APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15845
D.C. No. 2:16-cv-01065-DLR

[Filed January 27, 2020]

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEMOCRATIC PARTY, *Plaintiffs-Appellants*,	)
v.	)
KATIE HOBBS, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General, *Defendants-Appellees*,	)
THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman; SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.; TONY RIVERO, Rep., *Intervenor-Defendants-Appellees.*	)

App. 2

OPINION

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted En Banc March 27, 2019
San Francisco, California

Filed January 27, 2020

Before: Sidney R. Thomas, Chief Judge, and Diarmuid F. O'Scannlain, William A. Fletcher, Marsha S. Berzon[*], Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Consuelo M. Callahan, Mary H. Murguia, Paul J. Watford, and John B. Owens, Circuit Judges.

Opinion by Judge W. Fletcher;
Concurrence by Judge Watford;
Dissent by Judge O'Scannlain;
Dissent by Judge Bybee

[*] Judge Berzon was drawn to replace Judge Graber. Judge Berzon has read the briefs, reviewed the record, and watched the recording of oral argument held on March 27, 2019.

SUMMARY[**]

Civil Rights

The en banc court reversed the district court's judgment following a bench trial in favor of defendants, the Arizona Secretary of State and Attorney General in their official capacities, in an action brought by the Democratic National Committee and others challenging, first, Arizona's policy of wholly discarding, rather than counting or partially counting, ballots cast in the wrong precinct; and, second, House Bill 2023, a 2016 statute criminalizing the collection and delivery of another person's ballot.

Plaintiffs asserted that the out-of-precinct policy (OOP) and House Bill (H.B.) 2023 violated Section 2 of the Voting Rights Act of 1965 as amended because they adversely and disparately affected Arizona's American Indian, Hispanic, and African American citizens. Plaintiffs also asserted that H.B. 2023 violated Section 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. Finally, plaintiffs asserted that the OOP policy and H.B. 2023 violated the First and Fourteenth Amendments because they unduly burden minorities' right to vote.

The en banc court held that Arizona's policy of wholly discarding, rather than counting or partially counting, OOP ballots, and H.B. 2023's criminalization

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

of the collection of another person's ballot, have a discriminatory impact on American Indian, Hispanic, and African American voters in Arizona, in violation of the "results test" of Section 2 of the Voting Rights Act. Specifically, the en banc court determined that plaintiffs had shown that Arizona's OOP policy and H.B. 2023 imposed a significant disparate burden on its American Indian, Hispanic, and African American citizens, resulting in the "denial or abridgement of the right of its citizens to vote on account of race or color." 52 U.S.C. § 10301(a). Second, plaintiffs had shown that, under the "totality of circumstances," the discriminatory burden imposed by the OOP policy and H.B. 2023 was in part caused by or linked to "social and historical conditions" that have or currently produce "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" and to participate in the political process. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986); 52 U.S.C. § 10301(b).

The en banc court held that H.B. 2023's criminalization of the collection of another person's ballot was enacted with discriminatory intent, in violation of the "intent test" of Section 2 of the Voting Rights Act and of the Fifteenth Amendment. The en banc court held that the totality of the circumstances—Arizona's long history of race-based voting discrimination; the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic

voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona—cumulatively and unmistakably revealed that racial discrimination was a motivating factor in enacting H.B. 2023. The en banc court further held that Arizona had not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination. The panel declined to reach DNC's First and Fourteenth Amendment claims.

Concurring, Judge Watford joined the court's opinion to the extent it invalidated Arizona's out-of-precinct policy and H.B. 2023 under the results test. Judge Watford did not join the opinion's discussion of the intent test.

Dissenting, Judge O'Scannlain, joined by Judges Clifton, Bybee and Callahan, stated that the majority drew factual inferences that the evidence could not support and misread precedent along the way. In so doing, the majority impermissibly struck down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots.

Dissenting, Judge Bybee, joined by Judges O'Scannlain, Clifton and Callahan, wrote separately to state that in considering the totality of the circumstances, which took into account long-held, widely adopted measures, Arizona's time, place, and manner rules were well within our American democratic-republican tradition.

COUNSEL

Bruce V. Spiva (argued), Marc E. Elias, Elisabeth C. Frost, Amanda R. Callais, and Alexander G. Tischenko, Perkins Coie LLP, Washington, D.C.; Daniel C. Barr and Sarah R. Gonski, Perkins Coie LLP, Phoenix, Arizona; Joshua L. Kaul, Perkins Coie LLP, Madison, Wisconsin; for Plaintiffs-Appellants.

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Brett W. Johnson (argued) and Colin P. Ahler, Snell & Wilmer LLP, Phoenix, Arizona, for Intervenor-Defendants-Appellees.

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Kathleen E. Brody, ACLU Foundation of Arizona, Phoenix, Arizona; Dale Ho, American Civil Liberties Union Foundation, New York, New York; Davin Rosborough and Ceridwen Chery, American Civil Liberties Union Foundation, Washington, D.C.; for Amici Curiae American Civil Liberties Union & American Civil Liberties Union of Arizona.

OPINION

W. FLETCHER, Circuit Judge:

The right to vote is the foundation of our democracy. Chief Justice Warren wrote in his autobiography that the precursor to one person, one vote, *Baker v. Carr*, 369 U.S. 186 (1962), was the most important case decided during his tenure as Chief Justice—a tenure that included *Brown v. Board of Education*, 347 U.S. 483 (1954). Earl Warren, *The Memoirs of Earl Warren* 306 (1977). Chief Justice Warren wrote in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964): "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Justice Black wrote in *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

For over a century, Arizona has repeatedly targeted its American Indian, Hispanic, and African American citizens, limiting or eliminating their ability to vote and to participate in the political process. In 2016, the Democratic National Committee and other Plaintiffs-Appellants (collectively, "DNC" or "Plaintiffs") sued Arizona's Secretary of State and Attorney General in their official capacities (collectively, "Arizona") in federal district court.

DNC challenged, first, Arizona's policy of wholly discarding, rather than counting or partially counting,

ballots cast in the wrong precinct ("out-of-precinct" or "OOP" policy); and, second, House Bill 2023 ("H.B. 2023"), a 2016 statute criminalizing the collection and delivery of another person's ballot. DNC contends that the OOP policy and H.B. 2023 violate Section 2 of the Voting Rights Act of 1965 as amended ("VRA") because they adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens. DNC also contends that H.B. 2023 violates Section 2 of the VRA and the Fifteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. Finally, DNC contends that the OOP policy and H.B. 2023 violate the First and Fourteenth Amendments because they unduly burden minorities' right to vote.

Following a ten-day bench trial, the district court found in favor of Arizona on all claims. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824 (D. Ariz. 2018) (*Reagan*). DNC appealed, and a divided three-judge panel of our court affirmed. *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686 (9th Cir. 2018) (*DNC*). A majority of non-recused active judges voted to rehear this case en banc, and we vacated the decision of the three-judge panel. *Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942 (9th Cir. 2019).

We review the district court's conclusions of law de novo and its findings of fact for clear error. *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc). We may "correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law."

Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (internal quotation marks omitted); *see Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (*Salt River*). We review for clear error the district court's overall finding of vote dilution or vote denial in violation of the VRA. *Gingles*, 478 U.S. at 78; *Salt River*, 109 F.3d at 591.

Reviewing the full record, we conclude that the district court clearly erred. We reverse the decision of the district court. We hold that Arizona's policy of wholly discarding, rather than counting or partially counting, out-of-precinct ballots, and H.B. 2023's criminalization of the collection of another person's ballot, have a discriminatory impact on American Indian, Hispanic, and African American voters in Arizona, in violation of the "results test" of Section 2 of the VRA. We hold, further, that H.B. 2023's criminalization of the collection of another person's ballot was enacted with discriminatory intent, in violation of the "intent test" of Section 2 of the VRA and of the Fifteenth Amendment. We do not reach DNC's First and Fourteenth Amendment claims.

I. Out-of-Precinct Policy and H.B. 2023

DNC challenges (1) Arizona's policy of wholly discarding, rather than counting or partially counting, ballots cast out-of-precinct ("OOP"), and (2) H.B. 2023, a statute that, subject to certain exceptions, criminalizes the collection of another person's early ballot. *See* Ariz. Rev. Stat. §§ 16-122, -135, -584; H.B. 2023, 52nd Leg., 2d Reg. Sess. (Ariz. 2016), *codified as* Ariz. Rev. Stat. § 16-1005(H), (I).

Arizona offers two methods of voting: (1) in-person voting at a precinct or vote center either on election day or during an early-vote period, or (2) "early voting" whereby the voter receives the ballot via mail and either mails back the voted ballot or delivers the ballot to a designated drop-off location. Arizona's OOP policy affects in-person voting. H.B. 2023 affects early voting.

We describe in turn Arizona's OOP policy and H.B. 2023.

A. Out-of-Precinct Policy

1. Policy of Entirely Discarding OOP Ballots

Arizona law permits each county to choose a vote-center or a precinct-based system for in-person voting. *Reagan*, 329 F. Supp. 3d at 840. In counties using the vote-center system, registered voters may vote at any polling location in the county. *Id.* In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. Approximately 90 percent of Arizona's population lives in counties using the precinct-based system.

In precinct-based counties, if a voter arrives at a polling place and does not appear on the voter rolls for that precinct, that voter may cast a provisional ballot. *Id.*; Ariz. Rev. Stat. §§ 16-122, -135, -584. After election day, county election officials in close elections review all provisional ballots to determine the voter's identity and address. If, after reviewing a provisional ballot, election officials determine that the voter voted out of precinct, the county discards the OOP ballot in its entirety. In some instances, all of the votes cast by the OOP voter will have been cast for candidates and

propositions for which the voter was legally eligible to vote. In other instances, most of the votes cast by the OOP voter will have been cast properly, in the sense that the voter was eligible to vote on those races, but one or more votes for local candidates or propositions will have been cast improperly.

In both instances, the county discards the OOP ballot in its entirety. *Reagan*, 329 F. Supp. 3d at 840. That is, the county discards not only the votes of an OOP voter for the few local candidates and propositions for which the OOP voter may have been ineligible to vote. The county also discards the votes for races for which the OOP voter was eligible to vote, including U.S. President, U.S. Senator, and (almost always) Member of the U.S. House of Representatives; all statewide officers, including Governor, and statewide propositions; (usually) all countywide officers and propositions; and (often) local candidates and propositions.

2. Comparison with Other States

The district court found that Arizona "consistently is at *or near* the top of the list of states that collect and reject the largest number of provisional ballots each election." *Id.* at 856 (emphasis added). The district court's finding understates the matter. Arizona is consistently at the very top of the list by a large margin.

Dr. Jonathan Rodden, Professor of Political Science and Senior Fellow at the Hoover Institution at Stanford University, provided expert reports to the district court. The court gave "great weight" to Dr. Rodden's

analysis of the "rates and causes of OOP voting" in Arizona. *Id.* at 835. Dr. Rodden reported: "Since 2012, Arizona has clearly become the national leader in both provisional ballots cast and especially in provisional ballots rejected among in-person voters." Jonathan Rodden, Expert Report (Rodden) at 25.

Dr. Rodden reported that, from 2006 to 2010, between 9 to 13 percent of all in-person ballots cast in Arizona were provisional ballots. *Id.* at 24. In the 2012 general election, more than 22 percent of all in-person ballots cast were provisional ballots. *Id.* In Maricopa County, Arizona's most populous county, close to one in three in-person ballots cast in 2012 were provisional ballots. *Id.* at 27–28. In the 2014 midterm election, over 18 percent of in-person ballots cast in the State were provisional ballots. *Id.* at 25. These numbers place Arizona at the very top of the list of States in collection of provisional ballots.

Arizona also rejects a higher percentage of provisional ballots than any other State. The district court found:

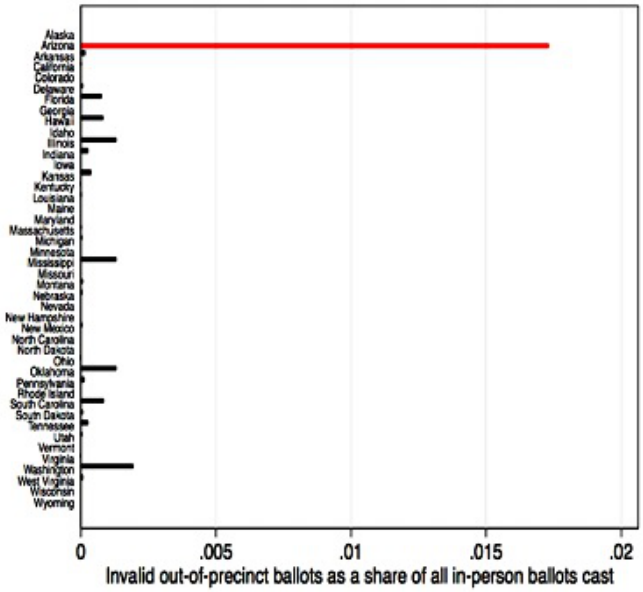
> In 2012 alone "[m]ore than one in every five [Arizona in-person] voters . . . was asked to cast a provisional ballot, and over 33,000 of these—more than 5 percent of all in-person ballots cast—were rejected. No other state rejected a larger share of its in-person ballots in 2012."

Reagan, 329 F. Supp. 3d at 856 (alterations in original) (quoting Rodden at 24–25).

One of the most frequent reasons for rejecting provisional ballots in Arizona is that they are cast out-of-precinct. *Id.*; *see also* Rodden at 26–29. From 2008 to 2016, Arizona discarded a total of 38,335 OOP ballots cast by registered voters—29,834 ballots during presidential general elections, and 8,501 ballots during midterm general elections. *Reagan*, 329 F. Supp. 3d at 856.

As the figure below shows, Arizona is an extreme outlier in rejecting OOP ballots:

Figure 6: Rejected out-of-precinct ballots as a share of in-person ballots cast according to 2012 EAC Report



Rodden at 26. The percentage of rejected OOP votes in Arizona is eleven times that in Washington, the State with the second-highest percentage.

The percentage of OOP ballots in Arizona, compared to all ballots cast, has declined in recent years. But the percentage of in-person ballots cast, compared to all ballots cast, has declined even more. *See* Jonathan Rodden, Rebuttal Report (Rodden Rebuttal) at 10. As a result, as a percentage of in-person ballots between 2008 and 2014, the percentage of OOP ballots has increased.

3. Reasons for OOP Ballots

Three key factors leading to OOP ballots are frequent changes in polling locations; confusing placement of polling locations; and high rates of residential mobility. These factors disproportionately affect minority voters. Dr. Rodden summarized:

> Voters must invest significant effort in order to negotiate a dizzying array of precinct and polling place schemes that change from one month to the next. Further, Arizona's population is highly mobile and residential locations are fluid, especially for minorities, young people, and poor voters, which further contributes to confusion around voting locations.

Rodden at 2; *see also Reagan*, 329 F. Supp. 3d at 857–58 (discussing these reasons).

a. Frequent Changes in Polling Locations

Arizona election officials change voters' assigned polling places with unusual frequency. Maricopa County, which includes Phoenix, is a striking example. The district court found that between 2006 and 2008, "at least 43 percent of polling locations" changed. *Reagan*, 329 F. Supp. 3d at 858. Between 2010 and 2012, approximately 40 percent of polling place locations were changed again. *Id.* These changes continued in 2016, "when Maricopa County experimented with 60 vote centers for the presidential preference election [in March], then reverted to a precinct-based system with 122 polling locations for the May special election, and then implemented over 700 assigned polling places [for] the August primary and November general elections." *Id.* The OOP voting rate was 40 percent higher for voters whose polling places were changed. *Id.* As Chief Judge Thomas put it, "the paths to polling places in the Phoenix area [are] much like the changing stairways at Hogwarts, constantly moving and sending everyone to the wrong place." *DNC*, 904 F.3d at 732 (Thomas, C.J., dissenting).

White voters in Maricopa County are more likely than minority voters to have continuity in their polling place location. Rodden at 60–61. Dr. Rodden wrote that between the February and November elections in 2012, "the rates at which African Americans and Hispanics experienced stability in their polling places were each about 30 percent lower than the rate for whites." *Id.*

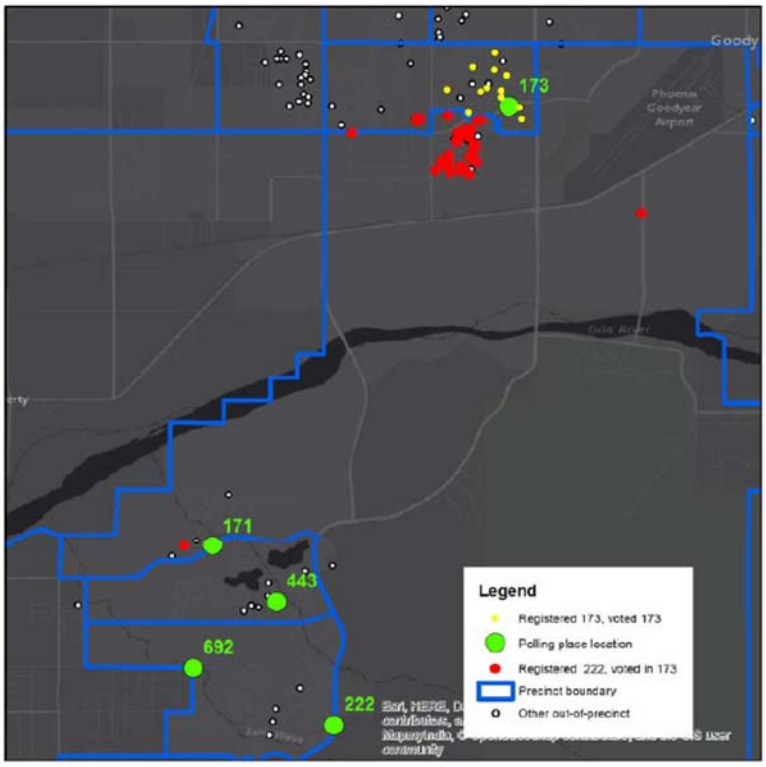
b. Confusing Placement of Polling Locations

Some polling places are located so counterintuitively that voters easily make mistakes. In Maricopa and Pima Counties, many polling places are located at or near the edge of precincts. *Id.* at 50. An example is the polling place for precinct 222 in Maricopa County during the 2012 election. Dr. Rodden wrote:

> [A] group of 44 voters who were officially registered to vote in precinct 222, . . . showed up on Election Day at the Desert Star School, the polling location for precinct 173. It is easy to understand how they might have made this mistake. Polling place 173 is the local elementary school, and the only polling place in the vicinity. It is within easy walking distance, and is the polling place for most of the neighbors and other parents at the school, yet due to a bizarre placement of the [polling place at the] Southern border of precinct 222, these voters were required to travel 15 minutes by car (according to [G]oogle maps) to vote in polling location 222, passing four other polling places along the way.

Id. at 47–48.

This map illustrates Dr. Rodden's point:



Id. at 47.

In 2012, approximately 25 percent of OOP voters lived closer to the polling place where they cast their OOP ballot than to their assigned polling place. *Id.* at 53. Voters who live more than 1.4 miles from their assigned polling place are 30 percent more likely to vote OOP than voters who live within 0.4 miles of their assigned polling place. *Id.* at 54. American Indian and Hispanic voters live farther from their assigned polling places than white voters. *Id.* at 60. American Indian voters are particularly disadvantaged. The district

court found: "Navajo voters in Northern Apache County lack standard addresses, and their precinct assignments for state and county elections are based upon guesswork, leading to confusion about the voter's correct polling place." *Reagan*, 329 F. Supp. 3d at 873; Rodden Second at 52–53.

c. Renters and Residential Mobility

High percentages of renters and high rates of residential mobility correlate with high rates of OOP voting. *Reagan*, 329 F. Supp. 3d at 857. The district court found that rates of OOP voting are "higher in neighborhoods where renters make up a larger share of householders." *Id.* Between 2000 and 2010, almost 70 percent of Arizonans changed their residential address, the second highest rate of any State. *Reagan*, 329 F. Supp. 3d at 857; Rodden at 11–12. The district court found that "[t]he vast majority of Arizonans who moved in the last year moved to another address within their current city of residence." *Reagan*, 329 F. Supp. 3d at 857.

