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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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9 Leslie Feldman, et al.,

No. CV-16-01065-PHX-DLR

10

Plaintiffs,

ORDER

11

v.

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

13

Defendants.

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Plaintiffs are Leslie Feldman, Luz Magallanes, Mercedes Hymes, Julio Morera, and Cleo Ovalle, Democrats and registered voters in Maricopa County, Arizona; Peterson Zah, former Chairman and First President of the Navajo Nation, and a registered voter in Apache County, Arizona; the Democratic National Committee; the Democratic Senatorial Campaign Committee; the Arizona Democratic Party (ADP); Kirkpatrick for U.S. Senate, a committee supporting the election of Democratic United States Representative Ann Kirkpatrick to the United States Senate; and Hillary for America, a committee supporting the election of Democratic candidate Hillary Clinton as President of the United States. Plaintiff-Intervenor is Bernie 2016, Inc., a committee that supported the election of former Democratic candidate Bernie Sanders as President of the United States. The Court will refer to these parties collectively as "Plaintiffs." Defendants are the Arizona Secretary of State's Office; Arizona Secretary of State Michele Reagan, in her official capacity; the Maricopa County Board of Supervisors; Denny Barney, Steve Chucri, Andy

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1 Kunasek, Clint Hickman, and Steve Gallardo, members of the Maricopa County Board of
2 Supervisors, in their official capacities; the Maricopa County Recorder and Elections
3 Department; Maricopa County Recorder Helen Purcell, in her official capacity; Maricopa
4 County Elections Director Karen Osborne, in her official capacity; and Arizona Attorney
5 General Mark Brnovich, in his official capacity. Defendant-Intervenors are the Arizona
6 Republican Party (ARP), Arizona state lawmakers Debbie Lesko and Tony Rivero,
7 Phoenix City Councilman Bill Gates, and Scottsdale City Councilwoman Suzanne Klapp.
8 At issue is Plaintiff's Motion for Preliminary Injunction on Provisional Ballot Claims.
9 (Doc. 72.) The motion is fully briefed, and the Court heard oral argument on September
10 2, 2016. For the following reasons, the motion is denied.¹

11 **BACKGROUND**

12 Since at least 1970, Arizona has required voters to cast ballots in their assigned
13 precinct and has enforced this system by counting only those ballots cast in the correct
14 precinct. (Doc. 180-2 at 115-16); A.R.S. §§ 16-122, 16-584. Because elections involve
15 many different overlapping jurisdictions, this precinct-based system ensures that each
16 voter receives a ballot reflecting only the races for which that person is entitled to vote
17 based on his or her residential address. (Doc. 177-1 at 10.) If a voter arrives at a precinct
18 but does not appear on the precinct register, Arizona allows the voter to cast a provisional
19 ballot. A.R.S. §§ 16-135, 16-584. This may occur, for example, if a voter recently
20 moved but did not notify the county recorder of the change of address before the election.

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22 ¹ The ARP argues that Plaintiffs have not named the necessary parties to obtain the
23 statewide relief they seek because Arizona law delegates responsibility for counting
24 provisional ballots to the individual counties, yet Plaintiffs have only named Maricopa
25 County and its elections officials in this lawsuit. (Doc. 178 at 6-7.) Plaintiffs, however,
26 argue that there is no reason to believe that county elections officials will ignore an
27 injunction issued by the Court because Secretary Reagan is charged with issuing the
28 Arizona Election Procedures Manual, which includes instructions on how to determine
the validity of provisional ballots. (Doc. 192.) This issue also has been raised in the
ARP's motion to dismiss, (Doc. 108), and Secretary Reagan and Attorney General
Brnovich's opposition to Plaintiffs' Joint Motion to Dismiss County Defendants, (Doc.
207). Because the Court denies Plaintiffs' preliminary injunction motion, it need not
decide for purposes this order whether all Arizona counties must be joined as defendants
in order for Plaintiffs to obtain statewide relief. Instead, the Court will address this issue
after further briefing on the pending motions to dismiss.

1 If the voter's current address is determined to be within the precinct, the provisional
2 ballot is counted. Arizona does not, however, count provisional ballots cast out of the
3 voter's correct precinct (OOP ballots).

