No. 16-16865

In the United States Court of Appeals
for the Ninth Circuit

LESLIE FELDMAN, *et al.*,

Plaintiffs/Appellants,

and

BERNIE 2016, INC.,

Plaintiff-Intervenor/Appellant,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Defendant-Intervenors/Appellees.

On Appeal from the United States District Court
for the District of Arizona
Cause No. CV-16-01065-PHX-DLR

PLAINTIFF-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Appellants provide the following information: (i) the telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties; (ii) facts showing the existence and nature of the emergency necessitating expedited review; (iii) when and how counsel for the other parties and the Clerk's Office were notified and served with the motion; and (iv) whether all grounds advanced in support of the requested relief were available in and submitted to the District Court. Appellants also give notice of a related emergency appeal arising out of this case.

(i) ***Attorneys for the Parties.***

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[1] Plaintiffs have moved to dismiss the County Defendants below, pursuant to a settlement agreement, but until that motion is granted, they remain parties to this litigation.

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(ii) ***The Existence and Nature of the Emergency.***

Appellants certify that an injunction pending appeal and expedited consideration of this appeal is necessary to prevent irreparable harm to Appellants, their members and constituencies, and thousands of other Arizona voters, which will otherwise result from Arizona's policy and practice of refusing to count provisional ballots cast in the voter's county of residence but in a precinct other than the one to which the voter is assigned for the November 8, 2016 election, even where that ballot contains otherwise entirely valid votes in races in which the voter was eligible to participate.

(iii) ***Notice to Counsel for Other Parties and Clerk's Office.***

In compliance with Circuit Rule 27-3(a), on October 17, 2016, Sarah Gonski, counsel for Appellants, contacted opposing counsel by phone, advising them of Appellants' intent to file the Emergency Motion. Ms. Gonski spoke with Brett Johnson for the Republican Party Intervenor-Defendants and Karen Hartman-Tellez for the State Defendants. Ms. Gonski was not able to contact Andrea Cummings, but left a voicemail advising her of the Emergency Motion. On October 18, Ms. Gonski emailed counsel for each Defendant a PDF copy of the signed emergency motion, as filed with the Ninth Circuit, which they also would have received through the ECF system.

On October 17, Ms. Gonski also contacted the Ninth Circuit Clerk's office at (415) 355-8020 and spoke with a duty attorney at approximately 10:30 a.m. Ms. Gonski informed the duty attorney of the nature of the emergency and that Appellants intended to file an emergency motion for injunction pending appeal and for expedited review as soon as practicably possible. Ms. Gonski also called the Motions Unit to advise them of the emergency nature of the motion.

(iv) ***Relief Sought in the District Court.***

The request to expedite this appeal is not relief available in the District Court. All grounds for the request for an emergency injunction pending appeal set forth herein were available in and were presented to the District Court as follows.

Appellants, including the Arizona Democratic Party ("ADP"), the national Democratic party ("DNC"), and current presidential and senatorial campaigns, filed a complaint in the District Court on April 15, 2016, challenging, among other things, the State's refusal to count out-of-precinct ("OOP") provisional ballots as a violation of § 2 of the Voting Rights Act of 1965 and a denial of equal protection under the Fourteenth Amendment. [*See* ER58-65 (Counts I-III)]

Following limited discovery, Appellants filed a Motion for Preliminary Injunction on its OOP ballot claim on June 10, 2016. Over Appellants' objections, the District Court granted Appellees' request for a substantially extended briefing schedule, permitting Appellees a full ten weeks to file their responses in opposition to Appellants' motion. [ER836, 842, 918] The District Court heard oral argument on September 2, after which it took the matter under advisement. It issued the order that is the subject of this appeal on October 11, 2016, denying Appellants' OOP ballot claim. [ER2] In that order, the District Court further noted that it recognized that time is of the essence and informed the parties that "it is not inclined to grant a stay of this order pending appeal" and that Appellants "may seek relief directly from the Ninth Circuit Court of Appeals pursuant to Federal Rule of Appellate Procedure 8(a)(2)." [ER17 n.7] Appellants timely filed a notice of appeal on October 15, 2016.

Only 20 days remain before the November 8 General Election. Emergency relief from this Court is therefore necessary to avoid irreparable constitutional harm.