The need to locate the proper polling place after moving—particularly after moving a short distance in an urban area—leads to a high percentage of OOP ballots. Dr. Rodden wrote:

> An individual who faces a rent increase in one apartment complex and moves to another less than a mile away might not be aware that she has moved into an entirely new precinct—indeed, in many cases . . . she may still live closest to her old precinct, but may now be required to travel further in order to vote in her

> new assigned precinct. Among groups for whom residential mobility is common, requirements of in-precinct-voting—as well as the requirement that they update their registration with the state every time that they move even a short distance within a county—can make it substantially more burdensome to participate in elections.

Rodden at 11.

The district court found that minority voters in Arizona have "disproportionately higher rates of residential mobility." *Reagan*, 329 F. Supp. 3d at 872. The court found, "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities." *Id.*

4. Disparate Impact on Minority Voters

The district court found that Arizona's policy of wholly discarding OOP ballots disproportionately affects minority voters. *Reagan*, 329 F. Supp. 3d at 871. During the general election in 2012 in Pima County, compared to white voters, the rate of OOP ballots was 123 percent higher for Hispanic voters, 47 percent higher for American Indian voters, and 37 percent higher for African American voters. Rodden at 43. During the 2014 and 2016 general elections in Apache, Navajo, and Coconino Counties, the vast majority of OOP ballots were in areas that are almost entirely American Indian. Rodden Rebuttal at 53–54, 58; Jonathan Rodden, Second Expert Report (Rodden

Second) at 22. In all likelihood, the reported numbers underestimate the degree of disparity. Dr. Rodden wrote, "[A]lthough the racial disparities described . . . are substantial, they should be treated as a *conservative* lower bound on the true differences in rates of out-of-precinct voting across groups." Rodden Second at 15 (emphasis in original). The district court found, "Dr. Rodden credibly explained that the measurement error for Hispanic probabilities leads only to the under-estimation of racial disparities." *Reagan*, 329 F. Supp. 3d at 838.

Racial disparities in OOP ballots in 2016 "remained just as pronounced" as in 2012 and 2014. Rodden Second at 3. For example, the rates of OOP ballots in Maricopa County "were twice as high for Hispanics, 86 percent higher for African Americans, and 73 percent higher for Native Americans than for their non-minority counterparts." *Reagan*, 329 F. Supp. 3d at 871–72; Rodden Second at 29. "In Pima County, rates of OOP voting were 150 percent higher for Hispanics, 80 percent higher for African Americans, and 74 percent higher for Native Americans than for non-minorities." *Reagan*, 329 F. Supp. 3d at 872. "[I]n Pima County the overall rate of OOP voting was higher, and the racial disparities larger, in 2016 than in 2014." *Id.*; Rodden Second at 33.

The district court found:

> Among all counties that reported OOP ballots in the 2016 general election, a little over 1 in every 100 Hispanic voters, 1 in every 100 African-American voters, and 1 in every 100 Native American voters cast an OOP ballot. For non-

> minority voters, the figure was around 1 in every 200 voters.

Reagan, 329 F. Supp. 3d at 872. That is, in the 2016 general election, as in the two previous elections, American Indians, Hispanics, and African Americans voted OOP at twice the rate of whites.

B. H.B. 2023

1. Early Voting and Ballot Collection

Arizona has permitted early voting for over 25 years. *Id.* at 839. "In 2007, Arizona implemented permanent no-excuse early voting by mail, known as the Permanent Early Voter List ("PEVL")." *Id.* Under PEVL, Arizonans may either (a) request an early vote-by-mail ballot on an election-by-election basis, or (b) request that they be placed on the Permanent Early Voter List. *See id.*; Ariz. Rev. Stat. §§ 16-542, -544. Some counties permit voters to drop their early ballots in special drop boxes. All counties permit the return of early ballots by mail, or in person at a polling place, vote center, or authorized election official's office. Early voting is by far "the most popular method of voting [in Arizona]." *Reagan*, 329 F. Supp. 3d at 839. Approximately 80 percent of all ballots cast in the 2016 general election were early ballots. *Id.* Until the passage of H.B. 2023, Arizona did not restrict collection and drop-off of voted ballots by third parties.

The district court heard extensive testimony about the number of ballots collected and turned in by third parties. *Id.* at 845. A Maricopa County Democratic Party organizer testified that during the course of her work for the party she personally saw 1,200 to 1,500

early ballots collected and turned in by third-party volunteers. These were only a portion of the total ballots collected by her organization. The organizer testified that during the 2010 election the Maricopa County Democratic Party collected hundreds of ballots from a heavily Hispanic neighborhood in one state legislative district alone. A representative of Citizens for a Better Arizona testified that the organization collected approximately 9,000 early ballots during the 2012 Maricopa County Sheriff's election. A member of the Arizona Democratic Party testified that the party collected "a couple thousand ballots" in 2014. *Id.* A community advocate testified before the Arizona Senate Elections Committee that in one election he collected 4,000 early ballots. *Id.* A Phoenix City Councilmember testified that she and her volunteers collected about 1,000 early ballots in an election in which she received a total of 8,000 votes.

2. Minority Voters' Reliance on Third-Party Ballot Collection

The district court found "that prior to H.B. 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." *Id.* at 870. The court recounted: "Helen Purcell, who served as the Maricopa County Recorder for 28 years from 1988 to 2016, observed that ballot collection was disproportionately used by Hispanic voters." *Id.* Individuals who collected ballots in past elections "observed that minority voters, especially Hispanics, were more interested in utilizing their services." *Id.* One ballot collector testified about what she termed a "case study" demonstrating the

extent of the disparity. In 2010, she and her fellow organizers collected "somewhere south of 50 ballots" in one area. The area was later redistricted before the next election to add the heavily Hispanic neighborhood of Sunnyslope. In 2012, the organization "pulled in hundreds of ballots, [with the] vast majority from that Sunnyslope area."

The district court found that, in contrast, the Republican Party has "not significantly engaged in ballot collection as a GOTV [Get Out the Vote] strategy." *Id.* The base of the Republican Party in Arizona is white. *Id.* Individuals who engaged in ballot collection in past elections observed that voters in predominately white areas "were not as interested in ballot collection services." *Id.*

Minority voters rely on third-party ballot collection for many reasons. Joseph Larios, a community advocate who has collected ballots in past elections, testified that "returning early mail ballots presents special challenges for communities that lack easy access to outgoing mail services; the elderly, homebound, and disabled voters; socioeconomically disadvantaged voters who lack reliable transportation; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process and therefore do not vote without assistance or tend to miss critical deadlines." *Id.* at 847–48 (summarizing Larios' testimony). These burdens fall disproportionately on Arizona's minority voters.

Arizona's American Indian and Hispanic communities frequently encounter mail-related

problems that make returning early ballots difficult. In urban areas of heavily Hispanic counties, many apartment buildings lack outgoing mail services. *Id.* at 869. Only 18 percent of American Indian registered voters have home mail service. *Id.* White registered voters have home mail service at a rate over 350 percent higher than their American Indian counterparts. *Id.* Basic mail security is an additional problem. Several witnesses testified that incoming and outgoing mail often go missing. *Id.* The district court found that especially in low-income communities, frequent mail theft has led to "distrust" in the mail service. *Id.*

A lack of transportation compounds the issue. "Hispanics, Native Americans, and African Americans . . . are significantly less likely than non-minorities to own a vehicle, more likely to rely upon public transportation, [and] more likely to have inflexible work schedules[.]" *Id.* In San Luis—a city that is 98 percent Hispanic—a major highway separates almost 13,000 residents from their nearest post office. *Id.* The city has no mass transit, a median income of $22,000, and many households with no cars. *Id.* On the Navajo Reservation, "most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families." *Id.* "[R]esidents of sovereign nations often must travel 45 minutes to 2 hours just to get a mailbox." *DNC*, 904 F.3d at 751–52 (Thomas, C.J., dissenting). As a result, voting "requires the active assistance of friends and neighbors" for many American Indians. *Reagan*, 329 F. Supp. 3d at 870 (quoting Rodden Second at 60).

The adverse impact on minority communities is substantial. Without "access to reliable and secure mail services" and without reliable transportation, many minority voters "prefer instead to give their ballots to a volunteer." *Id.* at 869. These communities thus end up relying heavily on third-party collection of mail-in ballots. Dr. Berman wrote with respect to Hispanic voters:

> [T]he practice of collecting ballots, used principally in Hispanic areas, ha[s] contributed to more votes being cast in those places tha[n] would have been cast without the practice. . . . That the practice has increased minority turnout appears to have been agreed upon or assumed by both sides of the issue[.] Democrats and Hispanic leaders have seen reason to favor it, Republicans have not.

Berman, Expert Reply Report at 8–9. Similarly, LeNora Fulton, a member of the Navajo Nation and previous Apache County Recorder, testified that it was "standard practice" in Apache County and the Nation to vote by relying on non-family members with the means to travel. *Reagan*, 329 F. Supp. 3d at 870.

3. History of H.B. 2023

Before the passage of H.B. 2023, Arizona already criminalized fraud involving possession or collection of another person's ballot. The district court wrote:

> [B]allot tampering, vote buying, or discarding someone else's ballot all were illegal prior to the passage of H.B. 2023. Arizona law has long provided that any person who knowingly collects

> voted or unvoted ballots and does not turn those ballots in to an elections official is guilty of a class 5 felony. A.R.S. § 16-1005. Further, Arizona has long made all of the following class 5 felonies: "knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election;" "receiv[ing] or agree[ing] to receive any consideration in exchange for a voted or unvoted ballot;" possessing another's voted or unvoted ballot with intent to sell; "knowingly solicit[ing] the collection of voted or unvoted ballots by misrepresenting [one's self] as an election official or as an official ballot repository or . . . serv[ing] as a ballot drop off site, other than those established and staffed by election officials;" and "knowingly collect[ing] voted or unvoted ballots and . . . not turn[ing] those ballots in to an election official . . . or any . . . entity permitted by law to transmit post." A.R.S. §§ 16-1005(a)–(f). The early voting process also includes a number of other safeguards, such as tamper evident envelopes and a rigorous voter signature verification procedure.

Reagan, 329 F. Supp. 3d at 854 (alterations in original) (internal record citations omitted).

There is no evidence of any fraud in the long history of third-party ballot collection in Arizona. Despite the extensive statutory provisions already criminalizing fraud involving possession or collection of another person's ballot, and despite the lack of evidence of any fraud in connection with third-party ballot collection, Republican State Senator Don Shooter introduced a bill

in February 2011. S.B. 1412, 50th Leg., 1st Reg. Sess. (introduced) (Ariz. 2011), http://www.azleg.gov/legtext/50leg/1r/bills/sb1412p.htm.

Senator Shooter's bill criminalized non-fraudulent third-party ballot collection. The district court had no illusions about Senator Shooter's motivation. It found:

> Due to the high degree of racial polarization in his district, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy. Indeed, Shooter's 2010 election was close: he won with 53 percent of the total vote, receiving 83 percent of the non-minority vote but only 20 percent of the Hispanic vote.

Reagan, 329 F. Supp. 3d at 879–80.

The state legislature amended Senator Shooter's bill several times, watering it down significantly. As finally enacted, the bill—included as part of a series of election-related changes in Senate Bill 1412 ("S.B. 1412")—restricted the manner in which unrelated third parties could collect and turn in more than ten voted ballots. S.B. 1412, 50th Leg., 1st Reg. Sess. (engrossed), Sec. 3 at D (Ariz. 2011), https://legiscan.com/AZ/text/SB1412/id/233492/Arizona-2011-SB1412-Engrossed.html. If a third-party ballot collector turned in more than ten ballots, the collector was required to provide photo identification. After each election, the Secretary of State was required to compile a statewide public report listing ballot collectors' information. The bill did not criminalize any violation of its provisions.

When S.B. 1412 became law, Arizona was still subject to preclearance under the Voting Rights Act. S.B. 1412 therefore could not go into effect until it was precleared by the U.S. Department of Justice ("DOJ") or a three-judge federal district court. On May 18, 2011, the Arizona Attorney General submitted S.B. 1412 to DOJ for preclearance. Arizona Attorney General Thomas Horne, *Effect of* Shelby County *on Withdrawn Preclearance Submissions*, (August 29, 2013), https://www.azag.gov/opinions/i13-008-r13-013. On June 27, 2011, DOJ precleared all provisions of S.B. 1412 except the provision regulating third-party ballot collection. *Reagan*, 329 F. Supp. 3d at 880.

DOJ sent a letter to Arizona concerning the third-party ballot collection provision, stating that the information provided with the preclearance request was "insufficient to enable [DOJ] to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." *Id.* at 880–81. DOJ requested additional information and stated that it "may object" to the proposed change if no response was received within sixty days. *Id*. at 881.

Instead of responding with the requested information, the Arizona Attorney General withdrew the preclearance request for the third-party ballot collection provision. *Id.* The Attorney General did so for good reason. According to DOJ records, Arizona's Elections Director, who had helped draft the provision, had admitted to DOJ that the provision was "targeted at voting practices in predominantly Hispanic areas."

The state legislature formally repealed the provision after receiving the letter from DOJ. Withdrawing a preclearance request was not common practice in Arizona. Out of 773 proposals that Arizona submitted for preclearance over almost forty years, the ballot collection provision of S.B. 1412 was one of only six that Arizona withdrew. *Id.*

Two years later, on June 25, 2013, the United States Supreme Court decided *Shelby County v. Holder*, 570 U.S. 529 (2013). The Court declared unconstitutional the formula in Section 4(b) of the VRA for determining "covered jurisdictions," thereby eliminating preclearance under Section 5 for any previously covered jurisdiction, including Arizona. On June 19, 2013, Arizona's Governor had signed a new bill, H.B. 2305, which entirely banned partisan ballot collection and required non-partisan ballot collectors to complete an affidavit stating that they had returned the ballot. *Reagan*, 329 F. Supp. 3d at 881; H.B. 2305, 51st Leg., 1st Reg. Sess. (engrossed), at Secs. 3 and 5 (Ariz. 2013), https://legiscan.com/AZ/text/HB2305/id/864002. Violation of H.B. 2305 was a criminal misdemeanor.

H.B. 2305 "was passed along nearly straight party lines in the waning hours of the legislative session." *Reagan*, 329 F. Supp. 3d at 881. "Shortly after its enactment, citizen groups organized a referendum effort[.]" *Id.* They "collected more than 140,000 signatures"—significantly more than the required amount—"to place H.B. 2305 on the ballot for a straight up-or-down [statewide] vote" in the next election. *Id.* Arizona law provided that repeal by

referendum prevented the legislature from enacting future related legislation without a supermajority vote. Moreover, any such future legislation could only "further[]"—not undercut—"the purposes" of the referendum. Ariz. Const. art. IV, pt. 1, § 1(6)(C), (14). "Rather than face a referendum, Republican legislators . . . repealed their own legislation along party lines." *Reagan*, 329 F. Supp. 3d at 881. The primary sponsor of H.B. 2305, then-State Senator Michele Reagan (a future Secretary of State of Arizona and an original defendant in this action), "admitted that the legislature's goal [in repealing H.B. 2305] was to break the bill into smaller pieces and reintroduce individual provisions 'a la carte.'" *Id.*

During the 2015 and 2016 legislative sessions, Republican legislators again sought to criminalize ballot collection by third parties, culminating in 2016 in the passage of H.B. 2023, the measure challenged in this suit. The district court found that Republican legislators had two motivations for passing H.B. 2023. First, Republican legislators were motivated by the "unfounded and often farfetched allegations of ballot collection fraud" made by former State Senator Shooter—who had introduced the bill to limit third-party ballot collection in 2011. *Id.* at 880 (finding Shooter's allegations "demonstrably false"). Second, Republican legislators were motivated by a "racially-tinged" video known as the "LaFaro Video." *Id.*

The video gave proponents of H.B. 2023 their best and only "evidence" of voter fraud. During legislative hearings on previous bills criminalizing third-party collection, the district court wrote, "Republican

sponsors and proponents [had] expressed beliefs that ballot collection fraud regularly was occurring but struggled with the lack of direct evidence substantiating those beliefs." *Id.* at 876. In 2014, Republicans' "perceived 'evidence' arrived in the form of a racially charged video created by Maricopa County Republican Chair A.J. LaFaro . . . and posted on a blog." *Id.* The court summarized:

> The LaFaro Video showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots. It also contained a narration of "Innuendos of illegality . . . [and] racially tinged and inaccurate commentary by . . . LaFaro." LaFaro's commentary included statements that the man was acting to stuff the ballot box; that LaFaro did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug; and that LaFaro did not follow him out to the parking lot to take down his tag number because he feared for his life.

Id. (alterations in original and internal record citations omitted). A voice-over on the video described "ballot parties" where people supposedly "gather en mass[e] and give their un-voted ballots to operatives of organizations so they can not only collect them, but also vote them illegally." *Id.* at 876–77.

The district court found, "The LaFaro Video did not show any obviously illegal activity and there is no evidence that the allegations in the narration were true." *Id.* at 877. The video "merely shows a man of apparent Hispanic heritage dropping off ballots and not

obviously violating any law." *Id.* The video "became quite prominent in the debates over H.B. 2023." *Id.* The court wrote:

> The LaFaro video also was posted on Facebook and YouTube, shown at Republican district meetings, and was incorporated into a television advertisement—entitled "Do You Need Evidence Terry?"—for Secretary Reagan when she ran for Secretary of State. In the ad, the LaFaro Video plays after a clip of then-Arizona Attorney General Terry Goddard stating he would like to see evidence that there has been ballot collection fraud. While the video is playing, Secretary Reagan's narration indicates that the LaFaro Video answers Goddard's request for evidence of fraud.

Id. (internal record citations omitted). The court found, "Although no direct evidence of ballot collection fraud was presented to the legislature or at trial, Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting[.]" *Id.* at 880.

The district court found that H.B. 2023 is no harsher than any of the third-party ballot collection bills previously introduced in the Arizona legislature. The court found:

> [A]lthough Plaintiffs argue that the legislature made H.B. 2023 harsher than previous ballot collection bills by imposing felony penalties, they ignore that H.B. 2023 in other respects is more

> lenient than its predecessors given its broad exceptions for family members, household members, and caregivers.

Id. at 881. In so finding, the district court clearly erred. Both S.B. 1412 and H.B. 2305 were more lenient than H.B. 2023.

For example, S.B. 1412, which was presented to DOJ for preclearance, required a third party collecting more than ten voted ballots to provide photo identification. There were no other restrictions on third-party ballot collection. There were no criminal penalties. By contrast, under H.B. 2023 a third party may collect a ballot only if the third party is an official engaged in official duties, or is a family member, household member, or caregiver of the voter. Ariz. Rev. Stat. § 16-1005(H), (I); *Reagan*, 329 F. Supp. 3d at 839–40. A third party who violates H.B. 2023 commits a class 5 felony.

In 2011, the relatively permissive third-party ballot collection provision of S.B. 1412 was withdrawn from Arizona's preclearance request when DOJ asked for more information. In 2016, in the wake of *Shelby County* and without fear of preclearance scrutiny, Arizona enacted H.B. 2023.

II. Section 2 of the VRA

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'" *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (alteration in original) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). "The Act create[d] stringent new remedies for

voting discrimination where it persists on a pervasive scale, and . . . strengthen[ed] existing remedies for pockets of voting discrimination elsewhere in the country." *Katzenbach*, 383 U.S. at 308.