4 In 2011, Arizona amended its elections code to allow counties to use vote centers
5 if deemed appropriate. A.R.S. § 16-411(B). Vote centers are equipped to print a specific
6 ballot for each voter that includes all races for which that person is eligible to vote based
7 on his or her residential address. (Doc. 178-2, ¶ 13; Doc. 180-1 at 126; Doc. 180-2 at 3-
8 4.) Thus, under a vote center system, voters may cast their ballots at any vote center in
9 the county in which they reside and receive the appropriate ballot. A.R.S. § 16-
10 411(B)(4). Maricopa County experimented with a vote center system during the 2016
11 Presidential Preference Election. (Doc. 178-3, ¶ 17.) The only other Arizona counties
12 that have used vote centers for countywide elections are Graham, Yavapai, and Yuma.
13 (Doc. 180-2 at 8.)

14 Plaintiffs brought this lawsuit in April 2016 challenging Arizona's rejection of
15 OOP ballots under the Voting Rights Act of 1965 (VRA) and the Fourteenth Amendment
16 to the United States Constitution. (Doc. 12; Doc. 53.) Specifically, Plaintiffs argue that
17 Arizona's rejection of OOP ballots violates § 2 of the VRA because it disparately impacts
18 the electoral opportunities of Hispanic, Native American, and African American voters as
19 compared to white voters, and violates the Fourteenth Amendment by unjustifiably
20 burdening voting rights. (Doc. 73.) They also argue that Arizona arbitrarily treats
21 similarly situated voters differently based solely on whether they reside in a county that
22 administers elections under a precinct-based system as opposed to a vote center model.
23 (*Id.*) Plaintiffs have moved to preliminarily enjoin Arizona from rejecting OOP ballots in
24 their entirety. (Doc. 72.) They do not seek an order requiring all counties to use vote
25 centers or to count OOP ballots for all races. Rather, Plaintiffs seek a mandatory
26 preliminary injunction preventing Arizona from rejecting OOP ballots for the races in
27 which the voter is eligible to vote. (Doc. 192 at 7.)
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LEGAL STANARD

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2 “A preliminary injunction is an extraordinary remedy never awarded as of right.”
3 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a
4 preliminary injunction must establish that he is likely to succeed on the merits, that he is
5 likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
6 equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20. These
7 elements may be balanced on a sliding scale, whereby a stronger showing of one element
8 may offset a weaker showing of another. *See Alliance for the Wild Rockies v. Cottrell*,
9 632 F.3d 1127, 1131, 1134-35 (9th Cir. 2011). However, the sliding-scale approach does
10 not relieve the movant of the burden to satisfy all four prongs for the issuance of a
11 preliminary injunction. *Id.* at 1135. When “a party seeks mandatory preliminary relief
12 that goes well beyond maintaining the status quo *pendente lite*, courts should be
13 extremely cautious about issuing a preliminary injunction.” *Martin v. Int’l Olympic*
14 *Comm.*, 740 F.2d 670, 675 (9th Cir. 1984). Generally, “mandatory injunctions are not
15 granted unless extreme or very serious damage will result and are not issued in doubtful
16 cases[.]” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879
17 (9th Cir. 2009) (internal quotation and citation omitted).

DISCUSSION

I. Likelihood of Success on the Merits

A. Section 2 of the VRA

21 Section 2 prohibits states from imposing any voting qualification, prerequisite,
22 standard, practice, or procedure that “results in a denial or abridgement of the right of any
23 citizen of the United States to vote on account of race or color[.]” 52 U.S.C. § 10301(a).
24 “A violation . . . is established if, based on the totality of circumstances, it is shown that
25 the political processes leading to nomination or election in the State or political
26 subdivision are not equally open to participation” by racial minorities, in that they “have
27 less opportunity than other members of the electorate to participate in the political
28 process and to elect representatives of their choice.” 52 U.S.C. § 10301(b).

1 Although proving a violation of § 2 does not require a showing of
2 discriminatory intent, only discriminatory results, proof of a causal
3 connection between the challenged voting practice and a prohibited result is
4 crucial. Said otherwise, a § 2 challenge based purely on a showing of some
relevant statistical disparity between minorities and whites, without any
evidence that the challenged voting qualification causes that disparity, will
be rejected.

5 *Gonzales v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (internal quotations and citations
6 omitted).