(v) ***Related Case.***

In Ninth Circuit Case No. 16-16698, Appellants have separately appealed a different preliminary injunction order of the District Court in this case, refusing to enjoin implementation and enforcement of Arizona' recent law criminalizing ballot collection (HB2023). A motions panel of this Court granted Appellants' motion to expedite that appeal, and this Court is scheduled to hear argument on the ballot collection issue on October 19, 2016.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge.

Executed in Phoenix, Arizona, this 18th day of October, 2016.

Respectfully submitted,

By: s/ *Sarah R. Gonski*
Sarah Gonski
Counsel for Original Plaintiffs/Appellants

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiff-Appellants the Democratic National Committee, the DSCC a/k/a the Democratic Senatorial Campaign Committee, Kirkpatrick for U.S. Senate, and Hillary for America, and Intervenor-Plaintiff/Appellant Bernie 2016, Inc., respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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This motion arises from Arizona's practice of rejecting, in their entirety, ballots cast "out-of-precinct" ("OOP") by duly registered voters. Although evidence credited by the District Court established that this practice imposes a significant discriminatory burden on minorities, it refused to issue the injunction Plaintiffs requested under § 2 of the Voting Rights Act of 1965 ("VRA") and the Fourteenth Amendment. Absent an injunction pending appeal, thousands of voters in this November's election—an alarmingly disproportionate number of whom are minorities—will be disenfranchised. Plaintiffs ask the Court to enjoin the State from discarding votes on OOP ballots cast in a voter's county of residence on races for which the voter is otherwise entitled to vote, a practice that a number of other states utilize to avoid wholesale disenfranchisement of OOP voters.

I. PROCEDURAL BACKGROUND

The procedural background of this litigation is set forth *supra* at v-vi.

II. FACTUAL BACKGROUND

Arizona permits each county to choose, in each election, whether to hold the election under a "vote center," a precinct-based model, or a hybrid model. A.R.S. § 16-411(B)(4). In a vote-center election, voters may vote at any polling location in the county, and their entire ballot will be counted. *Id.* In a precinct-based election, a voter may only vote at the precinct to which she is assigned for that election, or Arizona law, as interpreted by the Secretary of State, requires that the entire ballot

be rejected. [ER453-54; A.R.S. § 16-584] In 2012 and 2014 alone, Arizona rejected almost 14,500 OOP ballots cast in precinct-based elections. [ER1786] Statistical evidence "credit[ed]" by the District Court confirms that the OOP policy disproportionately disenfranchises Arizona's minority voters. Hispanic voters are more than twice as likely, African American voters are 62% more likely, and Native American voters are 37% more likely, than white voters to have their ballots rejected as a result. [*See* ER7; ER1799-800]

A. Arizona's Policy of Not Counting OOP Provisional Ballots.

Precincts are small groups of households entitled to vote on the same array of races in a given election. Each precinct often contains a single polling place, though in some counties polling places for multiple precincts may be located at a single location, and, as such, voters assigned to such polling locations may be assigned to a polling location physically located in a different precinct. [ER1770; ER1811-12] The record demonstrates that it is common for voters to appear to vote at a precinct other than the one to which they are assigned. In such circumstances, Federal law requires that Arizona permit the voter to cast a provisional ballot. A.R.S. §§ 16-135; 16-584. But if cast OOP, those provisional ballots are entirely discarded—not only for local races as to which the voter is not eligible to vote, but also for countywide, statewide, and national races as to which the voter is properly registered to vote.

In 2011, Arizona amended its elections code to allow counties to use a "vote center" model, under which voters can vote at *any* polling place in the county in which they reside, as an alternative to the precinct-based model, which requires voters to vote in their assigned precinct. A.R.S. § 16-411(B); *see also* ER1770. Graham, Yavapai, and Yuma Counties have used vote centers for county-wide elections. [ER2325] Maricopa County, Arizona's most populous, switched to a vote center model during the Presidential Preference Election in March 2016 and the Special Election on May 17, 2016. In the upcoming General Election, however, it will switch back to a precinct-based model, assigning each voter to only one of 724 precincts within the county. [*See* ER704] Thus, if a voter mistakenly votes at any of the other 723 precincts, her ballot will be rejected entirely.[2]

The State's refusal to count *any* votes on OOP ballots, even votes in races for which the voter is entitled to vote, is not necessary to fulfill the purposes of the precinct-based model. At least one state counts votes for all races for which the OOP voter is eligible to vote. *See* Md. Code Ann., Elec. Law § 11-303(e). Other states have also done so until they switched to a vote-by-mail system. *See* Or. Rev. Stat. Ann. § 254.408(6); Wash. Admin. Code § 434-262-032(5). North Carolina