When Section 2 of the Voting Rights Act was originally enacted in 1965, it read:

> SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

Chisom, 501 U.S. at 391 (citing 79 Stat. 437). "At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment." *Id.* at 392. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and it authorizes Congress to enforce the provision "by appropriate legislation." U.S. Const. amend. XV. In *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality), the Supreme Court held that the "coverage provided by § 2 was unquestionably coextensive with the coverage provided by the Fifteenth Amendment; the provision simply elaborated upon the Fifteenth Amendment." *Chisom*, 501 U.S. at 392. That is, the Court held that proof of intentional discrimination was necessary to establish a violation of Section 2. *Id.* at 393.

Congress responded to *Bolden* by amending Section 2, striking out "to deny or abridge" and substituting "in a manner which *results* in a denial or abridgement of." *Id.* (quoting amended Section 2; emphasis added by the Court); *see also Gingles*, 478 U.S. at 35. "Under the amended statute, proof of intent [to discriminate] is no longer required to prove a § 2 violation." *Chisom*, 501 U.S. at 394. Rather, plaintiffs can now prevail under Section 2 either by demonstrating proof of intent to discriminate or "by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Id.* That is, a Section 2 violation can "be established by proof of discriminatory results alone." *Chisom*, 501 U.S. at 404. The Supreme Court summarized: "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the '*results test*.'" *Gingles*, 478 U.S. at 35 (emphasis added).

A violation of Section 2 may now be shown under either the results test or the intent test. *Id.* at 35, 44. In the sections that follow, we analyze Plaintiffs' challenges under these two tests. First, we analyze Arizona's OOP policy and H.B. 2023 under the results test. Second, we analyze H.B. 2023 under the intent test.

A. Results Test: OOP Policy and H.B. 2023

1. The Results Test

Section 2 of the VRA "'prohibits all forms of voting discrimination' that lessen opportunity for minority voters." *League of Women Voters of N.C. v. North*

Carolina, 769 F.3d 224, 238 (4th Cir. 2014) (quoting *Gingles*, 478 U.S. at 45 n.10). As amended in 1982, Section 2 of the VRA provides:

> (a) No voting qualification or prerequisite to voting or *standard, practice, or procedure* shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301 (emphases added).

The results test of Section 2 applies in both vote dilution and vote denial cases. "Vote dilution claims involve challenges to methods of electing representatives—like redistricting or at-large districts—as having the effect of diminishing minorities' voting strength." *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir.

2014). A vote denial claim is generally understood to be "any claim that is not a vote dilution claim." *Id.* The case now before us involves two vote-denial claims.

The jurisprudence of vote-denial claims is relatively underdeveloped in comparison to vote-dilution claims. As explained by the Fourth Circuit, "[T]he predominance of vote dilution in Section 2 jurisprudence likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions[.]" *League of Women Voters*, 769 F.3d at 239.

In evaluating a vote-denial challenge to a "standard, practice, or procedure" under the "results test" of Section 2, most courts, including our own, engage in a two-step process. We first did so, in abbreviated fashion, in *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997). We later did so, at somewhat greater length, in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc). Other circuits have subsequently used a version of the two-step analysis. *See Veasey v. Abbott*, 830 F.3d 216, 244–45 (5th Cir. 2016); *League of Women Voters*, 769 F.3d at 240 (4th Cir. 2014); *Husted*, 768 F.3d at 554 (6th Cir. 2014). *Compare Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014) ("We are skeptical about the second of these steps[.]").

First, we ask whether the challenged standard, practice or procedure results in a disparate burden on members of the protected class. That is, we ask whether, "as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity

to participate in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 44. The mere existence—or "bare statistical showing"—of a disparate impact on a racial minority, in and of itself, is not sufficient. *See Salt River*, 109 F.3d at 595 ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." (emphasis in original)).

Second, if we find at the first step that the challenged practice imposes a disparate burden, we ask whether, under the "totality of the circumstances," there is a relationship between the challenged "standard, practice, or procedure," on the one hand, and "social and historical conditions" on the other. The purpose of the second step is to evaluate a disparate burden in its real-world context rather than in the abstract. As stated by the Supreme Court, "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" or to participate in the political process. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b). To determine at the second step whether there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them, we consider, as appropriate, factors such as those laid out in the Senate Report accompanying the 1982 amendments to the VRA. *Id.* at 43 ("The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations."); *Veasey*, 830 F.3d at 244–45.

The Senate Report provides:

> If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending on the kind of rule, practice, or procedure called into question.
>
> Typical factors include:
>
> > 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> >
> > 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> >
> > 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> >
> > 4. if there is a candidate slating process, whether the members of the minority

> group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-417 ("S. Rep."), at 28–29 (1982); *see Gingles*, 478 U.S. at 36–37 (quoting the Senate Report).

The Senate Committee's list of "typical factors" is neither comprehensive nor exclusive. S. Rep. at 29. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* "[T]he question whether the political processes are 'equally open' depends on a searching practical evaluation of the 'past and present reality.'" *Id.* at 30. An evaluation of the totality of circumstances in a Section 2 results claim, including an evaluation of appropriate Senate factors, requires "a blend of history and an intensely local appraisal[.]" *Gingles*, 478 U.S. at 78 (quoting *White v. Regester*, 412 U.S. 755, 769–70 (1973)). The Senate factors are relevant to both vote-denial and vote-dilution claims. *Gingles*, 478 U.S. at 45 (Senate factors will be "pertinent to certain types of § 2 claims," including vote denial claims, but will be "particularly [pertinent] to vote dilution claims.").

Our sister circuits have struck down standards, practices, or procedures in several vote-denial cases after considering the Senate factors. In *Husted*, the Sixth Circuit upheld a district court's finding that an Ohio law limiting early voting violated the results test of Section 2. The court wrote,

> We find Senate factors one, three, five, and nine particularly relevant to a vote denial claim in that they specifically focus on how historical or current patterns of discrimination "hinder [minorities'] ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37 (quoting Senate factor five). All of the factors, however, can still provide helpful background

> context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process.

Husted, 768 F.3d at 555. In *Veasey*, the Fifth Circuit upheld a district court's finding that Texas's requirement that a photo ID be presented at the time of voting violated the results test. *Veasey*, 830 F.3d at 256–64 (considering Senate factors one, two, five, six, seven, eight, and nine). In *League of Women Voters*, the Fourth Circuit held that the district court had clearly erred in finding that the results test had not been violated by North Carolina's elimination of same-day registration, and by North Carolina's practice of wholly discarding out-of-precinct ballots. *League of Women Voters*, 769 F.3d at 245–46 (considering Senate factors one, three, and nine).

2. OOP Policy and the Results Test

Uncontested evidence in the district court established that minority voters in Arizona cast OOP ballots at twice the rate of white voters. The question is whether the district court clearly erred in holding that Arizona's policy of entirely discarding OOP ballots does not violate the "results test" of Section 2.

a. Step One: Disparate Burden

The question at step one is whether Arizona's policy of entirely discarding OOP ballots results in a disparate burden on a protected class. The district court held that Plaintiffs failed at step one. The district court clearly erred in so holding.

Extensive and uncontradicted evidence in the district court established that American Indian, Hispanic, and African American voters are over-represented among OOP voters by a ratio of two to one. *See* Part II(A), *supra*. The district court wrote, "Plaintiffs provided quantitative and statistical evidence of disparities in OOP voting through the expert testimony of Dr. Rodden . . . . Dr. Rodden's analysis is credible and shows that minorities are over-represented among the small number of voters casting OOP ballots." *Reagan*, 329 F. Supp. 3d at 871. Dr. Rodden reported that this pattern was consistent over time and across counties. Based on this evidence, the court found that during the 2016 general election, American Indian, Hispanic, and African American voters were twice as likely as white voters to vote out-of-precinct and not have their votes counted. *Id.* at 872.

Despite these factual findings, the district court held that Arizona's policy of entirely discarding OOP ballots does not impose a disparate burden under the results test. The court gave two reasons to support its holding.

First, the district court discounted the disparate burden on the ground that there were relatively few OOP ballots cast in relation to the total number of ballots. *Id.* at 872. The district court clearly erred in so doing.

The district court pointed out that the absolute number of OOP ballots in Arizona fell between 2012 and 2016. It pointed out, further, that as a percentage of all ballots cast, OOP ballots fell from 0.47 percent to 0.15 percent during that period. *Id.* The numbers and

percentages cited by the district court are accurate. Standing alone, they may be read to suggest that locating the correct precinct for in-person voting has become easier and that OOP ballots, as a percentage of in-person ballots, have decreased accordingly.

However, the opposite is true. Arizona's OOP policy applies only to in-person ballots. The proper baseline to measure OOP ballots to is thus not all ballots, but all *in-person* ballots. The district court failed to point out that the absolute number of all in-person ballots fell more than the absolute number of OOP ballots, and that, as a result, as a percentage of in-person ballots, OOP ballots increased rather than decreased.

Even putting aside the potentially misleading numbers and percentages cited by the district court and focusing only on the decline in the absolute number of OOP ballots, the court clearly erred. As indicated above, the vote-denial category encompasses all cases that are not vote-dilution cases. The number of minority voters adversely affected, and the mechanism by which they are affected, may vary considerably. For example, if a polling place denies an individual minority voter her right to vote based on her race or color, Section 2 is violated based on that single denial. However, a different analysis may be appropriate when a facially neutral policy adversely affects a number of minority voters. Arizona's OOP policy is an example. We are willing to assume in such a case that more than a de minimis number of minority voters must be burdened before a Section 2 violation based on the results test can be found. Even on that assumption, however, we conclude that the number of

OOP ballots cast in Arizona's general election in 2016—3,709 ballots—is hardly de minimis.

We find support for our conclusion in several places. The Department of Justice submitted an amicus brief to our en banc panel in support of Arizona. Despite its support for Arizona, DOJ specifically disavowed the district court's conclusion that the number of discarded OOP ballots was too small to be cognizable under the results test. DOJ wrote:

> [T]he district court's reasoning was not correct to the extent that it suggested that plaintiffs' Section 2 claim would fail solely because of the small number of voters affected. . . .
>
> That is not a proper reading of the statute. Section 2 prohibits 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) (emphasis added); *see also Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."). Section 2 safeguards a personal right to equal participation opportunities. A poll worker turning away a single voter because of her race plainly results in "less opportunity * * * to participate in the political process and to elect representatives of [her] choice." 52 U.S.C. 10301(b).

DOJ Amicus Brief at 28–29. DOJ's brief appears to treat as equivalent the case of an individually targeted single minority voter who is denied the right to vote and the case where a facially neutral policy affects a single voter. We do not need to go so far. We need only point out that in the case before us a substantial number of minority voters are disparately affected by Arizona's OOP policy. As long as an adequate disparate impact is shown, as it has been shown here, and as long as the other prerequisites for finding a Section 2 violate are met, each individual in the affected group is protected under Section 2.

Further, in *League of Women Voters*, "approximately 3,348 out-of-precinct provisional ballots" cast by African American voters would have been discarded under the challenged North Carolina law. 769 F.3d at 244 (quoting the district court). The district court had held that this was a "minimal" number of votes, and that Section 2 was therefore not violated. The Fourth Circuit reversed, characterizing the district court's ruling as a "grave error." *Id.* at 241.

Finally, in the 2000 presidential election, the official margin of victory for President George W. Bush in Florida was 537 votes. Federal Election Commission, *2000 Official Presidential General Election Results* (Dec. 2001), *available at* https://transition.fec.gov/pubrec/2000presgeresults.htm. If there had been 3,709 additional ballots cast in Florida in 2000, in which minority voters had outnumbered white voters by a ratio of two to one, it is possible that a different President would have been elected.

Second, the district court concluded that Arizona's policy of rejecting OOP ballots does not impose a disparate burden on minority voters because Arizona's policy of entirely discarding OOP ballots "is not the cause of the disparities in OOP voting." *Reagan*, 329 F. Supp. 3d at 872. The court wrote that Plaintiffs "have not shown that Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." *Id.* at 873. Again, the district court clearly erred.

The district court misunderstood what Plaintiffs must show. Plaintiffs need not show that Arizona caused them to vote out of precinct. Rather, they need only show that the result of entirely discarding OOP ballots has an adverse disparate impact, by demonstrating "a causal connection between the challenged voting practice and a prohibited discriminatory *result*." *Salt River*, 109 F.3d at 595 (emphasis added). Here, "[t]he challenged practice—not counting OOP ballots—results in 'a prohibited discriminatory result'; a substantially higher percentage of minority votes than white votes are discarded." *DNC*, 904 F.3d at 736 (Thomas, C.J., dissenting).

We hold that the district court clearly erred in holding that Arizona's policy of entirely discarding OOP ballots does not result in a disparate burden on minority voters. We accordingly hold that Plaintiffs have succeeded at step one of the results test.

b. Step Two: Senate Factors

The question at step two is whether, under the "totality of circumstances," the disparate burden on minority voters is linked to social and historical conditions in Arizona so as "to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" or to participate in the political process. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b). The district court wrote that because in its view Plaintiffs failed at step one, discussion of step two was unnecessary. *Reagan*, 329 F. Supp. 3d at 873. The court nonetheless went on to discuss step two and, after considering various Senate factors, to hold that Plaintiffs failed at this step as well. The district court clearly erred in so holding.

At step two, we consider relevant Senate factors. Some Senate factors are "more important to" vote-denial claims, or to some vote-denial claims, and others, "[i]f present, . . . are supportive of, but *not essential to*" the claim. *Gingles*, 478 at 48 n.15 (emphasis in original). That is, Senate factors vary in importance depending on whether a court is dealing with a vote-dilution or a vote-denial case. The same factors may also vary in importance from one vote-denial case to another.

We emphasize that the relative importance of the Senate factors varies from case to case. For example, as we will describe in a moment, Arizona has a long and unhappy history of official discrimination connected to voting. Other States may not have such a history, but depending on the existence of other Senate factors they

may nonetheless be found to have violated the results test of Section 2.

The district court considered seven of the nine Senate factors: factor one, the history of official discrimination connected to voting; factor two, racially polarized voting patterns; factor five, the effects of discrimination in other areas on minority groups' access to voting; factor six, racial appeals in political campaigns; factor seven, the number of minorities in public office; factor eight, officials' responsiveness to the needs of minority groups; and factor nine, the tenuousness of the justification for the challenged voting practice.

We analyze below each of these factors, indicating whether we agree or disagree with the district court's analysis as to each. Of the various factors, we regard Senate factors five (the effects of discrimination in other areas on minorities access to voting) and nine (the tenuousness of the justification for the challenged voting practices) as particularly important. We also regard factor one (history of official discrimination) as important, as it bears on the existence of discrimination generally and strongly supports our conclusion under factor five. Though "not essential," *Gingles*, 478 U.S. at 48 n.15, the other factors provide "helpful background context." *Husted*, 768 F.3d at 555.

i. Factor One: History of Official Discrimination Connected to Voting

Arizona has a long history of race-based discrimination against its American Indian, Hispanic, and African American citizens. Much of that

discrimination is directly relevant to those citizens' ability "to register, to vote, or otherwise to participate in the democratic process." *Id.* We recount the most salient aspects of that history.

Dr. David Berman, a Professor Emeritus of Political Science at Arizona State University, submitted an expert report and testified in the district court. The court found Dr. Berman "credible" and gave "great weight to Dr. Berman's opinions." *Reagan*, 329 F. Supp. 3d at 834. The following narrative is largely drawn from Dr. Berman's report and the sources on which he relied.

(A) Territorial Period

Arizona's history of discrimination dates back to 1848, when it first became an American political entity as a United States territory. "Early territorial politicians acted on the belief that it was the 'manifest destiny' of the Anglos to triumph in Arizona over the earlier Native American and Hispanic civilizations." David Berman, Expert Report (Berman) at 4. Dr. Berman wrote that from the 1850s through the 1880s there were "blood thirsty efforts by whites to either exterminate" Arizona's existing American Indian population or "confine them to reservations." *Id.* at 5. In 1871, in the Camp Grant Massacre, white settlers "brutal[ly] murder[ed] over 100 Apaches, most of whom were women and children." *Id.* Arizona's white territorial legislature passed a number of discriminatory laws, including anti-miscegenation laws forbidding marriage between whites and Indians. *See* James Thomas Tucker et al., *Voting Rights in Arizona: 1982–2006*, 17 S. Cal. Rev. L. & Soc. Just. 283, 283 n.3

(2008) (Tucker et al., *Voting Rights*). Dr. Berman wrote: "By the late 1880s and the end of th[e] Indian wars, the realities of life for Native Americans in Arizona were confinement to reservations, a continuous loss of resources (water, land, minerals) to settlers, poverty, and pressure to abandon their traditional cultures." Berman at 5.

White settlers also discriminated against Arizona's Hispanic population. Dr. Berman wrote:

> Although Hispanics in the territory's early period commonly held prominent roles in public and political life, as migration continued they were overwhelmed by a flood of Anglo-American and European immigrants. While a small group of Hispanics continued to prosper, . . . most Hispanics toiled as laborers who made less than Anglos even though they performed the same work.

Id. (footnote omitted). Hispanics in Arizona "found it difficult to receive acceptance or fair treatment in a society that had little tolerance for people of Latin American extraction, and particularly those whose racial make-up included Indian or African blood." *Id.* at 5–6 (quoting Oscar J. Martinez, *Hispanics in Arizona*, *in* Arizona at Seventy-Five: The Next Twenty-Five Years 88–89 (Ariz. State Univ. Pub. History Program & the Ariz. Historical Soc'y, 1987)).

Pursuant to the Treaty of Guadalupe Hidalgo that ended the Mexican-American War, the United States conferred citizenship on the approximately 100,000 Hispanics living in Arizona. In 1909, the Arizona

territorial legislature passed a statute imposing an English language literacy test as a prerequisite to voter registration. *Id.* at 10. The test was specifically designed to prevent the territory's Hispanic citizens—who had lower English literacy rates than white citizens—from voting. *Id.* At the time, Indians were not citizens and were not eligible to vote.

In 1910, Congress passed a statute authorizing Arizona, as a prelude to statehood, to draft a state constitution. Upon approval of its constitution by Congress, the President, and Arizona voters, Arizona would become a State. *Id.* at 11. Members of Congress viewed Arizona's literacy test as a deliberate effort to disenfranchise its Hispanic voters. *Id.* The authorizing statute specifically provided that Arizona could not use its newly adopted literacy test to prevent Arizona citizens from voting on a proposed constitution. *Id.*

That same year, Arizona convened a constitutional convention. *Id.* at 7. Although Congress had ensured that Arizona would not use its literacy test to prevent Hispanic citizens from voting on the constitution, Hispanics were largely excluded from the drafting process. With the exception of one Hispanic delegate, all of the delegates to the convention were white. *Id.* By comparison, approximately one-third of the delegates to the 1910 New Mexico constitutional convention were Hispanic, and one-sixth of the 48 delegates to the 1849 California constitutional convention were Hispanic. *Id.*

The influence of Hispanic delegates is evident in those States' constitutions. For example, New Mexico's constitution provides that the "right of any citizen of the state to vote, hold office or sit upon juries, shall

never be restricted, abridged or impaired on account of . . . race, language or color, or inability to speak, read or write the English or Spanish languages." N.M. Const. art. VII, § 3 (1910). It also requires the legislature to provide funds to train teachers in Spanish instruction. N.M. Const. art. XII, § 8 (1910). California's constitution required all state laws to be published in Spanish as well as English. Cal. Const. art. XI, § 21 (1849).

By contrast, Arizona's constitution did not include such provisions. Indeed, two provisions required precisely the opposite. The Arizona constitution provided that public schools "shall always be conducted in English" and that "[t]he ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter, shall be a necessary qualification for all State officers and members of the State Legislature." Ariz. Const. art. XX, §§ 7, 8 (1910).

(B) Early Statehood

(1) Literacy Test

Arizona became a State in 1912. That same year, the Arizona legislature passed a statute reimposing an English literacy test—the test that had been imposed by the territorial legislature in 1909 and that Congress had forbidden the State to use for voting on the state constitution. Berman at 11; *see also* James Thomas Tucker, *The Battle Over Bilingual Ballots: Language Minorities and Political Access Under the Voting Rights Act* 20 (Routledge, 2016) (Tucker, *Bilingual Ballots*). According to Dr. Berman, the statute was enacted "to

limit 'the ignorant Mexican vote.'" David R. Berman, *Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development* 75 (Univ. of Neb. Press, 1998) (Berman, *Arizona Politics*) (quoting letter between prominent political leaders); Berman at 12.