7 In *Thornburg v. Gingles*, the Supreme Court cited a list of non-exhaustive factors
8 that courts should consider when determining whether, under the totality of the
9 circumstances, a challenged voting practice interacts with social and historical conditions
10 to cause a disparity between the electoral opportunities of minority and white voters.²

11 478 U.S. 30 (1986). These factors include:

- 12 1. the extent of any history of official discrimination in the state or political
13 subdivision that touched the right of the members of the minority group to
14 register, to vote, or otherwise to participate in the democratic process;
- 15 2. the extent to which voting in the elections of the state or political
subdivision is racially polarized;
- 16 3. the extent to which the state or political subdivision has used unusually
17 large election districts, majority vote requirements, anti-single shot
18 provisions, or other voting practices or procedures that may enhance the
opportunity for discrimination against the minority group;
- 19 4. if there is a candidate slating process, whether the members of the
minority group have been denied access to that process;
- 20 5. the extent to which members of the minority group in the state or
21 political subdivision bear the effects of discrimination in such areas as
22 education, employment and health, which hinder their ability to participate
effectively in the political process;
- 23 6. whether political campaigns have been characterized by overt or subtle
racial appeals; [and]
- 24 7. the extent to which members of the minority group have been elected to
25 public office in the jurisdiction.

26 *Gingles*, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). Courts also

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28 ² These factors are sometimes called the “Senate Factors” because they derive
from the Senate Report accompanying the 1982 amendments to the VRA.

1 may consider “whether there is a significant lack of responsiveness on the part of elected
2 officials to the particularized needs of the members of the minority group,” and “whether
3 the policy underlying the state or political subdivision’s use of such voting qualification,
4 prerequisite to voting, or standard, practice or procedure is tenuous.” *Id.* “[T]here is no
5 requirement that any particular number of factors be proved, or that a majority of them
6 point one way or the other.” *Id.* at 45.

7 Accordingly, a § 2 claim has two essential elements: (1) the challenged voting
8 practice must impose a disparate burden on the electoral opportunities of minority as
9 compared to white voters, and (2) “that burden must in part be caused by or linked to
10 social and historical conditions that have or currently produce discrimination against
11 members of the protected class.” *League of Women Voters of N. C. v. North Carolina*,
12 769 F.3d 224, 240 (4th Cir. 2014) (internal quotations and citations omitted). “The first
13 part of this two-prong framework inquires about the nature of the burden imposed and
14 whether it creates a disparate effect[.]” *Veasey v. Abbott*, --- F.3d ---, No. 14-41127,
15 2016 WL 3923868, at *17 (5th Cir. July 20, 2016). Drawing on the Supreme Court’s
16 guidance in *Gingles*, “[t]he second part . . . provides the requisite causal link between the
17 burden on voting rights and the fact that this burden affects minorities disparately
18 because it interacts with social and historical conditions that have produced
19 discrimination against minorities currently, in the past, or both.” *Id.* Stated otherwise,
20 “the second step asks not just whether social and historical conditions ‘result in’ a
21 disparate impact, but whether the challenged voting standard or practice causes the
22 discriminatory impact as it interacts with social and historical conditions.” *Ohio*
23 *Democratic Party v. Husted*, --- F.3d ---, No. 16-3561, 2016 WL 4437605, at *14 (6th
24 Cir. Aug. 23, 2016) (alterations omitted).

25 Maricopa County accounts for 61% of Arizona’s population and almost 70% of all
26 OOP ballots. (Doc. 177-1 at 43; Doc. 180-1 at 100.) Thus, Plaintiffs’ expert, Dr.
27 Jonathan Rodden, examined the relationship between race and OOP voting using the
28 2012 general election in Maricopa County as a case study. Because Arizona does not