[2] Maricopa County will have multiple polling locations for more than one precinct. Plaintiffs' expert found that, in past elections, Arizona rejects ballots voted OOP even in these locations, indicating that elections officials are not advising some voters who appear at the right location, but stand in the wrong line, that their ballot will be entirely rejected as a result of the OOP policy. [*See* ER1811-12]

was rebuked for ceasing to count such votes. *See League of Women Voters of N.C. v. North Carolina ("LOWV"),* 769 F.3d 224, 233, 247 (4th Cir. 2014).

B. Arizona's History of Discrimination.

The discriminatory impact of Arizona's OOP policy is tied to the history and current repercussions of discrimination against minorities. Until 2013, when the decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), halted enforcement of § 5 of the VRA, Arizona was one of only nine states to be wholly designated as a "covered jurisdiction"—a designation reserved for states with the most egregious and widespread histories of discrimination. [ER297] Arizona became subject to § 5's preclearance requirement when the VRA was amended in 1975 in response to Congressional findings that, "through the use of various practices and procedures, citizens of language minorities [had] been effectively excluded from participation in the electoral process." 52 U.S.C. § 10503. [*See also* ER286-90; ER296-97][3]

Language minorities are overwhelmingly also racial minorities,[4] and Arizona's exclusion of language minorities from political participation began even before it became a state. [ER286] In 1909, Arizona's territorial legislature enacted an English "educational test" for voter registration. Shortly after becoming a state

[3] Section 5 only required preclearance of *changes* to election practices. Because Arizona's OOP policy predated 1975, that policy was not subject to preclearance.

[4] *See* ER991 (24.6% of Arizona's Hispanics, 10.1% of Native Americans and 2.7% of African Americans speak English less than "very well," as compared to 1.0% of whites).

in 1912, Arizona enacted a similar literacy test designed "to limit 'the ignorant Mexican vote.'" [ER288] After Congress banned literacy tests in 1970, the U.S. Department of Justice estimated that over 73,000 people in Arizona could not vote because of its unlawful literacy test. [ER289] In 1988, Arizona voters approved a state constitutional amendment prohibiting the state government from using languages other than English—the most restrictive "English-only" provision in the nation which was ultimately struck down as unconstitutional by an *en banc* panel of this Court and the Arizona Supreme Court. [ER974-75]

More recently, errors by election officials have led to multiple instances of false or incorrect information being provided to Spanish-speaking voters. In the 2012 election, on three separate occasions, Maricopa County sent Spanish-language documents with the wrong election date to Hispanic voters. The English version of the same document provided the correct date. [ER780-81] Likewise, for the May 17, 2016 Special Election, over 1.3 million households received a ballot with erroneous descriptions of the propositions in the Spanish portion of the ballot, even though the English-language portion was correct. [ER774-76]

Arizona has also repeatedly limited minority access to education—the key prerequisite to economic advancement. For example, in 2000, it banned bilingual education, resulting in large achievement gaps for English learners and putting minorities at higher risk of failing or dropping out. [ER997] Further, the State long

failed to fulfill a court order to create a special fund to improve the state's public education system, especially for economically disadvantaged districts with heavy concentrations of minorities. These deficiencies disproportionately affect minority students, who are far more likely than white students to attend public schools. [*Id.*]

Arizona's minority communities also suffer marked disparities as compared to whites in areas such as employment, wealth, transportation, health, and education. [ER989-93] Minorities are more likely to rent, rather than own, their homes and, accordingly, have higher rates of mobility. [*See* ER989, 992; ER1769, 1771, 1791-92; ER228 ¶ 25; ER259 ¶ 33; ER189-90 ¶ 10; ER183-84 ¶¶ 15-16] Voters with higher rates of residential mobility are disproportionately likely to cast an OOP ballot. [ER1791-94] Further, minorities have lower access to vehicles and are more likely to rely on public transportation. They are also less likely to hold flexible jobs permitting them to leave work to vote. These factors further contribute to their higher likelihood of voting OOP. [*See* ER989-92; ER1825; ER3911 ¶¶ 4-6; ER165 ¶ 7; ER220-22 ¶¶ 3-7; ER242 ¶¶ 3-4; ER259 ¶ 33]