County registrars in Arizona had considerable discretion in administering literacy tests. Registrars used that discretion to excuse white citizens from the literacy requirement altogether, to give white citizens easier versions of the test, and to help white citizens pass the test. *See also Katzenbach*, 383 U.S. at 312 (describing the same practice with respect to African American citizens in southern States). In contrast, Hispanic citizens were often required to pass more difficult versions of the test, without assistance and without error. Berman, *Arizona Politics* at 75; *see also* Berman at 12.

The literacy test was used for the next sixty years. The year it was introduced, Hispanic registration declined so dramatically that some counties lacked enough voters to justify primaries. Berman at 12. One county had recall campaigns because enough Hispanic voters had been purged from voting rolls to potentially change the electoral result. *Id.* Arizona would use its literacy test not only against Hispanics, but also against African Americans and, once they became eligible to vote in 1948, against American Indians. The test was finally repealed in 1972, two years after an amendment to the Voting Rights Act banned literacy tests nationwide. *Id.*

(2) Disenfranchisement of American Indians

In 1912, when Arizona became a State, Indians were not citizens of Arizona or of the United States. In 1924, Congress passed the Indian Citizenship Act, declaring all Indians citizens of the United States and, by extension, of their States of residence. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

Indian voting had the potential to change the existing white political power structure of Arizona. *See* Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 Ariz. St. L.J. 1099, 1103–04 (2015) (Ferguson-Bohnee). Indians comprised over 14 percent of the population in Arizona, the second-highest percentage of Indians in any State. *Id.* at 1102 n.19, 1104. Potential power shifts were even greater at the county level. According to the 1910 Census, Indians comprised over 66 percent of the population of Apache County, over 50 percent of Navajo County, over 34 percent of Pinal County, and over 34 percent of Coconino County. *Id.* at 1104.

Enacted under the Fourteenth and Fifteenth Amendments, the Indian Citizenship Act should have given Indians the right to vote in Arizona elections. The Attorney General of Arizona initially agreed that the Act conferred the right to vote, and he suggested in 1924 that precinct boundaries should be expanded to include reservations. *Id.* at 1105. However, in the years leading up to the 1928 election, Arizona's Governor, county officials, and other politicians sought to prevent Indians from voting. *Id.* at 1106–08. The Governor, in

particular, was concerned that Indian voter registration—specifically, registration of approximately 1,500 Navajo voters—would hurt his reelection chances. *Id.* at 1107–08. The Governor sought legal opinions on ways to exclude Indian voters, *id.*, and was advised to "adopt a systematic course of challenging Indians at the time of election." *Id.* at 1108 (quoting Letter from Samuel L. Pattee to George W.P. Hunt, Ariz. Governor (Sept. 22, 1928)). County officials challenged individual Indian voter registrations. *Id.* at 1107–08.

Prior to the 1928 election, two Indian residents of Pima County brought suit challenging the county's rejection of their voter registration forms. *Id.* at 1108. The Arizona Supreme Court sided with the county. The Arizona constitution forbade anyone who was "under guardianship, *non compos mentis*, or insane" from voting. Ariz. Const. art. VII, § 2 (1910). The Court held that Indians were "wards of the nation," and were therefore "under guardianship" and not eligible to vote. *Porter v. Hall*, 271 P. 411, 417, 419 (Ariz. 1928).

Arizona barred Indians from voting for the next twenty years. According to the 1940 census, Indians comprised over 11 percent of Arizona's population. Ferguson-Bohnee at 1111. They were the largest minority group in Arizona. "One-sixth of all Indians in the country lived in Arizona." *Id.*

After World War II, Arizona's Indian citizens returned from fighting the Axis powers abroad to fight for the right to vote at home. Frank Harrison, a World War II veteran and member of the Fort McDowell Yavapai Nation, and Harry Austin, another member of

the Fort McDowell Yavapai Nation, filed suit against the State. In 1948, the Arizona Supreme Court overturned its prior decision in *Porter v. Hall*. *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948). Almost a quarter century after enactment of the Indian Citizenship Act of 1924, Indian citizens in Arizona had the legal right to vote.

(C) The 1950s and 1960s

For decades thereafter, however, Arizona's Indian citizens often could not exercise that right. The Arizona Supreme Court's decision in *Harrison v. Laveen* did not result in "a large influx" of new voters because Arizona continued to deny Indian citizens—as well as Hispanic and African American citizens—access to the ballot through other means. Berman at 15.

The biggest obstacle to voter registration was Arizona's English literacy test. In 1948, approximately 80 to 90 percent of Indian citizens in Arizona did not speak or read English. Tucker et al., *Voting Rights* at 285; *see also* Berman at 15. In the 1960s, about half the voting-age population of the Navajo Nation could not pass the English literacy test. Ferguson-Bohnee at 1112 n.88. For Arizona's Indian—and Hispanic and African American—citizens who did speak and read English, discriminatory administration of the literacy test by county registrars often prevented them from registering. *See, e.g.*, Berman, *Arizona Politics* at 75 ("As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians and Hispanics to register to vote.").

Voter intimidation during the 1950s and 60s often prevented from voting those American Indian, Hispanic, and African American citizens who had managed to register. According to Dr. Berman:

> During the 1960s, it was . . . clear that more than the elimination of the literacy test in some areas was going to be needed to protect minorities. Intimidation of minority-group members—Hispanics, African Americans, as well as Native Americans—who wished to vote was . . . a fact of life in Arizona. Anglos sometimes challenged minorities at the polls and asked them to read and explain "literacy" cards containing quotations from the U.S. Constitution. These intimidators hoped to frighten or embarrass minorities and discourage them from standing in line to vote. Vote challenges of this nature were undertaken by Republican workers in 1962 in South Phoenix, a largely minority Hispanic and African-American area. . . . [In addition,] [p]eople in the non-Native American community, hoping to keep Native Americans away from the polls, told them that involvement could lead to something detrimental, such as increased taxation, a loss of reservation lands, and an end to their special relationship with the federal government.

Berman at 14–15.

Intimidation of minority voters continued throughout the 1960s. For example, in 1964, Arizona Republicans undertook voter intimidation efforts throughout Arizona "as part of a national effort by the

Republican Party called 'Operation Eagle Eye.'" *Id.* at 14. According to one account:

> The approach was simple: to challenge voters, especially voters of color, at the polls throughout the country on a variety of specious pretexts. If the challenge did not work outright—that is, if the voter was not prevented from casting a ballot (provisional ballots were not in widespread use at this time)—the challenge would still slow down the voting process, create long lines at the polls, and likely discourage some voters who could not wait or did not want to go through the hassle they were seeing other voters endure.

Id. (quoting Tova Andrea Wang, *The Politics of Voter Suppression: Defending and Expanding Americans' Right to Vote* 44–45 (Cornell Univ. Press, 2012)).

Compounding the effects of the literacy test and voter intimidation, Arizona "cleansed" its voting rolls. In 1970, Democrat Raul Castro narrowly lost the election for Governor. (He would win the governorship four years later to become Arizona's first and only Hispanic Governor.) Castro received 90 percent of the Hispanic vote, but he lost the election because of low Hispanic voter turnout. Dr. Berman explained:

> [C]ontributing to that low turnout was "a decision by the Republican-dominated legislature to cleanse the voting rolls and have all citizens reregister. This cleansing of the rolls erased years of registration drives in barrios across the state. It seems certain that many

> Chicanos did not understand that they had to reregister, were confused by this development, and simply stayed away from the polls."

Id. at 17 (quoting F. Chris Garcia & Rudolph O. de la Garza, *The Chicano Political Experience* 105 (Duxbury Press, 1977)).

(D) Voting Rights Act and Preclearance under Section 5

Congress passed the Voting Rights Act in 1965. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437–446 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701, 10702). Under Section 4(b) of the Act, a State or political subdivision qualified as a "covered jurisdiction" if it satisfied two criteria. *Id.* § 4(b). The first was that on November 1, 1964—the date of the presidential election—the State or political subdivision had maintained a "test or device," such as a literacy test, restricting the opportunity to register or vote. The second was *either* that (a) on November 1, 1964, less than 50 percent of the voting-age population in the jurisdiction had been registered to vote, *or* (b) less than 50 percent of the voting-age population had actually voted in the presidential election of 1964. Seven States qualified as covered jurisdictions under this formula: Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia. Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897-02 (Aug. 7, 1965). Political subdivisions in four additional States—Arizona, Hawai'i, Idaho, and North Carolina—also qualified as covered jurisdictions. *See id.*;

Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14,505-02 (Nov. 19, 1965).

Under Section 4(a) of the VRA, covered jurisdictions were forbidden for a period of five years from using a "test or device," such as a literacy test, as a prerequisite to register to vote, unless a three-judge district court of the District of Columbia found that no such test had been used by the jurisdiction during the preceding five years for the purpose of denying the right to vote on account of race or color. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a). Under Section 5, covered jurisdictions were forbidden from changing "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" unless the jurisdiction "precleared" that change, by either obtaining approval (a) from a three-judge district court of the District of Columbia acknowledging that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color," or (b) from the Attorney General if a proposed change has been submitted to DOJ and the Attorney General has not "interposed an objection" within sixty days of the submission. *Id.* § 5.

Three counties in Arizona qualified as "covered jurisdictions" under the 1965 Act: Apache, Coconino, and Navajo Counties. *See* Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897-02, 14,505-02. Those counties were therefore initially prohibited from using the literacy test as a prerequisite to voter registration. All three counties were majority

American Indian, and there was a history of high use of the literacy test and correspondingly low voter turnout. Berman at 12. However, in 1966, in a suit brought by the counties against the United States, a three-judge district court held that there was insufficient proof that a literacy test had been used by the counties in a discriminatory fashion during the immediately preceding five years. *See Apache Cty. v. United States*, 256 F. Supp. 903 (D.D.C. 1966). The Navajo Nation had sought to intervene and present evidence of discrimination in the district court, but its motion to intervene had been denied. *Id.* at 906–13.

Congress renewed and amended the VRA in 1970, extending it for another five years. Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970). Under the VRA of 1970, the formula for determining covered jurisdictions under Section 4(b) was changed to add the presidential election of 1968 to the percentage-of-voters criterion. *Id.* § 4(b). As a result, eight out of fourteen Arizona counties—including Apache, Navajo, and Coconino Counties—qualified as covered jurisdictions. Tucker et al., *Voting Rights* at 286. Under the 1970 Act, non-covered jurisdictions were forbidden from using a "test or device," such as a literacy test, to the same degree as covered jurisdictions. The 1970 Act thus effectively imposed a nationwide ban on literacy tests. Voting Rights Act of 1970, Pub. L. No. 91-285, § 201.

Arizona immediately challenged the ban. In *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970), the Court unanimously upheld the ban on literacy tests. Justice Black wrote,

> In enacting the literacy test ban . . . [,] Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. . . . Congress . . . had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average. Arizona also has a serious problem of deficient voter registration among Indians.

Two years after the Court's decision, Arizona finally repealed its literacy test. Tucker, *Bilingual Ballots*, at 21.

In 1975, Congress again renewed and amended the VRA. Voting Rights Act of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). Under the VRA of 1975, the formula for determining covered jurisdictions under Section 4(b) was updated to add the presidential election of 1972. *Id.* § 202. In addition, Congress expanded the definition of "test or device" to address discrimination against language minority groups. *Id.* § 203 (Section 4(f)). Pursuant to this amended formula and definition, any jurisdiction where a single language minority group (e.g., Spanish speakers who spoke no other language) constituted more than 5 percent of eligible voters was subject to preclearance under Section 5 if (a) the jurisdiction did not offer bilingual election materials during the 1972 presidential election, and (b) less than

50 percent of the voting-age population was registered to vote, or less than 50 percent of the voting-age population actually voted in the 1972 presidential election. *Id.* §§ 201–203.

Every jurisdiction in Arizona failed the new test. As a result, the entire State of Arizona became a covered jurisdiction. Berman at 20–21.

(E) Continued Obstacles to Voting: The Example of Apache County

The VRA's elimination of literacy tests increased political participation by Arizona's American Indian, Hispanic, and African American citizens. However, state and county officials in Arizona continued to discriminate against minority voters. Apache County, which includes a significant part of the Navajo Reservation, provides numerous examples of which we recount only one.

In 1976, a school district in Apache County sought to avoid integration by holding a special bond election to build a new high school in a non-Indian area of the county. *See Apache Cty. High Sch. Dist. No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980); *see also* Tucker et al., *Voting Rights* at 324–26 (discussing the same). Less than a month before the election, the school district, a "covered jurisdiction" under the VRA, sought preclearance under Section 5 for proposed changes in election procedures, including closure of nearly half the polling stations on the Navajo Reservation. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Joe Purcell, Gust, Rosenfeld, Divelbess &

Henderson (Oct. 4, 1976). DOJ did not complete its review before the election. The school district nonetheless held the bond election using the proposed changes. After the election, DOJ refused to preclear the proposed changes, finding that they had a discriminatory purpose or effect. *Id.* (and subsequent letters from Assistant Attorney Gen. Drew S. Days III on May 3, 1977, and June 10, 1977). The school district brought suit in a three-judge district court, seeking a declaratory judgment that the election did not violate the VRA.

The district court found that "[t]he history of Apache County reveals pervasive and systemic violations of Indian voting rights." *Apache Cty. High Sch. Dist. No. 90*, No. 77-1815, at 6. The court found that the school district's behavior was neither "random[]" nor "unconscious[]." *Id.* at 14–15. "Rather, its campaign behavior served to effectuate the unwritten but manifest policy of minimizing the effect of the Navajos' franchise, while maximizing the Anglo vote." *Id.* at 15.

(F) *United States v. Arizona* and Preclearance during the 1980s and 1990s

During the following two decades, DOJ refused to preclear numerous proposed voting changes in Arizona. *See, e.g.*, *Goddard v. Babbitt*, 536 F. Supp. 538, 541, 543 (D. Ariz. 1982) (finding that a state legislative redistricting plan passed by the Arizona state legislature "dilut[ed] the San Carlos Apache Tribal voting strength and divid[ed] the Apache community of interest"); *see also* Tucker et al., *Voting Rights* at 326–28 (discussing additional examples). In 1988, the

United States sued Arizona, alleging that the State, as well as Apache and Navajo Counties, violated the VRA by employing election standards, practices, and procedures that denied or abridged the voting rights of Navajo citizens. *See United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (later amended Sept. 27, 1993); *see also* Tucker et al., *Voting Rights* at 328–30 (discussing the same). A three-judge district court summarized the complaint:

> The challenged practices include alleged discriminatory voter registration, absentee ballot, and voter registration cancellation procedures, and the alleged failure of the defendants to implement, as required by Section 4(f)(4), effective bilingual election procedures, including the effective dissemination of election information in Navajo and providing for a sufficient number of adequately trained bilingual persons to serve as translators for Navajo voters needing assistance at the polls on election day.

United States v. Arizona, No. 88-1989, at 1–2.

Arizona and the counties settled the suit under a Consent Decree. *Id.* at 1–26. The Decree required the defendants to make extensive changes to their voting practices, including the creation of a Navajo Language Election Information Program. *See id*. at 4–23. More than a decade later, those changes had not been fully implemented. *See* U.S. Gov't Accountability Office, *Department of Justice's Activities to Address Past Election-Related Voting Irregularities* 91–92 (2004), available at http://www.gao.gov/new.items/d04104

1r.pdf (identifying significant deficiencies and finding that implementation of the Navajo Language Election Information Program by Apache and Navajo Counties was "inadequate").

During the 1980s and 1990s, DOJ issued seventeen Section 5 preclearance objections to proposed changes in Arizona election procedures, concluding that they had the purpose or effect of discriminating against Arizona's American Indian and/or Hispanic voters. *See* U.S. Dep't of Justice, *Voting Determination Letters for Arizona*, https://www.justice.gov/crt/voting-determination-letters-arizona (last updated Aug. 7, 2015). Three of these objections were for statewide redistricting plans, one in the 1980s and two in the 1990s. *Id.* Other objections concerned plans for seven of Arizona's fifteen counties. *Id.* (objections to plans for Apache, Cochise, Coconino, Graham, La Paz, Navajo, and Yuma Counties).

(G) Continuation to the Present Day

Arizona's pattern of discrimination against minority voters has continued to the present day.

(1) Practices and Policies

We highlight two examples of continued discriminatory practices and policies. First, as the district court found, the manner in which Maricopa County—home to over 60 percent of Arizona's population—administers elections has "been of considerable concern to minorities in recent years." *Reagan*, 329 F. Supp. 3d at 871; Berman at 20. During the 2016 presidential primary election, Maricopa County reduced the number of polling places by 70

percent, from 200 polling places in 2012 to just 60 polling places in 2016. Berman at 20. The reduction in number, as well as the locations, of the polling places had a disparate impact on minority voters. Rodden at 61–68. Hispanic voters were "under-served by polling places relative to the rest of the metro area," *id.* at 62, and Hispanic and African American voters were forced to travel greater distances to reach polling places than white, non-Hispanic voters. *Id.* at 64–68. The reduction in the number of polling places "resulted in extremely long lines of people waiting to vote—some for five hours—and many people leaving the polls, discouraged from voting by the long wait." Berman at 20.

Second, the district court found that Maricopa County has repeatedly misrepresented or mistranslated key information in Spanish-language voter materials. *Reagan*, 329 F. Supp. 3d at 875 ("Along with the State's hostility to bilingual education, Maricopa County has sometimes failed to send properly translated education[al] materials to its Spanish speaking residents, resulting in confusion and distrust from Hispanic voters.")*;* Berman at 20. In 2012, the official Spanish-language pamphlet in Maricopa County told Spanish-speaking voters that the November 6 election would be held on November 8. Berman at 20. The county did not make the same mistake in its English-language pamphlet. Four years later, Spanish-language ballots in Maricopa County provided an incorrect translation of a ballot proposition. *Id.*

(2) Voter Registration and Turnout

Voter registration of Arizona's minority citizens lags behind that of white citizens. In November 2016, close to 75 percent of white citizens were registered to vote in Arizona, compared to 57 percent of Hispanic citizens. *See* U.S. Census Bureau, *Reported Voting and Registration by Sex, Race, and Hispanic Origin for November 2016*, tbl. 4b.

Arizona has one of the lowest voter turnout rates in the United States. A 2005 study ranked Arizona forty-seventh out of the fifty States. *See* Ariz. State Univ., Morrison Inst. for Pub. Policy, *How Arizona Compares: Real Numbers and Hot Topics* 47 (2005) (relying on Census data); *see also* Tucker et al., *Voting Rights* at 359. In 2012, Arizona ranked forty-fourth in turnout for that year's presidential election. Rodden at 19.

The turnout rate for minority voters is substantially less than that for white voters. In 2002, 59.8 percent of registered Hispanic voters turned out for the election, compared to 72.4 percent of total registered voters. Tucker et al., *Voting Rights* at 359–60 (relying on Census data). In the 2012 presidential election, 39 percent of Arizona's Hispanic voting-age population and 46 percent of Arizona's African American voting-age population turned out for the election, compared to 62 percent of Arizona's white population. Rodden at 20–21. The national turnout rate for African Americans in that election was 66 percent. *Id.* In the 2000 and 2004 presidential elections, turnout of Arizona's American Indian voters was approximately 23 percentage points below the statewide average. Tucker et al., *Voting Rights* at 360.

(H) District Court's Assessment of Factor One

The district court recognized Arizona's history of discrimination, but minimized its significance. Quoting Dr. Berman, the court wrote:

> In sum, "[d]iscriminatory action has been more pronounced in some periods of state history than others . . . [and] each party (not just one party) has led the charge in discriminating against minorities over the years." Sometimes, however, partisan objectives are the motivating factor in decisions to take actions detrimental to the voting rights of minorities. "[M]uch of the discrimination that has been evidenced may well have in fact been the unintended consequence of a political culture that simply ignores the needs of minorities." Arizona's recent history is a mixed bag of advancements and discriminatory actions.