1 track the race of voters, Dr. Rodden used two methods to estimate the racial composition
2 of OOP voters in Maricopa County. First, Dr. Rodden superimposed 2010 census block
3 group data on a map noting the location of OOP voters.³ He determined that OOP voting
4 is more concentrated in areas with higher Hispanic and African American populations
5 and less common in predominately white suburban neighborhoods. (Doc. 177-1 at 32.)
6 Second, Dr. Rodden estimated the race of OOP voters using surname data. (*Id.* at 34.)
7 “This approach makes use of the frequency of specific last names in the population,
8 which can be determined from past individual-level Census data, and the frequency of
9 racial groups in local areas according to the United States Census Department.” (*Id.* at
10 35.) Under this approach, Dr. Rodden also found that minorities are over-represented
11 among those casting OOP ballots in Maricopa County. (*Id.* at 37.) Dr. Rodden
12 concluded that white voters accounted for only 56% of OOP ballots, despite casting 70%
13 of all in-person voters. (*Id.* at 37.) In contrast, African American and Hispanic voters
14 made up 10% and 15% of in-person voters, but accounted for 13% and 26% of OOP
15 ballots, respectively. (*Id.*) Dr. Rodden analyzed comparable data from Pima County and
16 found that the results were similar to those in Maricopa County. (*Id.* at 43.) In his
17 rebuttal report, he analyzed data from Arizona’s non-metro counties and found similar
18 disparities among in-person voters. (Doc. 192-2 at 60.)

19 The Court credits Dr. Rodden’s assignment of race to OOP voters for purposes of
20 this order, but finds that his analysis paints an incomplete picture of the impact of OOP
21 voting. “No state has exactly equal registration rates, exactly equal turnout rates, and so
22 on, at every stage of its voting system.” *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir.
23 2014). Because some degree of disparity is inevitable, not every statistical disparity
24 between minority and white voters is cognizable under the VRA. Rather, a cognizable
25 disparity results “in an inequality in the opportunities enjoyed by [minority] and white
26 voters to elect their preferred representatives.” *See Gingles*, 478 U.S. at 47. Thus, in the

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28 ³ A census block group is the smallest unit of census geography for which such
data is available. (Doc. 177-1 at 31 n.21.)

1 context of this case, the Court views the relevant question as whether Arizona's rejection
2 of OOP ballots meaningfully reduces the likelihood that minority as compared to white
3 voters will cast ballots that ultimately are counted.

4 In Arizona, 2,323,579 ballots were cast during the 2012 general election, only
5 10,979—or 0.5%—of which were cast OOP. (Doc. 180-1 at 100; Doc. 177-1 at 26.) Dr.
6 Rodden's report shows that the percent of minority OOP ballots is higher than minority
7 representation in the number of *in-person ballots* cast. However, an analysis based only
8 on in-person voting is incomplete because in-person voting is not the only method by
9 which Arizonans vote. Arizona also permits absentee voting. During the 2012 election,
10 1,542,855 voters submitted absentee ballots, over 99% of which were counted. (*Id.* at 90,
11 92; Doc. 177-1 at 17.) This represents two-thirds of the total votes cast in that election.
12 By focusing only on in-person votes, or about only one-third of the votes cast, Dr.
13 Rodden's analysis distorts the practical effect of the observed disparities in OOP voting
14 on the overall electoral opportunities enjoyed by minority as compared to white voters.
15 Put in perspective, OOP ballots cast by white voters accounted for only 0.3% of all votes
16 cast during the 2012 election, whereas OOP ballots cast by Hispanic and African
17 American voters accounted only for 0.13% and 0.07%, respectively.⁴ (Doc. 180-1 at
18 101.) Considering OOP ballots represent such a small fraction of the overall votes cast
19 in any given election, the Court finds that OOP ballot rejection likely has no meaningful
20 impact on the opportunities of minority as compared to white voters to elect their
21 preferred representatives.

22 Even if the disparities observed by Dr. Rodden are cognizable under § 2, Plaintiffs
23 have not shown that challenged practice, itself, likely causes those disparities. Plaintiffs
24 argue that:

25 voters cast OOP ballots due to the systemic problems in Arizona's
26 administration of elections; specifically, voter confusion caused by the

27 ⁴ Notably, absentee voting steadily has been increasing. For example, in 2008,
28 35.6% of all registered voters submitted absentee ballots; in 2012, that figure grew to
41.4%. (Doc. 180-1 at 90.) Thus, the proportion of the electorate that votes OOP likely
will decline as absentee voting continues to increase.

1 large number of changes in polling locations from election to election; the
2 inconsistent election regimes used by and within counties; poor placement
3 of polling locations; and other faulty election administration procedures.

4 (Doc. 73 at 12-13.) Notably, however, Plaintiffs do not challenge any of these “systemic
5 problems” or “faulty election administration procedures” in this lawsuit.⁵ Instead,
6 Plaintiffs have challenged Arizona’s requirement that only ballots cast in the correct
7 precinct be counted. But it is circular to argue that minority votes are disproportionately
8 rejected for being cast OOP because Arizona rejects OOP ballots. In other words,
9 Arizona’s requirement that voters cast ballots in their assigned precincts is not the reason
10 it is difficult or confusing for some voters to find or travel to their correct precinct.