Minority voters are also more likely to cast OOP ballots due to systemic problems in Arizona's elections administration, including: (1) voter confusion caused by significant changes in polling locations from election to election; (2) the inconsistent election regimes used by and within counties; and (3) inequitable placement of polling locations. [ER1772-75, 1786-87, 1804-12, 1814-18; *see also*

ER205 ¶ 19; ER215 ¶ 17; ER228 ¶ 25; ER258 ¶ 31; ER189-90 ¶ 10; ER183-84 ¶¶ 15-16; ER916 ¶ 13; ER238 ¶ 17; ER780-81; ER774-76] Language barriers and Maricopa County's history of providing incorrect information to Spanish-speaking voters further exacerbate these systemic problems. [ER780-81; ER774-76; *see also* ER245-46 ¶ 16; ER190 ¶ 10; ER1764, 1815]

III. STANDARD FOR INTERIM RELIEF

In considering whether to grant an injunction pending appeal, this Court applies the standards for preliminary injunctive relief. *See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

IV. ARGUMENT

A. Plaintiffs Are Likely to Succeed On the Merits.

1. Arizona's OOP Ballot Policy Violates § 2 of the VRA.

Section 2 of the VRA forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The VRA should be read to "provide[] 'the broadest possible scope' in combating racial discrimination."

Chisom v. Roemer, 501 U.S. 380, 403 (1991) (citation omitted). As such, proving a § 2 claim "does not require showing of discriminatory intent, only discriminatory results." *Gonzalez v. Arizona (Gonzalez II)*, 677 F.3d 383, 405 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). Moreover, a "plaintiff need not show that the challenged voting practice caused the disparate impact by itself." *Gonzalez v. Arizona* (*Gonzalez I*), 624 F.3d 1162, 1193-94 (9th Cir. 2010). Nor that the challenged practice makes voting *impossible* for minorities—merely that it makes voting disproportionately more *burdensome*. *See Thornburg v. Gingles*, 478 U.S. 30, 35-36, 44, 47 (1986); *Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J. concurring).

Courts typically apply a two-step analysis in evaluating a § 2 claim. First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class." *LOWV*, 769 F.3d at 240 (citations omitted). Second, "that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Id.* (citations omitted). Both elements were satisfied here.

a. The OOP Ballot Policy Imposes a Discriminatory Burden On Minority Voters.

Plaintiffs presented overwhelming evidence that minorities in Arizona are "vastly over-represented among those casting [OOP] ballots" and, as a result, are

far more likely to be disenfranchised. [ER1797] Among other evidence, Plaintiffs submitted the expert report of Dr. Jonathan Rodden who examined the relationship between race and OOP voting. As summarized by the District Court:

> Dr. Rodden concluded that white voters accounted for only 56% of OOP ballots, despite casting 70% of all in-person votes. In contrast, African American and Hispanic voters made up 10% and 15% of in-person voters, but accounted for 13% and 26% of OOP ballots, respectively. Dr. Rodden analyzed comparable data from Pima County and found that the results were similar to those in Maricopa County. In his rebuttal report, he analyzed data from Arizona's non-metro counties and found similar disparities among in-person voters.

[ER7 (citations omitted)] Dr. Rodden further concluded that these disparities "have been quite persistent over time." [ER1797-98]

The District Court "credit[ed] Dr. Rodden's assignment of race to OOP voters," [ER7], and the State's own expert, Dr. Thornton, repeatedly acknowledged in her report that Dr. Rodden's findings were "statistically significant." [ER2275-76 ¶¶ 55, 57] Nevertheless, the District Court erroneously concluded that the disparate impact was not "meaningful" because "such a small fraction of the overall votes cast"—*i.e.*, "only 10,979"—were rejected OOP ballots. [ER8]

This was clear legal error. "[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority is being denied equal electoral opportunities." *LOWV*, 769 F.3d at 244 (reversing denial of preliminary injunction to permit OOP voting,

rejecting lower court reasoning that even though "failure to count [OOP] provisional ballots will have a disproportionate effect . . . such an effect 'will be minimal'" because "'so few voters cast' ballots in the wrong precincts") (citation omitted); 52 U.S.C. § 10301(a) (targeting practices that abridge "the right of *any* citizen . . . to vote on account of race or color") (emphasis added).