Id. at 875–76 (alterations in original).

The fact that each party in Arizona "has led the charge in discriminating against minorities" does not diminish the legal significance of that discrimination. Quite the contrary. That fact indicates that racial discrimination has long been deeply embedded in Arizona's political institutions and that both parties have discriminated when it has served their purposes. Further, the "mixed bag of advancements and discriminatory actions" in "Arizona's recent history" does not weigh in Arizona's favor. As Chief Judge Thomas wrote: "Rather, despite some advancements, most of which were mandated by courts or Congress

[through Section 5 preclearance], Arizona's history is marred by discrimination." *DNC*, 904 F.3d at 738 (Thomas, C.J., dissenting). The "history of official discrimination" in Arizona and its political subdivisions "touch[ing] the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process" is long, substantial, and unambiguous. *Gingles*, 478 U.S. at 36–37 (quoting S. Rep. at 28–29).

The district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

ii. Factor Two: Racially Polarized Voting Patterns

Voting in Arizona is racially polarized. The district court found, "Arizona has a history of racially polarized voting, which continues today." *Reagan*, 329 F. Supp. 3d at 876. In recent years, the base of the Republican party in Arizona has been white. Putting to one side "landslide" elections, in statewide general elections from 2004 to 2014, 59 percent of white Arizonans voted for Republican candidates, compared with 35 percent of Hispanic voters. The district court found that in the 2016 general election, exit polls "demonstrate that voting between non-minorities and Hispanics continues to be polarized along racial lines." *Id.* In the most recent redistricting cycle, the Arizona Independent Redistricting Commission "found that at least one congressional district and five legislative districts clearly exhibited racially polarized voting." *Id.*

Voting is particularly polarized when Hispanic and white candidates compete for the same office. In twelve non-landslide district-level elections in 2008 and 2010

between a Hispanic Democratic candidate and a white Republican candidate, an average of 84 percent of Hispanics, 77 percent of American Indians, and 52 percent of African Americans voted for the Hispanic candidate compared to an average of only 30 percent of white voters.

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iii. Factor Five: Effects of Discrimination

It is undisputed that "members of the minority group[s]" in Arizona "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37 (quoting S. Rep. at 28–29). The district court found, "Racial disparities between minorities and non-minorities in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona." *Reagan*, 329 F. Supp. 3d at 876.

The district court made factual findings in four key areas—education, poverty and employment, home ownership, and health. The district court concluded in each area that the effects of discrimination "hinder" minorities' ability to participate effectively in the political process.

First, the district court wrote:

> From 1912 until the Supreme Court's decision in *Brown v. Board of Education*, segregated education was widespread throughout Arizona

> and sanctioned by both the courts and the state legislature. In fact, the Tucson Public Schools only recently reached a consent decree with the DOJ over its desegregation plan in 2013. The practice of segregation also extended beyond schools; it was common place to have segregated public spaces such as restaurants, swimming pools, and theaters. Even where schools were not segregated, Arizona enacted restrictions on bilingual education. As recently as 2000, Arizona banned bilingual education with the passage of Proposition 203.
>
> Arizona has a record of failing to provide adequate funding to teach its non-English speaking students. This underfunding has taken place despite multiple court orders instructing Arizona to develop an adequate funding formula for its programs, including a 2005 order in which Arizona was held in contempt of court for refusing to provide adequate funding for its educational programs. "According to the Education Law Center's latest National Report Card that provided data for 2013, Arizona ranked 47th among the states in per-student funding for elementary and secondary education."

Id. at 874–75 (internal citations omitted).

White Arizonans "remain more likely than Hispanics, Native Americans, and African Americans to graduate from high school, and are nearly three times more likely to have a bachelor's degree than Hispanics and Native Americans." *Id.* at 868. "[I]n a

recent survey, over 22.4 percent of Hispanics and 11.2 percent of Native Americans rated themselves as speaking English less than 'very well,' as compared to only 1.2 percent of non-minorities." *Id.* The district court found that, due to "lower levels of [English] literacy and education, minority voters are more likely to be unaware of certain technical [voting] rules, such as the requirement that early ballots be received by the county recorder, rather than merely postmarked, by 7:00 p.m. on Election Day." *Id.*

Second, Hispanics and African Americans in Arizona live in poverty at nearly two times the rate of whites. American Indians live in poverty at three times the rate of whites. *Id.* "Wages and unemployment rates for Hispanics, African Americans, and Native Americans consistently have exceeded non-minority unemployment rates for the period of 2010 to 2015." *Id.* The district court found that minority voters are more likely to work multiple jobs, less likely to own a car, and more likely to lack reliable access to transportation, *id.* at 869, all of which make it more difficult to travel to a polling place—or between an incorrect polling place and a correct polling place.

Third, the district court found that "[i]n Arizona, 68.9 percent of non-minorities own a home, whereas only 32.3 percent of African Americans, 49 percent of Hispanics, and 56.1 percent of Native Americans do so." *Id.* at 868. Lower rates of homeownership and correspondingly higher rates of renting and residential mobility contribute to higher rates of OOP voting.

Fourth, the district court found that "[a]s of 2015, Hispanics, Native Americans, and African Americans

fared worse than non-minorities on a number of key health indicators." *Id.* at 868–69. "Native Americans in particular have much higher rates of disability than non-minorities, and Arizona counties with large Native American populations have much higher rates of residents with ambulatory disabilities." *Id.* at 869. "For example, '17 percent of Native Americans are disabled in Apache County, 22 percent in Navajo County, and 30 percent in Coconino County.'" *Id.* "Further, '11 percent [of individuals] have ambulatory difficulties in Apache County, 13 percent in Navajo County, and 12 percent in Coconino County, all of which contain significant Native American populations and reservations.'" *Id.* (alteration in original). Witnesses credibly testified that ambulatory disabilities—both alone and combined with Arizona's transportation disparities—make traveling to and between polling locations difficult.

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iv. Factor Six: Racial Appeals in Political Campaigns

Arizona's "political campaigns have been characterized by overt [and] subtle racial appeals" throughout its history. *Gingles*, 478 U.S. at 37 (quoting S. Rep. at 28–29). The district court found that "Arizona's racially polarized voting has resulted in racial appeals in campaigns." *Reagan*, 329 F. Supp. 3d at 876.

For example, when Raul Castro, a Hispanic man, successfully ran for governor in the 1970s, Castro's opponent, a white man, urged voters to support him instead because "he looked like a governor." *Id.* "In that

same election, a newspaper published a picture of Fidel Castro with a headline that read 'Running for governor of Arizona.'" *Id.* In his successful 2010 campaign for State Superintendent of Public Education, John Huppenthal, a white man running against a Hispanic candidate, ran an advertisement in which the announcer said that Huppenthal was "one of us," was opposed to bilingual education, and would "stop La Raza," an influential Hispanic civil rights organization. *Id.* When Maricopa County Attorney Andrew Thomas, a white man, ran for governor in 2014, he ran an advertisement describing himself as "the only candidate who has stopped illegal immigration." *Id.* The advertisement "simultaneously show[ed] a Mexican flag with a red strikeout line through it superimposed over the outline of Arizona." *Id.* Further, "racial appeals have been made in the specific context of legislative efforts to limit ballot collection." *Id.* The district court specifically referred to the "racially charged" LaFaro Video, falsely depicting a Hispanic man, characterized as a "thug," "acting to stuff the ballot box." *Id.*

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

v. Factor Seven: Number of Minorities in Public Office

The district court recognized that there has been a racial disparity in elected officials but minimized its importance. The court wrote, "Notwithstanding racially polarized voting and racial appeals, the disparity in the number of minority elected officials in Arizona has declined." *Id.* at 877. Citing an expert report by Dr.

Donald Critchlow—an expert whose opinion the court otherwise afforded "little weight," *id.* at 836—the court wrote, "Arizona has been recognized for improvements in the number of Hispanics and Native Americans registering and voting, as well as in the overall representation of minority elected officials," *id.* at 877.

As recounted above, it is undisputed that American Indian, Hispanic, and African American citizens are under-represented in public office in Arizona. Minorities make up 44 percent of Arizona's total population, but they hold 25 percent of Arizona's elected offices. *Id.* Minorities hold 22 percent of state congressional seats and 9 percent of judgeships. No American Indian or African American has ever been elected to represent Arizona in the United States House of Representatives. Only two minorities have been elected to statewide office in Arizona since the passage of the VRA. Arizona has never elected an American Indian candidate to statewide office. No American Indian, Hispanic, or African American candidate has ever been elected to serve as a United States Senator representing Arizona.

Arizona's practice of entirely discarding OOP ballots is especially important in statewide and United States Senate elections. Some votes for local offices may be improperly cast in an OOP ballot, given that the voter has cast the ballot in the wrong precinct. But no vote for statewide office or for the United States Senate is ever improperly cast in an OOP ballot. Arizona's practice of wholly discarding OOP ballots thus has the effect of disproportionately undercounting minority votes, by a factor of two to one, precisely where the

problem of under-representation in Arizona is most acute.

The district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

vi. Factor Eight: Officials' Responsiveness to the Needs of Minority Groups

The district court found that "Plaintiffs' evidence . . . is insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups." *Id*. In support of its finding, the court cited the activity of one organization, the Arizona Citizens Clean Elections Commission, which "engages in outreach to various communities, including the Hispanic and Native American communities, to increase voter participation" and "develops an annual voter education plan in consultation with elections officials and stakeholders," and whose current Chairman is an enrolled member of the San Carlos Apache Tribe. *Id.*

The district court's finding ignores extensive undisputed evidence showing that Arizona has significantly underserved its minority population. "Arizona was the last state in the nation to join the Children's Health Insurance Program, which may explain, in part, why forty-six states have better health insurance coverage for children." *DNC*, 904 F.3d at 740 (Thomas, C.J., dissenting). Further, "Arizona's public schools are drastically underfunded; in fact, in 2016 Arizona ranked 50th among the states and the District of Columbia in per pupil spending on public elementary and secondary education." *Id.* "Given the well-

documented evidence that minorities are likelier to depend on public services[,] . . . Arizona's refusal to provide adequate state services demonstrates its nonresponsiveness to minority needs." *Id.*; *cf. Myers v. United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (holding that the district court clearly erred when it ignored evidence contradicting its findings).

Further, the district court's finding is contradicted elsewhere in its own opinion. Earlier in its opinion, the court had written that Arizona has a "political culture that simply ignores the needs of minorities." *Id.* at 876 (citation omitted). Later in its opinion, the court referred to "Arizona's history of advancing partisan objectives with the unintended consequence of ignoring minority interests." *Id.* at 882.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs's favor.

vii. Factor Nine: Tenuousness of Justification of the Policy Underlying the Challenged Restriction

The ninth Senate factor is "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37 (quoting S. Rep. at 28). The district court found that Arizona's policy of entirely discarding OOP ballots is justified by the importance of Arizona's precinct-based system of elections. The court held:

> Precinct-based voting helps Arizona counties estimate the number of voters who may be expected at any particular precinct, allows for better allocation of resources and personnel,

> improves orderly administration of elections, and reduces wait times. The precinct-based system also ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote, thereby promoting voting for local candidates and issues and making ballots less confusing. Arizona's policy to not count OOP ballots is one mechanism by which it strictly enforces this system to ensure that precinct-based counties maximize the system's benefits. This justification is not tenuous.

Reagan, 329 F. Supp. 3d at 878.

The court misunderstood the nature of Plaintiffs' challenge. Plaintiffs do not challenge Arizona's precinct-based system of voting. Indeed, their challenge assumes both its importance and its continued existence. Rather, their challenge is to Arizona's policy, within that system, of entirely discarding OOP ballots. The question before the district court was not the justification for Arizona's precinct-based system. The question, rather, was the justification for Arizona's policy of entirely discarding OOP ballots.

There is no finding by the district court that would justify, on any ground, Arizona's policy of entirely discarding OOP ballots. There is no finding that counting or partially counting OOP ballots would threaten the integrity of Arizona's precinct-based system. Nor is there a finding that Arizona has ever sought to minimize the number of OOP ballots. The lack of such findings is not surprising given the extreme disparity between OOP voting in Arizona and

such voting in other states, as well as Arizona's role in causing voters to vote OOP by, for example, frequently changing the location of polling places.

The only plausible justification for Arizona's OOP policy would be the delay and expense entailed in counting OOP ballots, but in its discussion of the Senate factors, the district court never mentioned this justification. Indeed, the district court specifically found that "[c]ounting OOP ballots is administratively feasible." *Id.* at 860.

Twenty States, including Arizona's neighboring States of California, Utah, and New Mexico, count OOP ballots. *Id.*; Cal. Elec. Code §§ 14310(a)(3), 14310(c)(3), 15350; Utah Code Ann. § 20A-4-107(1)(b)(iii), 2(a)(ii), 2(c); N.M. Stat. Ann § 1-12-25.4(F); N.M. Admin. Code 1.10.22.9(N). The district court wrote: "Elections administrators in these and other states have established processes for counting only the offices for which the OOP voter is eligible to vote." *Reagan*, 329 F. Supp. 3d at 861. "Some states, such as New Mexico, use a hand tally procedure, whereby a team of elections workers reviews each OOP ballot, determines the precinct in which the voter was qualified to vote, and marks on a tally sheet for that precinct the votes cast for each eligible office." *Id.*; *see* N.M. Admin Code 1.10.22.9(H)–(N). "Other states, such as California, use a duplication method, whereby a team of elections workers reviews each OOP ballot, determines the precinct in which the voter was qualified to vote, obtains a new paper ballot for the correct precinct, and duplicates the votes cast on the OOP ballot onto the ballot for the correct precinct." *Reagan*, 329 F. Supp. 3d

at 861. "Only the offices that appear on both the OOP ballot and the ballot for the correct precinct are copied. The duplicated ballot then is scanned through the optical scan voting machine and electronically tallied." *Id.*

Arizona already uses a duplication system, similar to that used in California, for provisional ballots cast by voters eligible to vote in federal but not state elections, as well as for damaged or mismarked ballots that cannot be read by an optical scanner. *Id.* The district court briefly discussed the time that might be required to count or partially count OOP ballots, but it did not connect its discussion to its consideration of the Senate factors. The court cited testimony of a Pima County election official that the county's duplication procedure "takes about twenty minutes per ballot." *Id.* The court did not mention that this same official had stated in his declaration that the procedure instead takes fifteen minutes per ballot. The court also did not mention that a California election official had testified that it takes a very short time to count or partially count the valid votes on an OOP ballot. That official testified that it takes "several minutes" in California to confirm the voter's registration—which is done for all provisional ballots, in Arizona as well as in California. Once that is done, the official testified, it takes one to three minutes to duplicate the ballot.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs' favor.

viii. Assessment of Senate Factors

The district court's "overall assessment" of the Senate factors was: "In sum, of the germane Senate Factors, the Court finds that some are present in Arizona and others are not." *Id.* at 878. Based on this assessment, the court held that Plaintiffs had not carried their burden at step two. The district court clearly erred in so holding. The district court clearly erred in minimizing the strength in favor of Plaintiffs of Senate factors one (official history of discrimination) and seven (number of minorities in public office). Further, the district court clearly erred in finding that Senate factors eight (officials' responsiveness to the needs of minority groups) and nine (tenuousness of the justification of the policy underlying the challenged provision) do not favor Plaintiffs. Plaintiffs have successfully shown that all of the considered Senate factors weigh in their favor. Most important, plaintiffs have shown that the most pertinent factors, five and nine, weigh very strongly in their favor.

c. Summary

We hold that the district court clearly erred in holding that Plaintiffs' challenge to Arizona's OOP policy failed under the results test. We hold that Plaintiffs have carried their burden at both steps one and two. First, they have shown that Arizona's OOP policy imposes a significant disparate burden on its American Indian, Hispanic, and African American citizens, resulting in the "denial or abridgement of the right" of its citizens to vote "on account of race or color." 52 U.S.C. § 10301(a). Second, they have shown that, under the "totality of circumstances," the

discriminatory burden imposed by the OOP policy is in part caused by or linked to "social and historical conditions" that have or currently produce "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" and to participate in the political process. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b).

We therefore hold that Arizona's OOP policy violates the results test of Section 2 of the Voting Rights Act.

3. H.B. 2023 and the Results Test

Uncontested evidence in the district court established that, prior to the enactment of H.B. 2023, a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots. Uncontested evidence also established that, beginning in 2011, Arizona Republicans made sustained efforts to limit or eliminate third-party ballot collection. The question is whether the district court clearly erred in holding that H.B. 2023 does not violate the "results test" of Section 2.

a. Step One: Disparate Burden

The question at step one is whether H.B. 2023 results in a disparate burden on a protected class. The district court held that Plaintiffs failed at step one. The district court clearly erred in so holding.

Extensive and uncontradicted evidence established that prior to the enactment of H.B. 2023, third parties collected a large and disproportionate number of early ballots from minority voters. Neither the quantity nor

the disproportion was disputed. Numerous witnesses testified without contradiction to having personally collected, or to having personally witnessed the collection of, thousands of early ballots from minority voters. There is no evidence that white voters relied to any significant extent on ballot collection by third parties.

The district court recognized the disparity in third-party ballot collection between minority and white citizens. It wrote that "[t]he Democratic Party and community advocacy organizations . . . focused their ballot collection efforts on low-efficacy voters, who trend disproportionately minority." *Reagan*, 329 F. Supp. 3d at 870. "In contrast," the court wrote, "the Republican Party has not significantly engaged in ballot collection as a GOTV strategy." *Id.*

The district court nonetheless held that this evidence was insufficient to establish a violation at step one. To justify its holding, the court wrote, "[T]he Court finds that Plaintiffs' circumstantial and anecdotal evidence is insufficient to establish a cognizable disparity under § 2." *Id.* at 868. The court wrote further:

> Considering the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions, it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the

> electoral opportunities of minorities as compared to non-minorities.

Id. at 871.

First, the court clearly erred in discounting the evidence of third-party ballot collection as merely "circumstantial and anecdotal." The evidence of third-party ballot collection was not "circumstantial." Rather, as recounted above, it was direct evidence from witnesses who had themselves acted as third-party ballot collectors, had personally supervised third-party ballot collection, or had personally witnessed third-party ballot collection by others. Nor was the evidence merely "anecdotal." As recounted above, numerous witnesses provided consistent and uncontradicted testimony about third-party ballot collection they had done, supervised, or witnessed. This evidence established that many thousands of early ballots were collected from minority voters by third parties. The court itself found that white voters did not significantly rely on third-party ballot collection. No better evidence was required to establish that large and disproportionate numbers of early ballots were collected from minority voters.

Second, the court clearly erred by comparing the number of early ballots collected from minority voters to the much greater number of all ballots cast "without the assistance of third parties," and then holding that the relatively smaller number of collected early ballots did not cause a "meaningful inequality." *Id.* at 871. In so holding, the court repeated the clear error it made in comparing the number of OOP ballots to the total number of all ballots cast. Just as for OOP ballots, the

number of ballots collected by third parties from minority voters surpasses any de minimis number.

We hold that H.B. 2023 results in a disparate burden on minority voters, and that the district court clearly erred in holding otherwise. We accordingly hold that Plaintiffs have succeeded at step one of the results test.

b. Step Two: Senate Factors

The district court did not differentiate between Arizona's OOP policy and H.B. 2023 in its discussion of step two. Much of our analysis of the Senate factors for Arizona's OOP policy applies with equal force to the factors for H.B. 2023. Again, we regard Senate factors five (the effects of discrimination in other areas on minorities access to voting) and nine (the tenuousness of the justification for the challenged voting practices) as particularly important, given the nature of Plaintiffs' challenge to H.B. 2023. We also regard factor one (history of official discrimination) as important, as it strongly supports our conclusion under factor five. Though "not essential," *Gingles*, 478 U.S. at 48 n.15, the other less important factors provide "helpful background context." *Husted*, 768 F.3d at 555.