11 Moreover, Plaintiffs have only loosely linked the observed disparities in minority
12 OOP voting to social and historical conditions that have produced discrimination.
13 Plaintiffs argue that “voters cast OOP ballots due to their high rates of residential
14 mobility, a factor that is inextricably linked to the State’s long history of discrimination.”
15 (Doc. 73 at 7.) Although Plaintiffs provide evidence supporting the first part of this
16 statement—that minorities are more likely to rent, less likely to own homes, and have
17 greater rates of residential mobility, (Doc. 139-1 at 41; Doc. 177-1 at 11, 31-32)—they
18 have not shown that racial discrimination is a substantial cause of these disparities. For
19 example, Plaintiffs cite no evidence of private or state-sponsored discrimination in
20 housing. Instead, they contend that historical discrimination in employment, income, and
21 education has had lingering effects on the socioeconomic status of racial minorities.
22 These disparities, in turn, lead to lower rates of homeownership and higher rates of
23 residential mobility among minorities, which then leads minorities to experience greater
24 confusion about their correct polling place location.

25 The Court does not discount Arizona’s history of racial discrimination or the

26 ⁵ Plaintiffs initially challenged Maricopa County’s polling place allocation plans
27 for the upcoming general election, but the parties later settled all polling place allocation
28 claims. (Doc. 202.) Additionally, although Plaintiffs argue that the inconsistent use of
vote centers and precincts raises Equal Protection concerns, they do not challenge the
validity of A.R.S. § 16-411(B), nor do they argue that all counties must use the same
voting system.

1 lingering effects on the socioeconomic status of minorities. But if the requisite causal
2 link under § 2 could be established primarily by pointing to socioeconomic disparities
3 between minorities and whites, then nearly all voting regulations could conceivably
4 violate the VRA because nearly all costs of voting are heavier for socioeconomically
5 disadvantaged voters. (See Doc. 139-1 at 39 (“Decades of research has demonstrated that
6 socio-economic standing significantly impacts the ability to fully participate in the
7 political process.”).) Taken to its logical conclusion, Plaintiffs’ causation theory would
8 allow a plaintiff to successfully challenge any aspect of a state’s election regime in which
9 there is not perfect racial parity simply by noting that the costs of voting fall heavier on
10 minorities due to their socioeconomic status. The Court doubts that such a loose
11 approach to causation is consistent with the text or purposes of the VRA, particularly in
12 light of the Ninth Circuit’s repeated emphasis on the importance of a “causal connection
13 between the challenged voting practice and a prohibited discriminatory result.” *Smith v.*
14 *Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (internal
15 quotations and citation omitted).

16 In sum, the Court finds that Plaintiffs are not likely to succeed on their § 2 claim
17 because they have not shown that Arizona’s rejection of OOP ballots results in a
18 cognizable disparity between the electoral opportunities of minority voters compared to
19 white voters, nor have they adequately linked the observed disparities to the challenged
20 practice, itself, or to historical discrimination in Arizona.

21 **B. Fourteenth Amendment**

22 Although the Constitution empowers states to regulate the times, places, and
23 manner of elections, U.S. Const. art. I, § 4, cl. 1, this power is not absolute. It is “subject
24 to the limitation that [it] may not be exercised in a way that violates other . . . provisions
25 of the Constitution.” *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); see *Washington State*
26 *Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). As relevant
27 here, the Fourteenth Amendment protects against unjustified burdens on voting and
28 arbitrary disparate treatment of similarly situated persons. See *Burdick v. Takushi*, 504