The District Court also minimized the disparate impact of the State's OOP policy because only one-third of votes cast during the 2012 election were in-person votes. According to the court, "Dr. Rodden's analysis distorts the practical effect of the observed disparities in OOP voting" because his examination focused only on in-person voting, whereas "Arizona also permits absentee voting." [ER8]

This too was error. As other courts have acknowledged, voting by mail "is not the equivalent of in-person voting for those who are able and want to vote in person." *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016). To the contrary, "[m]ail-in voting involves a complex procedure that cannot be done at the last minute," "deprives voters of the help they would normally receive in filling out ballots at the polls," and ignores that "voters lose the ability to account for last-minute developments, like candidates dropping out of a primary race, or targeted mailers and other information disseminated right before the election." *Id.* at 255-56. And the OOP policy, *by definition*, only applies to in-person voting.

In any event, voting by mail is not an option for a voter who mistakenly goes to the wrong polling location on Election Day. *See* A.R.S. § 16-542(E) (early ballot request must be received by no later than 11th day prior to election). Even worse, the court's suggestion that voters could somehow avoid the risks of voting at the wrong precinct assumes that voters are informed of those risks in the first place. But the Arizona Superior Court has specifically found that many voters are never told that their OOP ballots will be discarded. *See* Under Advisement Ruling at 5, *Jones v. Reagan*, No. CV-2016-014708, at 5 (Ariz. Super. Ct. Sept. 9, 2016) (ordering Maricopa County to count ballots of voters who voted in the wrong precinct, in part because voters are frequently *not* informed "that their vote will not be counted if cast in the wrong precinct"). Dr. Rodden's findings reflect the same problem, indicated by the fact that the OOP policy is even used to reject ballots cast in polling locations serving multiple precincts, where a voter is in the right place, but in a line other than the one assigned to her particular precinct. [ER1811-12] There was also substantial testimonial evidence from voters who were not informed that they were in the wrong polling location or that their provisional ballot would not count. [ER167-69; ER171-73; ER175-77; ER215-17; ER228-30]

Nor is the disparate burden on minority voters lessened by the District Court's observation that "Arizona employs a variety of methods to educate voters about their correct precincts." [ER12] As the striking disparate impact

demonstrates, these methods are simply not working for many minority voters. Indeed, due to undisputed socioeconomic differences, many minorities lack online resources to receive this information. [ER989-93] This is exacerbated by Maricopa County's record of providing misinformation to Spanish-speaking voters. [ER780-81; ER774-76]

b. The Burden Imposed Is Linked to Social and Historical Conditions that Produce Discrimination.

In evaluating whether a voting practice works together with the totality of circumstances to produce discrimination against minority voters, courts often look to nine non-exclusive factors known as the "Senate Factors." *Thornburg*, 478 U.S. at 44-45. These factors, discussed at length in the expert report of Dr. Lichtman, [ER974-1002], include factors such as the "history of voting-related discrimination in the [jurisdiction]," "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process" and the extent to which "the policy underlying the . . . use of the contested practice . . . is tenuous." *Thornburg*, 478 U.S. at 44-45. "[T]here is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other." *LOWV*, 769 F.3d at 240 (alteration in original) (citation omitted). *See also United States v. Blaine Cty., Mont.*, 363 F.3d 897, 914 n.26 (9th Cir. 2004); *Farrakhan v. Washington*, 338 F.3d 1009, 1015-16 (9th Cir. 2003).

The District Court record establishes that the disparate burdens of excluding OOP ballots are linked to the ongoing effects of Arizona's history of discrimination. For example, Hispanic victims of Arizona's historic language-barrier discrimination are far more likely than whites to be misinformed about voting rules. *See supra* at 5 (§ II.B). Likewise, because minority voters have disproportionally higher rates of residential mobility, they must continuously reeducate themselves about their new voting location, and as a result, they are much more likely to vote in the wrong precinct. [ER989; ER1767-72]

Plaintiffs also presented evidence that when a minority voter arrives at the wrong precinct, they are less likely to be able to remedy the error (assuming they are even made aware of it) because minorities have less access to vehicles and are more likely to rely on public transportation or assistance to travel. [ER989, 992; ER1825; see also ER165 ¶ 7; ER220-22 ¶¶ 3-7; ER242 ¶¶ 3-4; ER259 ¶ 33] In addition, minorities disproportionately hold less flexible, working-class jobs that can make it more difficult for them to travel to a second polling location before polls close. [ER989-90; ER259 ¶ 33; ER3911 ¶ 5]

