that bill, and Plaintiffs have never before challenged its constitutionality. *See* Ex. 9.

Arizona provides its voters with multiple avenues to obtain information about the correct polling place, and poll workers direct voters to the correct polling place on Election Day. Plaintiffs have not shown these methods of communicating polling place information to voters are insufficient or that allowing Arizona to continue to process OOP votes as it has for more than forty years is an irreparable harm.

V. The Balance of the Equities and the Public Interest Do Not Favor a Preliminary Injunction.

In a claim against the government, the public interest merges with the balance of the equities. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The balance of the equities and the public interest do not support Plaintiffs' last-minute attempt to enjoin an election law that has been in effect for more than forty years. "[A]ny time a State is enjoined by a

court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (internal quotation marks and citation omitted). That harm is particularly acute here because the "State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The Ninth Circuit has therefore held that the "law recognizes that election cases are different from ordinary injunction cases," because "hardship falls not only upon the putative defendant, the [Arizona] Secretary of State, but on all the citizens of [Arizona]." *Sw. Voter Registration Educ.*, 344 F.3d at 919.

The Court should also consider the Plaintiffs' delay under this factor. *See W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012). Arizona has not counted OOP ballots for more than forty years, and the number of OOP ballots has been steadily declining. Ex. 6, Table 6. The Plaintiffs nonetheless waited until April of a presidential election year to bring this lawsuit. Dkt. No. 1.

Plaintiffs' delay causes unquestionable harm. Most Arizona counties will have to scramble to develop procedures to implement Plaintiffs' relief, and they will have to do so without the time or money necessary to acquire additional election technology. *See* Ex. 2, ¶ 11-13. Instead, counties would likely need to use a manual approach similar to that used for damaged ballots. And it could then take fifteen minutes to count each OOP ballot. Ex. 4, ¶¶ 24-28. Not only will this significantly burden election officials, it will delay election results and inject uncertainty into the process. Ex. 2, ¶¶ 9-11. Finally, as other courts have noted, Plaintiffs' relief opens the door to the intentional disenfranchisement of voters. *McCrory*, 2016 WL 1650774, at *113 (stating that groups intentionally steered voters to the wrong districts); *SEIU*, 698 F.3d at 345 (same). The Court should therefore find that these factors also cut against the Plaintiff's request for a preliminary injunction.

VI. Conclusion

For the foregoing reasons, Plaintiffs' Motion should be denied.

RESPECTFULLY SUBMITTED this 22nd day of August, 2016.

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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/ Maureen Riordan

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