1 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

2 **i. *Anderson-Burdick***

3 All elections regulations “invariably impose some burden upon individual voters.”
4 *Burdick*, 504 U.S. at 433. “[A]s a practical matter, there must be substantial regulation of
5 elections if they are to be fair and honest and if some order, rather than chaos, is to
6 accompany the democratic process.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus,
7 when an election law is challenged a court must weigh the nature and magnitude of the
8 burden imposed by the law against state’s interests in and justifications for it. *See Nader*
9 *v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008). “[T]he severity of the burden the
10 election law imposes on the plaintiff’s rights dictates the level of scrutiny applied by the
11 court.” *Nader*, 531 F.3d at 1034. A law that severely burdens the right to vote is subject
12 to strict scrutiny, meaning it must be narrowly tailored to serve a compelling state
13 interest. *Id.* at 1035. On the other hand, a state’s important regulatory interests are
14 generally sufficient to justify laws that impose lesser burdens. *See Washington State*
15 *Grange*, 552 U.S. at 452; *Nader v. Cronin*, 620 F.3d 1214, 1217 (9th Cir. 2010). Laws
16 that do significantly increase the usual burdens of voting do not raise substantial
17 constitutional concerns. *See Crawford*, 553 U.S. at 198. This framework is commonly
18 referred to as the *Anderson-Burdick* test, named after the two Supreme Court cases from
19 which it derives.

20 Plaintiffs identify two burdens that Arizona’s rejection of OOP ballots allegedly
21 imposes. First, voters must locate their correct precinct. Second, if voters mistakenly
22 arrive at the wrong precinct, they must find and timely travel to their correct precinct.
23 (Doc. 201 at 27:13-17.) But Arizona’s rejection of OOP ballots does not make it any
24 more difficult for voters to locate their correct precinct. Plaintiffs do not argue that it will
25 be easier for voters to identify their correct precinct if Arizona eliminated its prohibition
26 on counting OOP ballots. Instead, Plaintiffs cite evidence that “voter confusion caused
27 by the large number of changes in polling locations from election to election is one of the
28 primary factors causing voters to cast OOP ballots.” (Doc. 73 at 31; Doc. 177-1.)

1 Additionally, “[p]olling location placement, inconsistent election regimes used by and
2 within counties, and procedural errors are also contributing causes.” (Doc. 73 at 32.)
3 Thus, the difficulties experienced by some voters in locating their correct precinct are
4 caused primarily by the relocation of polling places from election to election, which is
5 not the practice challenged here. Though Arizona’s rejection of OOP ballots might make
6 it more imperative for voters to correctly identify their precinct, it does not increase the
7 burdens associated with doing so.

8 Notably, Arizona employs a variety of methods to educate voters about their
9 correct precincts. The Secretary of State’s Office operates several websites with polling
10 place information, responds to voter inquiries, and mails a publicity pamphlet to voters
11 that includes information on how to locate their correct precinct. (Doc. 180-1 at 29.)
12 Counties and the Arizona Citizens Clean Elections Commission operate online polling
13 place locators. (*Id.* at 30, 45, 52.) County Recorders also spread awareness through news
14 and social media. (*Id.* at 45, 52.) This information is communicated in both English and
15 Spanish. (*Id.*) Additionally, poll workers are trained to tell voters if they are at the
16 wrong polling place and to give voters information about their correct polling place. (*Id.*
17 at 54, 64-65.) Given the many ways in which Arizona voters can learn their correct
18 polling place location, the Court finds that the rejection of OOP ballots likely imposes no
19 more than minimal burdens not substantially greater than those typically associated with
20 voting. *See Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485,
21 at *14 (Colo. Dist. Ct. Oct. 18, 2004) (“[I]t does not seem to be much of an intrusion into
22 the right to vote to expect citizens, whose judgment we trust to elect our government
23 leaders, to be able to figure out their polling place.”); *see also Serv. Employees Int’l*
24 *Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (explaining that voters cannot
25 be absolved “of all responsibility for voting in the correct precinct or correct polling place
26 by assessing voter burden solely on the basis of the outcome—i.e., the state’s ballot
27 validity determination”).

28 Because Plaintiffs have demonstrated only minimal burdens on voters caused by

1 rejecting OOP ballots, Arizona need show only that this practice serves important
2 regulatory interests. *Washington State Grange*, 552 U.S. at 452.

3 The advantages of the precinct system are significant and numerous: it caps
4 the number of voters attempting to vote in the same place on election day; it
5 allows each precinct ballot to list all of the votes a citizen may cast for all
6 pertinent federal, state, and local elections, referenda, initiatives, and levies;
7 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.