We do not repeat here the entirety of our analysis of Arizona's OOP policy. Rather, we incorporate that analysis by reference and discuss only the manner in which the analysis is different for H.B. 2023.

i. Factor One: History of Official Discrimination Connected to Voting

We recounted above Arizona's long history of race-based discrimination in voting. H.B. 2023 grows directly out of that history. During the Republicans' 2011 attempt to limit ballot collection by third parties, Arizona was still subject to preclearance under Section 5. When DOJ asked for more information about whether the relatively innocuous ballot-collection provision of S.B. 1412 had the purpose or would have the effect of denying minorities the right to vote and requested more information, Arizona withdrew the preclearance request. It did so because there was evidence in the record that the provision intentionally targeted Hispanic voters. In 2013, public opposition threatened to repeal H.B. 2305 by referendum. If passed, the referendum would have required that any future bill on the same topic pass the legislature by a supermajority. Republicans repealed H.B. 2305 rather than face a referendum. Finally, after the Supreme Court's decision in *Shelby County* eliminated preclearance, Arizona enacted H.B. 2023, making third-party ballot collection a felony. The campaign was marked by race-based appeals, most prominently in the LaFaro Video described above.

As it did with respect to OOP voting, the district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

ii. Factor Two: Racially Polarized Voting Patterns

H.B. 2023 connects directly to racially polarized voting patterns in Arizona. The district court found

that "H.B. 2023 emerged in the context of racially polarized voting." *Reagan*, 329 F. Supp. 3d at 879. Senator Shooter, who introduced the bill that became S.B. 1412—the predecessor to H.B. 2023—was motivated by the "high degree of racial polarization in his district" and introduced the bill following a close, racially polarized election. *Id.*

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iii. Factor Five: Effects of Discrimination

H.B. 2023 is closely linked to the effects of discrimination that "hinder" the ability of American Indian, Hispanic, and African American voters "to participate effectively in the political process." *Gingles*, 478 U.S. at 37. The district court found that American Indian, Hispanic, and African American Arizonans "are significantly less likely than non-minorities to own a vehicle, more likely to rely upon public transportation, more likely to have inflexible work schedules, and more likely to rely on income from hourly wage jobs." *Reagan*, 329 F. Supp. 3d at 869. In addition, "[r]eady access to reliable and secure mail service is nonexistent in some minority communities." *Id.* Minority voters in rural communities disproportionately lack access to outgoing mail, while minority voters in urban communities frequently encounter unsecure mailboxes and mail theft. *Id.* These effects of discrimination hinder American Indian, Hispanic, and African American voters' ability to return early ballots without the assistance of third-party ballot collection.

The district court did not clearly err in assessing the strength of this factor in Plaintiffs' favor.

iv. Factor Six: Racial Appeals in Political Campaigns

The enactment of H.B. 2023 was the direct result of racial appeals in a political campaign. The district court found that "racial appeals [were] made in the specific context of legislative efforts to limit ballot collection." *Id.* at 876. Proponents of H.B. 2023 relied on "overt or subtle racial appeals," *Gingles*, 478 U.S. at 37, in advocating for H.B. 2023, including the "racially tinged" LaFaro Video, *Reagan*, 329 F. Supp. 3d at 876–77 (characterizing the LaFaro Video as one of the primary motivators for H.B. 2023). The district court concluded, "[Senator] Shooter's allegations and the LaFaro video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting." *Reagan*, 329 F. Supp. 3d at 880.

The district court did not clearly err in assessing the strength of this factor in Plaintiff's favor.

v. Factor Seven: Number of Minorities in Public Office

Because Arizona's OOP policy had a particular connection to the election of minorities to statewide office and to the United States Senate, we concluded that the factor of minorities in public office favored Plaintiffs. That particular connection to statewide office does not exist between H.B. 2023 and election of minorities. However, H.B. 2023 is likely to have a pronounced effect in rural counties with significant American Indian and Hispanic populations who

disproportionately lack reliable mail and transportation services, and where a smaller number of votes can have a significant impact on election outcomes. In those counties, there is likely to be a particular connection to election of American Indian and Hispanic candidates to public office.

As it did with respect to OOP voting, the district court clearly erred in minimizing the strength of this factor in Plaintiffs' favor.

vi. Factor Eight: Officials' Responsiveness to the Needs of Minority Groups

The district court found that "Plaintiffs' evidence . . . is insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups." *Id.* at 877. As discussed above, this finding ignores extensive evidence to the contrary and is contradicted by the court's statements elsewhere in its opinion.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs' favor.

vii. Factor Nine: Tenuousness of Justification of the Policy Underlying the Challenged Restriction

The district court relied on two justifications for H.B. 2023: That H.B. 2023 is aimed at preventing ballot fraud "by creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction"; and that H.B. 2023 is aimed at improving and maintaining "public confidence in election integrity." *Id.* at 852. We address these justifications in turn.

First, third-party ballot collection was permitted for many years in Arizona before the passage of H.B. 2023. No one has ever found a case of voter fraud connected to third-party ballot collection in Arizona. This has not been for want of trying. The district court described the Republicans' unsuccessful attempts to find instances of fraud:

> The Republican National Lawyers Association ("RNLA") performed a study dedicated to uncovering cases of voter fraud between 2000 and 2011. The study found no evidence of ballot collection or delivery fraud, nor did a follow-up study through May 2015. Although the RNLA reported instances of absentee ballot fraud, none were tied to ballot collection and delivery. Likewise, the Arizona Republic conducted a study of voter fraud in Maricopa County and determined that, out of millions of ballots cast in Maricopa County from 2005 to 2013, a total of 34 cases of fraud were prosecuted. Of these, 18 involved a felon voting without her rights first being restored. Fourteen involved non-Arizona citizens voting. The study uncovered no cases of fraud perpetrated through ballot collection.

Id. at 853 (internal citations omitted).

The district court wrote, "[T]here has never been a case of voter fraud associated with ballot collection charged in Arizona." *Id.* at 852. "No specific, concrete example of voter fraud perpetrated through ballot collection was presented by or to the Arizona legislature during the debates on H.B. 2023 or its

predecessor bills." *Id.* at 852–53. "No Arizona county produced evidence of confirmed ballot collection fraud in response to subpoenas issued in this case, nor has the Attorney General's Office produced such information." *Id.* at 853.

Ballot-collection-related fraud was already criminalized under Arizona law when H.B. 2023 was enacted. Collecting and failing to turn in someone else's ballot was already a class 5 felony. Ariz. Rev. Stat. § 16-1005(F). Marking someone else's ballot was already a class 5 felony. *Id.* § 16-1005(A). Selling one's own ballot, possessing someone else's ballot with the intent to sell it, knowingly soliciting the collection of ballots by misrepresenting one's self as an election official, and knowingly misrepresenting the location of a ballot drop-off site were already class 5 felonies. *Id.* § 16-1005(B)–(E). These criminal prohibitions are still in effect. Arizona also takes measures to ensure the security of early ballots, such as using "tamper evident envelopes and a rigorous voter signature verification procedure." *Reagan*, 329 F. Supp. 3d at 854.

The history of H.B. 2023 shows that its proponents had other aims in mind than combating fraud. H.B. 2023 does not forbid fraudulent third-party ballot collection. It forbids *non-fraudulent* third-party ballot collection. To borrow an understated phrase, the anti-fraud rationale advanced in support of H.B. 2023 "seems to have been contrived." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

Second, we recognize the importance of public confidence in election integrity. We are aware that the federal bipartisan Commission on Federal Election

Reform, charged with building public confidence, recommended *inter alia* that States "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005). We are aware of the recent case of voter fraud in North Carolina involving collection and forgery of absentee ballots by a political operative hired by a Republican candidate. And we are aware that supporters of H.B. 2023 and its predecessor bills sought to convince Arizona voters, using false allegations and racial innuendo, that third-party ballot collectors in Arizona have engaged in fraud.

Without in the least discounting either the common sense of the bipartisan commission's recommendation or the importance of public confidence in the integrity of elections, we emphasize, first, that the Supreme Court has instructed us in Section 2 cases to make an "intensely local appraisal." *Gingles*, 478 U.S. at 78. The third-party ballot collection fraud case in North Carolina has little bearing on the case before us. We are concerned with Arizona, where third-party ballot collection has had a long and honorable history, and where the acts alleged in the criminal indictment in North Carolina were illegal under Arizona law before the passage of H.B. 2023, and would still be illegal if H.B. 2023 were no longer the law.

We emphasize, further, that if some Arizonans today distrust third-party ballot collection, it is because of the fraudulent campaign mounted by proponents of H.B. 2023. Those proponents made strenuous efforts to

persuade Arizonans that third-party ballot collectors have engaged in election fraud. To the degree that there has been any fraud, it has been the false and race-based claims of the proponents of H.B. 2023. It would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation.

The district court clearly erred in finding that this factor does not weigh in Plaintiffs' favor. This factor either weighs in Plaintiffs' favor or is, at best, neutral.

viii. Assessment

The district court made the same overall assessment of the Senate factors in addressing H.B. 2023 as in addressing Arizona's policy of discarding OOP ballots. As it did with respect to OOP ballots, the court concluded that Plaintiffs had not carried their burden at step two. Here, too, the district court's conclusion was clearly erroneous. Contrary to the court's conclusion, Plaintiffs have successfully shown that six of the Senate factors weigh in their favor and that the remaining factor weighs in their favor or is neutral.

c. Summary

We hold that the district court clearly erred in holding that Plaintiffs' challenge to H.B. 2023 failed under the results test. We hold that Plaintiffs have carried their burden at both steps one and two. First, they have shown that H.B. 2023 imposes a disparate burden on American Indian, Hispanic, and African American citizens, resulting in the "denial or

abridgement of the right" of its citizens to vote "on account of race or color." 52 U.S.C. § 10301(a). Second, they have shown that, under the "totality of circumstances," the discriminatory burden imposed by H.B. 2023 is in part caused by or linked to "social and historical conditions" that have or currently produce "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives" and to participate in the political process. *Gingles*, 478 U.S. at 47; 52 U.S.C. § 10301(b).

We therefore conclude that H.B. 2023 violates the results test of Section 2 of the Voting Rights Act.

B. Intent Test: H.B. 2023

As indicated above, uncontested evidence in the district court established that before enactment of H.B. 2023, a large and disproportionate number of minority voters relied on third parties to collect and deliver their early ballots. Uncontested evidence also established that, beginning in 2011, Arizona Republicans made sustained efforts to outlaw third-party ballot collection. After a racially charged campaign, they finally succeeded in passing H.B. 2023. The question is whether the district court clearly erred in holding that H.B. 2023 does not violate the "intent test" of Section 2.

1. The Intent Test

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), provides the framework for analyzing a claim of intentional discrimination under Section 2. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d

204, 220–21 (4th Cir. 2016). Under *Arlington Heights*, Plaintiffs have an initial burden of providing "[p]roof of racially discriminatory intent or purpose." *Arlington Heights*, 429 U.S. at 265. Plaintiffs need not show that discriminatory purpose was the "sole[]" or even a "primary" motive for the legislation. *Id.* Rather, Plaintiffs need only show that discriminatory purpose was "*a* motivating factor." *Id.* at 265–66 (emphasis added).

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266. "[D]iscriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Because "[o]utright admissions of impermissible racial motivation are infrequent[,] . . . plaintiffs often must rely upon other evidence," including the broader context surrounding passage of the legislation. *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). "In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for '[d]iscrimination today is more subtle than the visible methods used in 1965.'" *N.C. State Conference of NAACP*, 831 F.3d at 221 (quoting H.R. Rep. No. 109–478, at 6 (2006)).

Arlington Heights provided a non-exhaustive list of factors that a court should consider. *Arlington Heights*, 429 U.S. at 266. The factors include (1) the historical

background; (2) the sequence of events leading to enactment, including any substantive or procedural departures from the normal legislative process; (3) the relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group. *Id.* at 266–68.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In determining whether a defendant's burden has been carried, "courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *N.C. State Conference of NAACP*, 831 F.3d at 221 (emphases in original) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982)). "In the context of a § 2 discriminatory intent analysis, one of the critical background facts of which a court must take notice is whether voting is racially polarized." *Id.* "[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *Id.* at 222.

2. H.B. 2023 and the Intent Test

a. *Arlington Heights* Factors and Initial Burden of Proof

The district court wrote, "Having considered [the *Arlington Heights*] factors, the Court finds that H.B.

2023 was not enacted with a racially discriminatory purpose." *Reagan*, 329 F. Supp. 3d at 879. The court then went on to discuss each of the four factors, but did not attach any particular weight to any of them. In holding that the Plaintiffs had not shown that discriminatory purpose was "a motivating factor," the district court clearly erred.

We address the *Arlington Heights* factors in turn.

i. Historical Background

"A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *N.C. State Conference of NAACP*, 831 F.3d at 223–24; *see Arlington Heights*, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes."). As recounted above, the Arizona legislature has a long history of race-based discrimination, disenfranchisement, and voter suppression, dating back to Arizona's territorial days. Further, the history of H.B. 2023 itself reveals invidious purposes.

In addressing the "historical background" factor, the district court mentioned briefly the various legislative efforts to restrict third-party ballot collection that had been "spearheaded" by Senator Shooter, described briefly Senator Shooter's allegations of third-party ballot fraud, and alluded to the "racially-tinged" LaFaro Video. *Reagan*, 329 F. Supp. 3d at 879–80. But the district court discounted their importance. We

discuss the court's analysis below, under the third *Arlington Heights* factor.

ii. Sequence of Events Leading to Enactment

"The specific sequence of events leading up to the challenged decision . . . may shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. We recounted above the sequence of events leading to the enactment of H.B. 2023. The district court acknowledged this history but again discounted its importance. We discuss the court's analysis below, under the third *Arlington Heights* factor.

iii. Relevant Legislative History

"The legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body[.]" *Id.* at 268. The district court found that legislators voted for H.B. 2023 in response to the "unfounded and often farfetched allegations of ballot collection fraud" made by former Senator Shooter, and the "racially-tinged LaFaro Video." *Reagan*, 329 F. Supp. 3d at 880. As Chief Judge Thomas wrote: "Because there was 'no direct evidence of ballot collection fraud . . . presented to the legislature or at trial,' the district court understood that Shooter's allegations and the LaFaro Video were *the* reasons the bill passed." *DNC*, 904 F.3d at 748 (Thomas, C.J., dissenting) (quoting *Reagan*, 329 F. Supp. 3d at 880) (emphasis in original).

Senator Shooter was one of the major proponents of the efforts to limit third-party ballot collection and was influential in the passage of H.B. 2023. *Reagan*, 329 F. Supp. 3d at 879. According to the district court,

Senator Shooter made "demonstrably false" allegations of ballot collection fraud. *Id.* at 880. Senator Shooter's efforts to limit ballot collection were motivated in substantial part by the "high degree of racial polarization in his district." *Id.* at 879. He was "motivated by a desire to eliminate" the increasingly effective efforts to ensure that Hispanic votes in his district were collected, delivered, and counted. *Id.*

The LaFaro Video provides even stronger evidence of racial motivation. Maricopa County Republican Chair LaFaro produced a video showing "a man of apparent Hispanic heritage"—a volunteer with a get-out-the-vote organization—apparently dropping off ballots at a polling place. *Id.* at 876. LaFaro's voice-over narration included unfounded statements, *id.* at 877, "that the man was acting to stuff the ballot box" and that LaFaro "knew that he was a thug," *id.* at 876. The video was widely distributed. It was "shown at Republican district meetings," "posted on Facebook and YouTube," and "incorporated into a television advertisement." *Id.* at 877.

The district court used the same rationale to discount the importance of all of the first three *Arlington Heights* factors. It pointed to the "sincere belief," held by some legislators, that fraud in third-party ballot collection was a problem that needed to be addressed. The district court did so even though it recognized that the belief was based on the false and race-based allegations of fraud by Senator Shooter and other proponents of H.B. 2023. The court wrote: "Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that

ballot collection presented opportunities for fraud that did not exist for in person voting[.]" *Id.* at 880.

We accept the district court's conclusion that some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed. However, as the district court found, that sincere belief had been fraudulently created by Senator Shooter's false allegations and the "racially-tinged" LaFaro video. Even though some legislators did not themselves have a discriminatory purpose, that purpose may be attributable to their action under the familiar "cat's paw" doctrine. The doctrine is based on the fable, often attributed to Aesop, in which a clever monkey induces a cat to use its paws to take chestnuts off of hot coals for the benefit of the monkey.

For example, we wrote in *Mayes v. Winco Holdings, Inc.*, 846 F.3d 1274 (9th Cir. 2017):

> [T]he animus of a supervisor can affect an employment decision if the supervisor "influenced or participated in the decisionmaking process." *Dominguez-Curry* [*v. Nev. Transp. Dep't*], 424 F.3d [1027,] 1039–40 [(9th Cir. 2017)]. Even if the supervisor does not participate in the ultimate termination decision, a "supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011).

Id. at 1281; *see also Poland v. Chertoff* , 494 F.3d 1174, 1182 (9th Cir. 2007) ("[I]f a subordinate . . . sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process.").

The good-faith belief of these sincere legislators does not show a lack of discriminatory intent behind H.B. 2023. Rather, it shows that well meaning legislators were used as "cat's paws." Convinced by the false and race-based allegations of fraud, they were used to serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies.

We hold that the district court clearly erred in discounting the importance of the first three *Arlington Heights* factors. We hold that all three factors weigh in favor of showing that discriminatory intent was a motivating factor in enacting H.B. 2023.

iv. Disparate Impact on a Particular Racial Group

"The impact of the official action[,] whether it 'bears more heavily on one race than another,' may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights*, 429 U.S. at 266 (internal citation omitted). As described above, uncontested evidence

shows that H.B. 2023 has an adverse and disparate impact on American Indian, Hispanic, and African American voters. The district court found that the legislature "was aware" of the impact of H.B. 2023 on what the court called "low-efficacy minority communities." *Reagan*, 329 F. Supp. 3d at 881.

It appears that the district court weighed this factor in favor of showing discriminatory intent as a motivating factor in enacting H.B. 2023. The court did not clearly err in so doing.

v. Assessment

We hold that the district court clearly erred in holding that Plaintiffs failed to carry their initial burden of proof of showing that racial discrimination was a motivating factor leading to the enactment of H.B. 2023. We hold that all four of the *Arlington Heights* factors weigh in favor of Plaintiffs. Our holding does not mean that the majority of the Arizona state legislature "harbored racial hatred or animosity toward any minority group." *N.C. State Conference of NAACP*, 831 F.3d at 233. "But the totality of the circumstances"—Arizona's long history of race-based voting discrimination; the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona—"cumulatively and

unmistakably reveal" that racial discrimination was *a* motivating factor in enacting H.B. 2023. *Id*.

b. Would H.B. 2023 Otherwise Have Been Enacted

At the second step of the *Arlington Heights* analysis, Arizona has the burden of showing that H.B. 2023 would have been enacted without racial discrimination as a motivating factor. Because the district court held that Plaintiffs had not carried their initial burden, it did not reach the second step of the *Arlington Heights* analysis.

Although there is no holding of the district court directed to *Arlington Heights*' second step, the court made a factual finding that H.B. 2023 would not have been enacted without racial discrimination as a motivating factor. The court specifically found that H.B. 2023 would not have been enacted without Senator Shooter's and LaFaro's false and race-based allegations of voter fraud. The court wrote, "The legislature was motivated by a misinformed belief that ballot collection fraud was occurring, but a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Reagan*, 329 F. Supp. 3d at 882. That is, members of the legislature, based on the "misinformed belief" created by Shooter, LaFaro, and their allies and serving as their "cat's paws," voted to enact H.B. 2023. *See Poland*, 494 F.3d at 1182. Based on the court's finding, we hold that Arizona has not carried its burden of showing that H.B. 2023 would have been enacted without the motivating factor of racial discrimination.

c. Summary

We hold that the district court clearly erred in holding that Plaintiffs failed to establish that H.B. 2023 violates the intent test of Section 2 of the VRA. A holding that H.B. 2023 violates the intent test of Section 2 necessarily entails a holding that it also violates the Fifteenth Amendment.