The District Court nonetheless found that Plaintiffs' evidentiary showing failed on causation grounds. According to the court, "Arizona's requirement that voters cast ballots in their assigned precincts is not the reason it is difficult or confusing for some voters to find or travel to their correct precinct." [ER9] In

effect, the District Court appears to have concluded that Plaintiffs should have challenged the underlying conditions that create confusion and difficulty for minority voters, rather than challenging the practice—exclusion of OOP ballots—that is the immediate cause of their disenfranchisement. [*See, e.g.*, *id.*; ER12]

But Plaintiffs are not required to challenge or seek to rectify every aspect of the electoral system that may be flawed. *See Gonzalez I*, 624 F.3d at 1193 ("plaintiff need not show that the challenged voting practice caused the disparate impact by itself"). Section 2 permits a plaintiff to select for challenge any "standard, practice, or procedure" that, if remedied, will lead to a significant reduction in the "denial or abridgement" of his or her right to vote. 52 U.S.C. § 10301(a). Here, Arizona's practice of excluding OOP ballots in their entirety is the immediate, proximate cause of the disenfranchisement of affected voters, and is a natural and appropriate target for challenge because ending the practice will result in a substantial reduction in the abridgement of their right to vote.

The District Court also erroneously concluded that Plaintiffs "only loosely linked the observed disparities in minority OOP voting to social and historical conditions that have produced discrimination." [ER9] To be sure, the court acknowledged Plaintiffs' evidence that "historical discrimination in employment, income, and education has had lingering effects on the socioeconomic status of racial minorities," and that "[t]hese disparities, in turn, lead to lower rates of

homeownership and higher rates of residential mobility among minorities, which then leads minorities to experience greater confusion about their correct polling place location." [*Id.*; *see also* ER989-93] Yet the court concluded that "socioeconomic disparities between minorities and whites" are not sufficient to satisfy the "requisite causal link under § 2." [ER10]

But Plaintiffs presented evidence that went far beyond the mere *existence* of "socioeconomic disparities." Plaintiffs detailed the particular causal linkages between Arizona's persistent political, social and economic discriminatory policies and effects, and the resulting marked disparities between minorities and whites in employment, wealth, transportation, health and education. [*See e.g.* ER996-97; ER989-93; ER1778-83]

Moreover, the District Court's dismissal of mere "socioeconomic disparities" is contrary to other courts that have found that evidence of "socioeconomic disparities" *is* sufficient proof under § 2—in particular, such evidence satisfies the requirement that the disparate burden "be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *LOWV*, 769 F.3d at 240 (citation omitted); *see, e.g.*, *Veasey*, 830 F.3d at 259 ("socioeconomic disparities [] hindered [] ability of African-Americans and Hispanics to [] participate in the political process.") (citation omitted); *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204,

233 (4th Cir. 2016) ("socioeconomic disparities establish that no mere 'preference' led African Americans . . . to disproportionately lack acceptable photo ID.").

Most fundamentally, the District Court ignored the basic point of § 2 analysis: "[P]laintiffs need only show that, considering the totality of the circumstances, they do not have an equal opportunity to participate in the political process." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988). Here, consideration of the "totality of circumstances" leads to only one possible conclusion: the practice of excluding OOP ballots plainly imposes a disparate burden on Arizona's minority voters, and that burden is linked to lasting socioeconomic effects of Arizona's extensive history of discrimination.

2. Arizona's OOP Policy Violates the Fourteenth Amendment.

In evaluating whether a facially nondiscriminatory election law imposes an "undue" burden on voters in violation of the Fourteenth Amendment, courts "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Here, the burden imposed on Arizona's minority voters by the exclusion of OOP ballots is severe. Since 2012 alone, Arizona has categorically disenfranchised some 14,500 voters for casting an OOP ballot—a number that far outpaces any other state in the country. [ER1786] Indeed, the raw number of rejected ballots in Arizona is more than *double* the number of such ballots in any other state, even without accounting for population differences. [ER3649]

In rejecting Plaintiffs' Fourteenth Amendment claim, the District Court reasoned that "the difficulties experienced by some voters in locating their correct precinct are caused primarily by the relocation of polling places from election to election," rather than by the practice of excluding OOP ballots *per se*. [ER12] But as discussed above in connection with § 2, it is the practice of rejecting the ballot that directly transforms those difficulties into an act of disenfranchisement.