8 *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). Even
9 Dr. Rodden acknowledges that “precincts must be created, and ballots printed, so that the
10 residential address of every voter is connected to the right bouquet of local elected
11 officials.” (Doc. 177-1 at 10.) Arizona’s prohibition on counting OOP ballots is one
12 mechanism by which Arizona enforces and administers this precinct-based system and,
13 therefore, is sufficiently justified in light of the minimal burdens imposed.⁶

14 **ii. Equal Protection**

15 Finally, Plaintiffs do not advance a coherent Equal Protection theory. They argue
16 that Arizona’s:

17 policy of rejecting OOP ballots in jurisdictions that opt to run an election
18 under a precinct-based system, while other jurisdictions holding the same
19 election under a vote center based system count ballots voted anywhere in
20 the county, further violates the [Fourteenth] Amendment’s Equal Protection
Clause because it treats similarly situated voters differently without
sufficient justification for doing so.

21 (Doc. 73 at 32.) For example, “voters in a county such as Yuma or Yavapai, which
22 ordinarily use a vote center model, have a significantly better probability of having their
23 vote counted than voters in counties such as Maricopa and Pima, which ordinarily use
24 precinct-based systems.” (*Id.* at 32-33.) But Arizona’s rejection of OOP ballots does not
25 cause this differential treatment. Instead, the discrepancy is the result of some counties
26 administering elections using vote centers and others precincts. Stated otherwise, if all

27 _____
28 ⁶ Indeed, more than two dozen other states enforce precinct-based systems by
rejecting OOP ballots. (Doc. 180-1 at 10-20.)

1 counties used the same voting system, Arizona's rejection of OOP ballots would affect
2 voters equally regardless of the county in which they reside.

3 Plaintiffs, however, do not challenge A.R.S. § 16-411(B), which allows Arizona
4 counties to choose between precinct-based and vote center models, nor do they seek an
5 injunction requiring all counties to use the same voting system. During oral argument,
6 the Court asked whether it was Plaintiffs' position that "Arizona can't use both precinct
7 and voter center models; they can have one or the other but not both," to which counsel
8 responded no. (Doc. 201 at 29:4-7.)

9 Moreover, Plaintiffs' requested injunction would not remedy the inequities they
10 have identified. Plaintiffs seek an order requiring counties to partially count OOP ballots
11 by accepting votes for races in which the voter is eligible to vote and rejecting votes for
12 races in which the voter is not. But under this framework, voters in counties that
13 administer elections under a vote center model still would be treated more favorably than
14 voters in counties that use precincts. In a vote center county, voters may show up at any
15 vote center and receive a ballot reflecting all races in which they are eligible to vote. But
16 a voter in a precinct county cannot show up at any precinct and receive the appropriate
17 ballot. Even under Plaintiffs' proposed regime that voter will be partially
18 disenfranchised.

19 Accordingly, the Court finds that Plaintiffs are not likely to succeed on their Equal
20 Protection challenge because they have not advanced a coherent theory, and because the
21 relief they seek does not remedy the inequality they have identified.

22 **II. Irreparable Harm**

23 Because Plaintiffs are not likely to succeed on the merits of their claims, they have
24 not shown that Arizona's rejection of OOP ballots will cause them irreparable harm. *See*
25 *Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986). Moreover, Arizona has
26 required voters to cast ballots in their assigned precinct since at least 1970, and all parties
27 agree that OOP provisional ballots have been rejected since at least 2006. Arizona
28 authorized counties to use vote centers in 2011. Yavapai and Yuma counties have used

1 vote centers since 2012. Despite this lengthy history, Plaintiffs waited until April of
2 2016—an election year—to bring this lawsuit and did not request mandatory preliminary
3 injunctive relief until June. The only explanation Plaintiffs have provided for this delay
4 is that “not all election laws appear troublesome at first glance,” and that strong data of
5 substantial disenfranchisement was not previously available. (Doc. 192 at 31; Doc. 201
6 at 32-33.) This explanation, however, is belied by the fact that Dr. Rodden relies on data
7 from the 2008, 2010, 2012, and 2014 elections to draw his conclusions concerning the
8 impact of OOP ballot rejection on minority voters. (Doc. 177-1.) Plaintiffs fail to
9 explain why they waited until mere months before the 2016 general election to challenge
10 this practice, and their “long delay before seeking a preliminary injunction implies a lack
11 of urgency and irreparable harm.” *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d
12 1374, 1377 (9th Cir. 1985).