III. Response to Dissents

We respectfully disagree with our dissenting colleagues. For the most part, our response to their contentions is contained in the body of our opinion and needs no elaboration. Several contentions, however, merit a specific response.

A. Response to the First Dissent

Our first dissenting colleague, Judge O'Scannlain, makes several mistakes.

First, our colleague contends that H.B. 2023 does not significantly change Arizona law. Our colleague writes:

> For years, Arizona has restricted who may handle early ballots. Since 1992, Arizona has prohibited anyone but the elector himself from possessing "that elector's *unvoted* absentee ballot." 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390) (West). In 2016, Arizona enacted *a parallel regulation*, H.B. 2023 (the "ballot-collection" policy), concerning the collection of early ballots.

Diss. Op. at 116–117 (emphases added).

Our colleague appends a footnote to the first sentence in the passage just quoted:

> The majority's effort to deny history can easily be dismissed. Maj. Op. 104–105. As Judge Bybee's dissent ably recounts, not only Arizona but 21 other states have restricted early balloting for years. Bybee, J. Diss. Op. 157–158.

Our colleague fails to recognize the distinction between "unvoted" and "voted" ballots. Contrary to our colleague's contention, H.B. 2023 is not "a parallel regulation" to already existing Arizona law. Under prior Arizona law, possession of an "unvoted absentee ballot" was forbidden. Arizona law in no way restricted non-fraudulent possession of *voted* absentee ballots (absentee ballots on which the vote had already been indicated). Unlike our colleague, the district court recognized the distinction. It wrote:

> Since 1997, it has been the law in Arizona that "[o]nly the elector may be in possession of that elector's *unvoted* early ballot." A.R.S. § 16-542(D). In 2016, Arizona amended A.R.S. § 16-1005 by enacting H.B. 2023, which limits who may collect a voter's *voted or unvoted* early ballot.

Reagan, 329 F. Supp. 3d at 839 (emphases added). H.B. 2023 for the first time forbade non-fraudulent collection of *voted* ballots. It was not a "parallel regulation." It was a fundamental change in Arizona law.

Second, our colleague repeats the potentially misleading numbers and percentages of OOP voting recounted by the district court. Our colleague writes:

> Only 0.47 percent of all ballots cast in the 2012 general election (10,979 out of 2,323,579) were not counted because they were cast out of the voter's assigned precinct. [*Reagan*, 329 F. Supp. 3d] at 872. In 2016, this fell to 0.15 percent (3,970 out of 2,661,497). *Id.*

Diss. Op. at 122–123. Our colleague, like the district court, *see Reagan*, 329 F. Supp. 3d at 872, fails to mention that, as a percentage of all in-person ballots, OOP ballots increased between 2012 and 2016.

Third, our colleague quotes from a sentence in a footnote in the Supreme Court's opinion in *Gingles*. Based on that sentence, he insists that "substantial difficulty electing representatives of their choice" is the governing standard for the Section 2 results test in the case before us. Our colleague writes:

> [In *Gingles*], the Court observed that "[i]t is obvious that unless minority group members experience *substantial difficulty* electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, 478 U.S. at 48 n.15 (quoting 52 U.S.C. § 10301(b)) (emphasis added).

Diss. Op. at 124 (emphasis in original). He later writes:

> Given the lack of any testimony in the record indicating that the ballot-collection policy would result in minority voters '*experienc[ing] substantial difficulty electing representatives of*

> *their choice*,' *Gingles*, 478 U.S. at 48 n.15, the district court did not clearly err[.]

Id. at 132 (emphasis added).

Our colleague fails to distinguish between a vote dilution case and a vote denial case. As we noted above, a vote dilution case is one in which multimember electoral districts have been formed, or in which district lines have been drawn, so as to dilute and thereby diminish the effectiveness of minority votes. Vote denial cases are all other cases, including cases in which voters are prevented from voting or in which votes are not counted. *Gingles* was a vote dilution case, and the case before us is a vote denial case. Our colleague fails to quote the immediately preceding sentence in the *Gingles* footnote, which makes clear that the Court was addressing vote dilution cases. The Court wrote, "In recognizing that some Senate Report factors are more important to multimember district *vote dilution claims* than others, the Court effectuates the intent of Congress." *Gingles*, 478 U.S. at 48 n.15 (emphasis added).

The standard in a vote denial case is different, as recognized by DOJ in its amicus brief in this case, and in *League of Women Voters* where the Fourth Circuit struck down a state statute that would have prevented the counting of OOP ballots in North Carolina without inquiring into whether the number of affected ballots was likely to affect election outcomes. *See* 769 F.3d at 248–49. As we noted above, there may be a de minimis number in vote denial cases challenging facially neutral policies or law, but the 3,709 OOP ballots in our case is above any such de minimis number.

Citing our en banc decision in *Gonzalez*, our colleague contends that our case law does not differentiate between vote denial and vote dilution cases. But the very language from *Gonzalez* that he quotes belies his contention. We wrote in text:

> [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.

Gonzalez, 677 F.3d at 405. We then appended a footnote, upon which our colleague relies:

> This approach applies both to claims of vote denial and of vote dilution. [*Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586,] 596 n.8 [(9th Cir. 1997)].

Id. at 405 n.32. The quoted language makes the obvious point that in both vote denial and vote dilution cases, we require evidence of a causal relation between a challenged voting qualification and any claimed statistical disparity between minority and white voters. However, this language does not tell us that the predicate disparity, and its effect, are the same in vote denial and vote dilution cases.

B. Response to the Second Dissent

Our second dissenting colleague, Judge Bybee, writes "to make a simple point: The Arizona rules challenged here are part of an 'electoral process that is necessarily structured to maintain the integrity of the democratic system.'" Diss. Op. at 142 (quoting *Burdick*

v. Takushi, 504 U.S. 428, 441 (1992)). We respectfully disagree. There is nothing in Arizona's policy of discarding OOP votes or about H.B. 2023 that is necessary "to maintain the integrity" of Arizona's democratic system.

Our colleague writes, further, "Parties of all stripes should have an equal interest in rules that are both fair on their face and fairly administered." *Id.* at 144. Our colleague misunderstands the purpose of the VRA's results test of Section 2. The results test looks past the facial fairness of a law to its actual results.

We take these two points in turn.

1. Integrity of Arizona's Democratic System

First, our colleague uses his "simple point" to justify Arizona's OOP policy and H.B. 2023 on the ground that they are necessary to protect the integrity of Arizona's system.

Our colleague argues that eliminating Arizona's OOP policy will "lower[] the cost to voters of determining where they are supposed to vote, but only as to presidential, U.S. Senate, and statewide races," and will have "its own consequences." *Id.* at 151, 153. To illustrate those consequences, our colleague imagines a voter from Tuscon who votes in Phoenix. Based on his imagined voter, he posits "two predictable ways" in which future elections in Arizona will be "skew[ed]" if OOP votes are counted for the elections in which the voter is entitled to vote. *Id.* at 152. Because his imagined voter cares only about national elections, that voter "may vote with impunity in the wrong precinct." *Id.* at 152. This will result, first, in

"overvalu[ing]" national elections, and, second, in "undervalu[ing]" local elections. *Id.*

Our colleague speculates that Arizona's OOP policy will result in voters either finding the right precinct, or voting by mail. He writes:

> Under Arizona's current OOP rule, a voter, having gone to the trouble of going to a precinct to vote in person and suffering the indignity of having to fill out a provisional ballot, is less likely to make the same mistake next year. A voter who has had a ballot disqualified is more likely to figure out the correct precinct next time—or, better yet, sign up for the convenience of early voting, a measure that avoids the conundrum of OOP altogether.

Id. at 155.

Our colleague's speculation leads him to predict that Arizona's OOP policy will lead to increased in-precinct voting. There is nothing in the record that remotely supports our colleague's predicted consequences. Instead, the record clearly shows the opposite. Arizona's OOP policy has been in place since at least 1970. *Reagan*, 329 F. Supp. 3d at 840. The record shows that, despite its long-standing policy, Arizona has consistently had by far the highest rate of OOP voting of any State—in 2012, eleven times greater than the second-place State. *See* Figure 6, *supra* at 13; *see also* Rodden at 26 (describing OOP voting as a "persistent problem" in Arizona).

Contrary to our colleague's speculation, OOP voters are unlikely ever to discover the "indignity" of having

their provisional ballots discarded. Our colleague quotes from an Arizona statute requiring county recorders to establish a "method" by which a voter casting a provisional ballot be notified that his or ballot was not counted, and giving a reason why it was not counted. Diss. Op. at 155 n.9. However, there is nothing in the record showing that county recorders have in fact established, or followed, such a "method." Instead, there was uncontradicted testimony in the district court by OOP voters that they were not directed to their proper polling place and were never told that their vote would not be counted if cast out of precinct. *See Reagan*, 329 F. Supp. 3d at 858 (finding that poll workers neither directed OOP voters to the correct precinct nor told voters that OOP ballots would be discarded).

The persistence of OOP voting is unsurprising given the actions of Arizona. Arizona changes polling places with extraordinary frequency, and often locates them in inconvenient and misleading places. This produces a high rate of OOP voting, particularly in urban areas and particularly for voters with high rates of residential mobility. The uncontested result is that minority voters cast OOP votes twice as often as white voters.

Our colleague further argues that H.B. 2023 is an appropriate measure to protect against voter fraud. He begins by pointing out that many States forbid third-party ballot collection. Diss. Op. at 158–160. But a simple numerical comparison with other states fails to take into account, as the VRA says we must, the particular geography, ethnic patterns, and long history

of third-party ballot collection in Arizona. *See Gingles*, 478 U.S. at 78 (a Section 2 analysis requires "a blend of history and an intensely local appraisal"). Evidence in the record shows that third-party ballot collection has long had a unique role in Arizona, given the large numbers of Hispanic and American Indian voters who have unreliable or non-existent in-home mail service, who have unreliable means of transportation, who live long distances from polling places, and who have long-standing cultural traditions of ballot collection. Evidence in the record shows that Arizona has never, in its long history of third-party ballot collection, found a single case of fraud.

Our colleague also argues that Arizona should not ignore the recommendation of the report of the bipartisan commission, *Building Confidence in U.S. Elections* (2005). Diss. Op. at 161–164. This is a reasonable argument, but it has limited force when applied to Arizona. Forbidding third-party ballot collection protects against potential voter fraud. But such protection is not necessary, or even appropriate, when there is a long history of third-party ballot collection with no evidence, ever, of any fraud and such fraud is already illegal under existing Arizona law. Such protection is undesirable, even illegal, when a statute forbidding third-party ballot collection produces a discriminatory result or is enacted with discriminatory intent. The commission was concerned with maintaining "confidence" in our election system, as indicated by the title of its report. If there is a lack of confidence in third-party ballot collection in Arizona, it is due to the fraudulent, race-based campaign mounted by the proponents of H.B. 2023.

Finally, our colleague points to third-party ballot collection fraud perpetrated by a Republican political operative in North Carolina. *Id.* at 164–166. Our colleague's argument ignores the different histories and political cultures in Arizona and North Carolina, and puts to one side as irrelevant the long and honorable history of third-party ballot collection in Arizona. The argument also ignores the fact that Arizona had long had statutes prohibiting fraudulent handling of both unvoted and voted ballots by third parties, even before the enactment of H.B. 2023. The actions of the North Carolina Republican operative, if performed in Arizona, would have been illegal under those statutes. H.B. 2023 does not forbid fraudulent third-party ballot collection. Such fraud is forbidden by other provisions of Arizona law. H.B. 2023 forbids *non-fraudulent* third-party ballot collection.

2. Rules that Are Fair on Their Face

Second, our colleague defends Arizona's OOP policy and H.B. 2023 as "rules that are . . . fair on their face." *Id.* at 144. The results test of Section 2 of the VRA is based on the understanding that laws that are "fair on their face" can, as in this case, produce discriminatory results. Indeed, Congress added the results test to the VRA precisely to address laws that were fair on their face but whose result was unfair discrimination.

Arizona's OOP policy and H.B. 2023 both fail the results test. The result of Arizona's OOP policy is that twice as many minority ballots as white ballots are thrown away. Prior to the enactment of H.B. 2023, third-party ballot collectors, acting in good faith, collected many thousands of valid ballots cast by

minority voters. White voters rarely relied on third-party ballot collection. The result of H.B. 2023 is that many thousands of minority ballots will now not be collected and counted, while white ballots will be largely unaffected.

IV. Conclusion

We hold that Arizona's OOP policy violates the results test of Section 2. We hold that H.B. 2023 violates both the results test and the intent test of Section 2. We hold that H.B. 2023 also violates the Fifteenth Amendment. We do not reach Plaintiffs' other constitutional challenges.

We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

WATFORD, Circuit Judge, concurring:

I join the court's opinion to the extent it invalidates Arizona's out-of-precinct policy and H.B. 2023 under the results test. I do not join the opinion's discussion of the intent test.

O'SCANNLAIN, Circuit Judge, with whom CLIFTON, BYBEE, and CALLAHAN, Circuit Judges, join, dissenting:

We have been asked to decide whether two current Arizona election practices violate the Voting Rights Act or the First, Fourteenth, or Fifteenth Amendments to the United States Constitution.[1] Based on the record before us and relevant Supreme Court and Ninth

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[1] Section 2 of the Voting Rights Act prohibits a State from adopting an election practice 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 First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble." U.S. Const. amend. I.

The Fourteenth Amendment guarantees: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The Fifteenth Amendment ensures that the right "to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV.

Circuit precedent, the answer to such question is clear: they do not. The majority, however, draws factual inferences that the evidence cannot support and misreads precedent along the way. In so doing, it impermissibly strikes down Arizona's duly enacted policies designed to enforce its precinct-based election system and to regulate third-party collection of early ballots.

I respectfully dissent.

I

Given the abundant discussion by the district court and the en banc majority, I offer only a brief summary of the policies at issue here and discuss the district court's factual findings as pertinent to the analysis below.

A

Arizona offers voters several options: early mail ballot, early in-person voting, and in-person Election Day voting. *Democratic Nat'l Comm. v. Reagan ("DNC")*, 329 F. Supp. 3d 824, 838 (D. Ariz. 2018).

1

Since at least 1970, Arizona has required that in-person voters "cast their ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the correct precinct." *Id.* at 840. A voter who arrives at a precinct in which he or she is not listed on the register may cast a provisional ballot, but Arizona will not count such ballot if it determines that the voter does not live in the precinct in which he or

she voted. *Id.* For shorthand, I refer to this rule as Arizona's "out-of-precinct" or "OOP" policy.

Most Arizona voters, however, do not vote in person on Election Day. *Id.* at 845. Arizona law permits all registered voters to vote early by mail or in person at an early voting location in the 27 days before an election. Ariz. Rev. Stat. §§ 16-121(A), 16-541(A), 16-542(D). All Arizona counties operate at least one location for early in person voting. *DNC*, 329 F. Supp. 3d at 839. Rather than voting early in person, any voter may instead request an early ballot to be delivered to his or her mailbox on an election-by-election or permanent basis. *Id.* In 2002, Arizona became the first state to make available an online voter registration option, which also permits voters to enroll in permanent early voting by mail. *Id.* Voters who so enroll will be sent an early ballot no later than the first day of the 27-day early voting period. *Id.* Voters may return early ballots in person at any polling place, vote center, or authorized office without waiting in line or may return their early ballots by mail at no cost. *Id.* To be counted, however, an early ballot must be received by 7:00 p.m. on Election Day. *Id.*

2

For years, Arizona has restricted who may handle early ballots.[2] Since 1992, Arizona has prohibited anyone but the elector himself from possessing "that

[2] The majority's effort to deny history can easily be dismissed. Maj. Op. 104–105. As Judge Bybee's dissent ably recounts, not only Arizona but 21 other states have restricted early balloting for years. Bybee, J. Diss. Op. 157–158.

elector's unvoted absentee ballot." 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390) (West). In 2016, Arizona enacted a parallel regulation, H.B. 2023 (the "ballot-collection" policy), concerning the collection of early ballots.[3] *DNC*, 329 F. Supp. 3d at 839. Under the ballot-collection policy, only a "family member," "household member," "caregiver," "United States postal service worker" or other person authorized to transmit mail, or "election official" may return another voter's completed early ballot. *Id.* at 839–40 (citing Ariz. Rev. Stat. § 16-1005(H)–(I)).

B

In April 2016, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party (together, "DNC") sued the State of Arizona to challenge the OOP policy and the ballot-collection policy. The district court denied DNC's motions to enjoin preliminarily enforcement of both polices, and DNC asked our court to issue injunctions pending appeal of such denials. After expedited proceedings before three-judge and en banc panels, our court denied the motion for an injunction against the OOP policy but granted the parallel motion against the ballot-collection policy. *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165 (9th Cir. 2016) (en banc) (mem.) (per curiam); *Feldman v. Ariz. Sec'y of State's Office (Feldman III)*, 843 F.3d 366 (9th Cir. 2016) (en banc). The Supreme Court, however, stayed

[3] While the majority refers to the legislation as "H.B. 2023," I prefer to call it the ballot-collection policy by which it is commonly known and will do so throughout the dissent.

our injunction against the ballot-collection policy and the OOP and ballot-collection policies functioned in usual fashion. *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016) (mem.).

In 2017, the district court proceeded to the merits of DNC's suit. In May 2018, after a ten-day bench trial, the district court issued a decision supported by thorough findings of fact and conclusions of law. *DNC*, 329 F. Supp. 3d at 832. The district court found that DNC failed to prove any violation of the Voting Rights Act or the United States Constitution and issued judgment in the state's favor. *Id.* at 882–83.

DNC timely appealed, and a three-judge panel of our court affirmed the decision of the district court in its entirety. *Democratic Nat'l Comm. v. Reagan ("DNC")*, 904 F.3d 686 (9th Cir. 2018), *vacated by order granting rehearing en banc*, 911 F.3d 942 (9th Cir. 2019) (mem.). But today, the en banc panel majority reverses the decision of the district court and holds that the OOP and ballot-collection policies violate § 2 of the Voting Rights Act and that the ballot-collection policy was enacted with discriminatory intent in violation of the Fifteenth Amendment.

II

The first mistake of the en banc majority is disregarding the critical standard of review. Although the majority recites the appropriate standard, it does not actually engage with it.[4] Maj. Op. 8–9. The

[4] As the majority admits, we review the district court's "overall finding of vote dilution" under § 2 of the Voting Rights Act only for

standard is not complex. We review *de novo* the district court's conclusions of law, but may review its findings of fact only for *clear error*. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc).

The majority's disregard of such standard and, thus, our appellate role, infects its analysis of each of DNC's claims. The demanding clear error standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Rather, we may reverse a finding only if, "although there is evidence to support it, [we are] left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). To do otherwise "oversteps the bounds of [our] duty under [Federal Rule of Civil Procedure] 52(a)" by "duplicat[ing] the role of the lower court." *Id.* at 573. As explained in Parts III and IV, I fail to see how *on the record before us* one could be "left with a definite and firm conviction" that the district court erred.

III

DNC first contends that Arizona's policies violate § 2 of the Voting Rights Act. A district court's determination of whether a challenged practice violates

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clear error. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (emphasis added); Maj. Op. 8–9. The majority quotes an elaboration of this standard by the Supreme Court in *Gingles*. Maj. Op. 8–9. But the Court in *Gingles* actually held that the district court's ultimate finding was not clearly erroneous. *Gingles*, 478 U.S. at 80.