Having erroneously discounted the burden imposed by Arizona's OOP policy, the District Court then proceeded to justify that policy by listing the regulatory advantages of a precinct-based voting model. [ER13] But that misses the mark. Plaintiffs here are not challenging Arizona's use of precinct-based voting. Rather, as discussed in Section II above, a state may enjoy the benefits of precinct-based voting without disqualifying the entirety of an OOP ballot. Other states that use this model recognize this very point by counting the votes on OOP

ballots for races for which the voter was eligible, and discarding only the votes for races for which the voter was ineligible. *See supra* at 2-4 (Section II.A).

B. Appellants Will Suffer Irreparable Harm Absent an Injunction.

The State's OOP ballot policy, by disqualifying the ballots of duly registered voters, is the essence of irreparable harm. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *LOWV*, 769 F.3d at 247; *see also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

The District Court, however, refused to find irreparable harm, not only because of its mistaken view of the merits, but also because of its view that Plaintiffs' failure to challenge the OOP policy sooner "'implies a lack of urgency and irreparable harm."' [ER15 (citing *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985))] But the principle that delay evidences a lack of irreparable harm concerns cases (as in *Oakland Tribune*) where the complained-of harm has already occurred. *See McDermott v. Ampersand Publ'g, LLC*, 593 F.3d 950, 965 (9th Cir. 2010) (delay only significant to the consideration of irreparable harm if, among other things, the harm has already occurred). This principle has no application where, as here, the complained of harm—vote disqualification at the general election—has yet to occur. In any event, as a matter of law, the mere longevity of an unconstitutional practice is no basis to deny a challenge to that practice. *See United States v. Windsor*, 133 S. Ct. 2675, 2682

(2013) (striking down parts of Defense of Marriage Act, enacted in 1996); *Wauchope v. U.S. Dep't of State*, 985 F.2d 1407, 1411-12 (9th Cir. 1993).

C. Public Interest and Balance of Equities Tip Sharply in Plaintiffs' Favor.

As a general matter, "[t]he public interest and the balance of equities favor 'prevent[ing] the violation of a party's constitutional rights.'" *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 920 (9th Cir. 2016) (alteration in original) (citation omitted). That is particularly so where voting rights are involved because "[t]he public has a 'strong interest in exercising the fundamental political right to vote,'" and in "permitting as many qualified voters to vote as possible." *LOWV*, 769 F.3d at 247-48 (citations omitted).

The District Court ignored these interests, instead focusing on the claimed administrative burdens of counting OOP ballots. But Arizona would hardly be a pioneer in counting OOP ballots—by the State's own admission, many states have already solved this problem. [ER2148] And as the Defendants do not dispute, if election administrators educate voters about their correct precinct and train poll workers to communicate effectively with voters who arrive at the wrong precinct, the burdens should be minimized.[5]

[5] Moreover, according to the District Court, granting relief at this point—still three weeks before the election—would cause delays in counting votes and impose financial burdens. But Defendants previously assured the court that the extended briefing schedule that they requested would not result in a ruling too late to be effective. [ER930 at 6:8-15; *id.* 7:3-7] The Defendants cannot have it both ways.

In all events, the District Court's balancing of the equities was fatally flawed because of its view of the merits. The court failed to acknowledge that Plaintiffs had raised "'serious questions' as to the merits." *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016). Those serious questions, combined with the harm to voting rights that Plaintiffs will suffer absent an injunction, strongly favor the requested relief. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) ("Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction[.]").

D. Expedited Review Is Appropriate.

For the same reasons discussed above, expedited relief is appropriate. *See* 9th Cir. R. 27-12. In the absence of a ruling from this Court in advance of the upcoming November 8, 2016 General Election, Plaintiffs will suffer irreparable harm to their fundamental constitutional rights. Transcript preparation has been completed. Plaintiffs' counsel has been advised that none of the Defendants consent to expedited review.

V. CONCLUSION

This appeal should be expedited. Pending its resolution, the Court should grant this Motion and enter an order enjoining Defendants from continuing their policy and practice of entirely discarding OOP ballots.

RESPECTFULLY SUBMITTED this 18th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 18, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sarah R. Gonski

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this Motion complies with the length limits permitted by Ninth Circuit Rule 32-2(b). The Motion contains 4,794 words and 20 pages, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The Motion's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*