13 **III. Balance of Hardships/Public Interest**

14 Finally, the Court finds that neither the balance of hardships nor the public interest
15 supports the issuance of a mandatory preliminary injunction. Defendants provide
16 evidence that requiring counties to develop procedures for counting OOP ballots in the
17 upcoming general election would be significantly burdensome. After a general election,
18 Arizona counties have twenty days to complete their canvass, which includes tallying
19 votes for each candidate and providing vote totals to the Secretary of State’s Office.
20 (Doc. 180-1 at 30.) The Secretary then has until the fourth Monday following the general
21 election to verify the information from the canvass. (*Id.*) According to Arizona Elections
22 Director Eric Spencer, “instituting a new vote counting procedure would likely delay the
23 canvass process, and therefore likely put the counties and the state past the statutory
24 deadlines.” (*Id.*) Further, “the elections budgets for counties are likely already set and do
25 not necessarily include funds to cover the additional labor and duplicate ballots that
26 would be required to count OOP ballots.” (*Id.*)

27 Indeed, Pima County Elections Director Brad Nelson explained that counting
28 votes “for some offices cast by a person voting on an incorrect ballot would take

1 additional time, manpower, and financial resources.” (*Id.* at 55.) To partially count OOP
 2 ballots, counties likely would use a manual approach similar to the method for counting
 3 damaged ballots. (*Id.*) Under this process:

4 the correct ballot for that precinct would need to be accessed and a team of
 5 two election workers would create a new ballot. One worker would read
 6 the voter’s selections for the races appearing on both the voted [OOP]
 ballot and the correct ballot for the voter’s assigned precinct. Once those
 votes have been marked, the new ballot is printed[.]

7 The newly-marked ballot for the correct precinct then would be put together
 8 with the original ballot and provided to a different two-person team for
 9 proofing. The second team would verify that the votes marked on the
 duplicate ballot matched the votes on the original ballot.

10 (*Id.*) Nelson estimated that this process could take up to fifteen minutes per OOP ballot.

11 (*Id.*) Thus, requiring county election officials to institute a new procedure for counting
 12 OOP ballots for the upcoming general election would impose substantial costs on
 13 elections officials and could heighten the risk of human error in vote tabulation. On
 14 balance, the Court finds that mandatory injunctive relief is inappropriate.

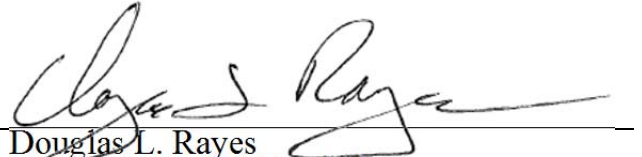
15 CONCLUSION

16 For these reasons, Plaintiffs have not satisfied their heavy burden for obtaining a
 17 mandatory preliminary injunction. Plaintiffs have not shown that Arizona’s rejection of
 18 OOP ballots likely results in a cognizable disparity in the electoral opportunities of
 19 minority as compared to white voters. Nor have they shown that the practice more than
 20 minimally burdens voting rights. Further, Arizona has required voters to cast ballots in
 21 their correct precinct since at least 1970, and the data upon which Plaintiffs rely has been
 22 available since at least 2008. Plaintiffs delay in challenging the practice implies a lack of
 23 urgency and undermines the need for immediate mandatory injunctive relief during the
 24 waning months of an election year.⁷

25
 26 ⁷ The Court previously denied Plaintiffs’ motion to preliminarily enjoin
 27 enforcement of H.B. 2023, after which Plaintiffs moved under Federal Rule of Civil
 28 Procedure 62(c) for a stay of the order pending appeal. (Docs. 204, 210.) The Court
 denied this request. (Doc. 213.) The Court anticipates that Plaintiffs likewise will appeal
 this order. Although under Federal Rule of Appellate Procedure 8(a)(1), “[a] party must
 ordinarily move first in the district court for . . . a stay of the judgment or order . . .
 pending appeal,” the Court is mindful of the time constraints imposed by the upcoming

1 **IT IS ORDERED** that Plaintiffs' Motion for Preliminary Injunction on
2 Provisional Ballot Claims, (Doc. 72), is **DENIED**.

3 Dated this 11th day of October, 2016.

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8 Douglas L. Rayes
 United States District Judge

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general election. Accordingly, the Court informs the parties now that it is not inclined to grant a stay of this order pending appeal. Plaintiffs may seek relief directly from the Ninth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 8(a)(2).