§ 2 of the Voting Rights Act is "intensely fact-based": the court assesses the "totality of the circumstances" and conducts "a 'searching practical evaluation of the past and present reality.'" *Smith v. Salt River Project Agric. Improvements & Power Dist. ("Salt River")*, 109 F.3d 586, 591 (9th Cir. 1997) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). Thus, "[d]eferring to the district court's superior fact-finding capabilities, we review *only for clear error its ultimate finding of no § 2 violation*." *Id.* at 591 (emphasis added).

In relevant part, § 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State . . . *are not equally open to participation by members of a class of citizens protected by subsection (a)* in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301 (emphasis added). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by

black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. To determine whether a practice violates § 2, courts employ a two-step analysis. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014); League of Women *Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014).

The first step is asking whether the practice provides members of a protected class "less 'opportunity' than others 'to participate in the political process *and* to elect representatives of their choice.'" *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (alteration in original) (quoting 52 U.S.C. § 10301). In other words, the challenged practice "must impose a *discriminatory burden* on members of a protected class." *League of Women Voters*, 769 F.3d at 240 (emphasis added). To prevail at step one, the plaintiff therefore "must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Salt River*, 109 F.3d at 595 (alteration in original) (quoting *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 312 (3d Cir. 1994)); *see also Ohio Democratic Party*, 834 F.3d at 638. If a discriminatory burden is established, then—and only then—do we consider whether the burden is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240 (quoting *Gingles*, 478 U.S. at 47).

The majority agrees that this two-step analysis controls but mistakenly applies it. According to the majority, DNC has shown that the OOP policy and the ballot-collection policy fail at both steps—and, presumably, that the district court clearly erred in finding otherwise. Under an appropriately deferential analysis, however, DNC cannot prevail even at step one: it has simply failed to show that either policy erects a discriminatory burden.

A

As to the facially neutral OOP policy, DNC argues, erroneously, that wholly discarding, rather than partially counting, ballots that are cast out-of-precinct violates § 2 of the Voting Rights Act because such policy imposes a discriminatory burden on minority voters related to Arizona's history of discrimination. The district court, quite properly, found that DNC failed to carry its burden at step one—that the practice imposes a discriminatory burden on minority voters—for two reasons. *DNC*, 329 F. Supp. 3d at 873.

1

First, the district court determined that DNC failed to show "that the racial disparities in OOP voting are practically significant enough to work a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." *Id.* Thus, it ruled that DNC failed to show that the precinct-based system has a "disparate impact on the opportunities of minority voters to elect their preferred representatives." *Id.* at 872. To the contrary, the district court made the factual finding that out-of-

precinct "ballots represent . . . a small and ever-decreasing fraction of the overall votes cast in any given election." *Id.*

Furthermore, the district court determined that "the burdens imposed by precinct-based voting . . . are not severe. Precinct-based voting merely requires voters to locate and travel to their assigned precincts, which are ordinary burdens traditionally associated with voting." *Id.* at 858. Indeed, the numbers found by the district court support such conclusion. Only 0.47 percent of all ballots cast in the 2012 general election (10,979 out of 2,323,579) were not counted because they were cast out of the voter's assigned precinct. *Id.* at 872. In 2016, this fell to 0.15 percent (3,970 out of 2,661,497). *Id.* And of those casting ballots in-person on Election Day, approximately 99 percent of minority voters and 99.5 percent of non-minority voters cast their ballots in their assigned precincts. *Id.* Given that the overwhelming majority of all voters complied with the precinct-based voting system during the 2016 election, it is difficult to see how the district court's finding could be considered clearly erroneous. *See also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion) (discussing "the usual burdens of voting"). And it further ruled that DNC "offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information" to suggest that the burden of voting in one's assigned precinct is more significant for minority voters than for non-minority voters. *DNC*, 329 F. Supp. 3d at 873.

As Judge Ikuta explained in her now-vacated majority opinion for the three-judge panel:

> If a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting, a court can reasonably conclude that the law does not impair any particular group's opportunity to "influence the outcome of an election," even if the practice has a disproportionate impact on minority voters.

DNC, 904 F.3d at 714 (citation omitted) (quoting *Chisom*, 501 U.S. at 397 n.24). The "bare statistic[s]" presented may indeed show a disproportionate impact on minority voters, but we have held previously that such showing is not enough. *Salt River*, 109 F.3d at 595 ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." (emphasis in original)). A court must evaluate the burden imposed by the challenged voting practice—not merely any statistical disparity that may be shown. The Supreme Court's interpretation of § 2 in *Gingles* suggests the same. There, the Court observed that "[i]t is obvious that unless minority group members experience *substantial difficulty* electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, 478 U.S. at 48 n.15 (emphasis added) (quoting 52 U.S.C. § 10301(b)). Furthermore, because "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system," it cannot be the case that pointing to a mere statistical disparity related to a challenged

voting practice is sufficient to "dismantle" that practice. *Frank*, 768 F.3d at 754; *see also Salt River*, 109 F.3d at 595.

The majority, however, contends that "the district court discounted the disparate burden on the ground that there were relatively few OOP ballots cast in relation to the total number of ballots." Maj. Op. 43. In the majority's view, the district court should have emphasized that the percentage of in-person ballots that were cast out-of-precinct increased, thus isolating the specific impact of the OOP policy amongst in-person voters bound by the precinct-system requirements.

Contrary to the majority's assertion, however, the legal review at hand does not require that we isolate the specific challenged practice in the manner it suggests. Rather, at step one of the § 2 inquiry, we only consider whether minority voters "experience substantial difficulty electing representatives of their choice," *Gingles*, 478 U.S. at 48 n.15, "based on the totality of circumstances," 52 U.S.C. § 10301(b).[5]

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[5] The majority correctly asserts that *Gingles* was a vote dilution not-vote denial case. However, it incorrectly claims the standard in a vote denial case is different and, without stating such standard, it simply concludes that the 3,709 ballots cast out of precinct in the 2016 general election in Arizona is more than any "de minimis number" below which there is no Section 2 violation, without ever revealing what such minimum threshold might be. Maj. Op. 107. The majority cites *League of Women Voters*, a vote denial case, to reach this conclusion. *See* 769 F.3d at 248–49. Yet, in that case, the Fourth Circuit relies on *Gingles* throughout to determine that the same analysis applies to vote denial and vote dilution cases. *Id.* at 238–40. Earlier in its opinion, the majority

Although the majority would like us to believe that the increasing percentage of in-person ballots cast out-of-precinct demonstrates that minorities are disparately burdened by the challenged policy, the small number of voters who chose to vote in-person and the even smaller number of such voters who fail to do so in the correct precinct demonstrate that any minimal burden imposed by the policy does not deprive minority voters of equal opportunities to elect representatives of their choice. A conclusion otherwise could not be squared with our determination that a mere statistical showing of disproportionate impact on racial minorities does not satisfy the challenger's burden. *See Salt River*, 109 F.3d at 595. If such statistical impact is not sufficient, it must perforce be the case that the crucial test is the *extent* to which the practice burdens minority voters as opposed to non-minority voters. But the en banc majority offers no explanation for how or why the burden of voting in one's assigned precinct is severe or beyond that of the burdens traditionally associated with voting.

The majority argues that there may be a "de minimis number" below which no § 2 violation has

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itself uses *Gingles* as the standard for analyzing a § 2 violation in a vote denial case. Maj. Op. 37. The distinction the majority attempts to draw fails because, contrary to what the majority implies, "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," *Gonzalez v. Arizona*, 677 F.3d 383, 495 (9th Cir. 2012) (internal quotation marks omitted), and "[t]his approach applies both to claims of vote denial and vote dilution." *Id.* at 495 n. 32.

occurred.[6] Maj. Op. 44. But we know from our own precedent that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 . . . inquiry." *Salt River*, 109 F.3d at 595 (emphasis in original). And *Chisom* makes clear that § 2 "claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice." 501 U.S. at 398 (emphasis in original). As such, the inquiry must require consideration of both the scope of the burden imposed by the particular policy—not merely how many voters are impacted by it—and the difficulty of accessing the political process in its entirety.

Thus, it cannot be true, as the majority suggests, that simply showing that some number of minority voters' ballots were not counted as a result of an individual policy satisfies step one of the § 2 analysis for a facially neutral policy.

2

Second, the district court made the factual finding that "Arizona's policy to not count OOP ballots is not the cause of [any identified] disparities in OOP voting." *DNC*, 329 F. Supp. 3d at 872. According to the OOP policy that is challenged by DNC, a ballot is not counted if it is cast outside of the voter's assigned precinct. And the district court pointed to several factors that result in higher rates of out-of-precinct

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[6] As Judge Ikuta explained, "an election rule requiring voters to identify their correct precinct in order to have their ballots counted does not constitute a 'disenfranchisement' of voters." *DNC*, 904 F.3d at 730 n.33; *see also id.* at 724 n.27.

voting among minorities. For example, the district court found that "high rates of residential mobility are associated with higher rates of OOP voting," and minorities are more likely to move more frequently. *Id.* at 857, 872. Similarly, "rates of OOP voting are higher in neighborhoods where renters make up a larger share of householders." *Id.* at 857. The precinct-system may also pose special challenges for Native American voters, because they may "lack standard addresses" and there may be additional "confusion about the voter's correct polling place" where precinct assignments may differ from assignments for tribal elections. *Id.* at 873. "Additionally", the district court found, Arizona's "changes in polling locations from election to election, inconsistent election regimes used by and within counties, and placement of polling locations all tend to increase OOP voting rates." *Id.* at 858.

But the burden of *complying* with the precinct-based system in the face of any such factors is plainly distinguishable from the *consequence* imposed should a voter fail to comply. Indeed, as the district court found, "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." *Id.* Although "the consequence of voting OOP might make it more imperative for voters to correctly identify their precincts," *id.*, such consequence does not *cause* voters to cast their ballots out-of-precinct or make it more burdensome for voters to cast their ballots in their assigned precincts.

The majority goes astray by failing to recognize the distinction between the burden of complying and the consequence of failing to do so. In fact, the majority undercuts its own claim by citing the same host of reasons identified by the district court as the reasons why a minority voter is more likely to vote out-of-precinct. Maj Op. 14–19. All the factors the majority seizes upon, however, stem from the general requirement that a voter cast his or her ballot in the assigned precinct—not the policy that enforces such requirement. The importance of such distinction is made clear by the relief that DNC seeks: DNC does not request that Arizona be made to end its precinct-based system or to assign its precincts differently, but instead requests that Arizona be made to count those ballots that are not cast in compliance with the OOP policy.[7] Removing the enforcement policy, however, would do nothing to minimize or to extinguish the disparity that exists in out-of-precinct voting.

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[7] The majority suggests that DNC challenges only "Arizona's policy, within that system, of entirely discarding OOP ballots" as opposed to counting or partially counting them. Maj. Op. 78. But this is not a compromise position: there is no difference between counting and partially counting a ballot cast out-of-precinct. Counting an OOP ballot would entail evaluating the ballot to determine on which issues the person would have been qualified to vote in his or her assigned precinct and discarding the person's votes as to issues on which he or she would not have been qualified to vote. Certainly, the majority isn't suggesting that a person would ever be allowed to vote on issues which he or she would not have been eligible to vote even in the assigned precinct. It is difficult to discern any other possible meaning for what the majority refers to as entirely "counting" out-of-precinct ballots.

Consider another basic voting requirement: in order to cast a ballot, a voter must register. If a person fails to register, his or her vote will not count. Any discriminatory result from such a policy would need to be addressed in a challenge to *that* policy itself. For example, if minorities are underrepresented as a segment of registered voters, perhaps they could challenge some discriminatory aspect of the registration system. But they surely could not prevail by challenging simply the state's *enforcement* of the registration policy by refusing to count unregistered voters' ballots. Minorities in a jurisdiction may very well be underrepresented as members of the registered electorate, but the discrepancy between the protected class as a segment of the general population and as a segment of the registered voting population would not require that a state permit unregistered voters to cast valid ballots on Election Day.

Similarly, the fact that a ballot cast by a voter outside of his or her assigned precinct is discarded does not *cause* minorities to vote out-of-precinct disproportionately. But DNC does not challenge the general requirement that one vote in his or her precinct or take issue with the assignment of precinct locations—the very requirements that *could* lead to a disproportionate impact. It may indeed be the case in a precinct-based voting system that a state's poor assignment of districts, distribution of inadequate information about voting requirements, or other factors have some material effect on election practices such that minorities have less opportunity to elect representatives of their choice as a result of the system. But, in the words of the majority, DNC's challenge

"assumes both [the] importance and [the] continued existence" of "Arizona's precinct-based system of voting." Maj. Op. 78. Instead, DNC challenges only Arizona's *enforcement* of such system. Thus, even if there were a recognizable disparity in the opportunities of minority voters voting out-of-precinct, it would nonetheless not be the *result* of the policy at issue before us.

3

I reject the suggestion implicit in the majority opinion that any facially neutral policy which may result in some statistical disparity is necessarily discriminatory under step one of the § 2 inquiry. We have already held otherwise. *Salt River*, 109 F.3d at 595. And the majority itself concedes that "more than a de minimis number of minority voters must be burdened before a Section 2 violation based on the results test can be found." Maj. Op. 44. Furthermore, I fail to see how DNC—and the majority—can concede the importance and continued existence of a precinct-based system, yet argue that the enforcement mechanism designed to maintain such system is impermissible.

Because DNC has failed to meet its burden under step one of the Voting Rights Act § 2 inquiry—that the district court's findings were clearly erroneous—our analysis of its OOP claim should end here.

B

As to the facially neutral ballot-collection policy, DNC argues, erroneously, that it violates § 2 because there is "extensive evidence" demonstrating that

minority voters are more likely to have used ballot-collection services and that they would therefore be disproportionately burdened by limitations on such services. Specifically, DNC relies on anecdotal evidence that ballot collection has disproportionately occurred in minority communities, that minority voters were more likely to be without home mail delivery or access to transportation, and that ballot-harvesting efforts were disproportionately undertaken by the Democratic Party in minority communities. And, DNC claims, such burden is caused by or linked to Arizona's history of discrimination.

The district court, quite properly, rejected such argument, making the factual finding that DNC failed to establish at step one that the ballot-collection policy imposed a discriminatory burden on minority voters. *DNC*, 329 F. Supp. 3d at 866, 871. Once again, the question is whether such finding was clearly erroneous. *Salt River*, 109 F.3d at 591.

1

The district court found broadly that the non-quantitative evidence offered by DNC failed to show that the ballot-collection policy denied minority voters of "meaningful access to the political process." *DNC*, 329 F. Supp. 3d at 871. As Judge Ikuta observed, to determine whether the challenged policy provides minority voters "less opportunity to elect representatives of their choice, [we] must necessarily consider the severity and breadth of the law's impacts on the protected class." *DNC*, 904 F.3d at 717.

But no evidence of that impact has been offered. "In fact, *no* individual voter testified that [the ballot-collection policy's] limitations on who may collect an early ballot would make it significantly more difficult to vote." *DNC*, 329 F. Supp. 3d at 871 (emphasis added). Anecdotal evidence of how voters have chosen to vote in the past does not establish that voters are unable to vote in other ways or would be burdened by having to do so. The district court simply found that "prior to the [ballot-collection policy's] enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties," *id.* at 870, but, once again, the disparate impact of a challenged policy on minority voters is insufficient to establish a § 2 violation, *see Salt River*, 109 F.3d at 594–95.

The majority simply does not address the lack of evidence as to whether minority voters have less opportunity than non-minority voters now that ballot collection is more limited. Instead, the majority answers the wrong question by pointing to minority voters' use of ballot collection in the past. The majority offers no record-factual support for its conclusion that the anecdotal evidence presented demonstrates that compliance with the ballot-collection policy imposes a disparate burden on minority voters—a conclusion that must be reached in order to satisfy step one of the § 2 inquiry—let alone evidence that the district court's contrary finding was "clearly erroneous."

Given the lack of any testimony in the record indicating that the ballot-collection policy would result in minority voters "experienc[ing] substantial difficulty

electing representatives of their choice," *Gingles*, 478 U.S. at 48 n.15, the district court did not clearly err in finding that, "for some voters, ballot collection is a preferred and more convenient method of voting," but a limitation on such practice "does not deny minority voters meaningful access to the political process." *DNC*, 329 F. 3d Supp. at 871.

2

The district court further found that the ballot-collection policy was unlikely to "cause a meaningful inequality in the electoral opportunities of minorities" because only "a relatively small number of voters have used ballot collection services" in the past at all. *DNC*, 329 F. Supp. 3d at 870–71. And, the district court noted, DNC "provided no quantitative or statistical evidence comparing the proportion that is minority versus non-minority." *Id.* at 866. "Without this information," the district court explained, "it becomes difficult to compare the law's impact on different demographic populations and to determine whether the disparities, if any, are meaningful." *Id.* at 867. Thus, from the record, we do not know either the extent to which voters may be burdened by the ballot-collection policy or how many minority voters may be so burdened.

Nonetheless, the district court considered circumstantial and anecdotal evidence offered by DNC and determined that "the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within [the ballot-collection policy's] exceptions." *Id.* at 871. DNC—and the majority—argue that such finding is not

supported by the record, but, given the lack of quantitative or statistical evidence before us, it is difficult to conclude that such finding is clearly erroneous. The district court itself noted that it could not "speak in more specific or precise terms" given the sparsity of the record. *Id.* at 870. Drawing from anecdotal testimony, the district court estimated that fewer than 10,000 voters used ballot-collection services in any election. *Id.* at 845. Drawing even "the unjustified inference that 100,000 early mail ballots were collected" during the 2012 general election, the district court found that such higher total would nonetheless be "relatively few early voters" as compared to the 1.4 million early mail ballots returned or 2.3 million total votes cast. *Id.* at 845. The majority further argues that the district court erred in "discounting the evidence of third-party ballot collection as merely 'circumstantial and anecdotal'" Maj. Op. 83. But the district court did nothing of the sort. To the contrary, the district court considered whether the ballot-collection policy violated § 2 by making these estimates—and even generous estimates—from the anecdotal evidence offered. And the district court's subsequent conclusion that the limitation of third-party ballot collection would impact only a "relatively small number of voters," *id.* at 870, is clearly plausible on this record, *see Bessemer City*, 470 U.S. at 573.

The majority also argues that the total number of votes affected is not the relevant inquiry; the proper test is whether the number of ballots collected by third parties surpasses any de minimis number. Maj. Op. 84. But we already know "that a bare statistical showing"

that an election practice has a "disproportionate *impact* on a racial minority does not satisfy" step one of the § 2 inquiry. *Salt River*, 109 F.3d at 595 (emphasis in original). And, even if such impact were sufficient, the record offers no evidence from which the district court could determine the extent of the discrepancy between minority voters as a proportion of the entire electorate versus minority voters as a proportion of those who have voted using ballot-collection services in the past. *DNC*, 329 F. Supp. 3d at 866–67.

3

As Judge Bybee keenly observed in a previous iteration of this case (and indeed in his dissent in this case), "[t]here is no constitutional or federal statutory right to vote by absentee ballot." *Feldman III*, 843 F.3d at 414 (Bybee, J., dissenting) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969)); *accord* Bybee, J. Diss. Op. 156. Both today and in the past, Arizona has chosen to provide a wide range of options to voters. But Arizona's previous decision to permit a particular mechanism of voting does not preclude Arizona from modifying its election system to limit such mechanism in the future so long as such modification is made in a constitutional manner. And, in fact, Arizona's modification here was made in compliance with "the recommendation of the bipartisan Commission on Federal Election Reform." *DNC*, 329 F. Supp. 3d at 855. Without any evidence in the record of the severity and breadth of the burden imposed by this change to the ballot-collection policy, we cannot be "left with the definite and firm conviction" that the district court erred in finding that DNC failed to show that the

policy violated § 2. *See Bessemer City*, 470 U.S. at 573; *see also Salt River*, 109 F.3d at 591.

C

Because I disagree with the majority's conclusion that DNC has satisfied its burden at step one of the § 2 Voting Rights Act inquiry, I would not reach step two. I therefore do not address the majority's consideration of the so-called "Senate Factors" in determining whether the burden is "in part caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240 (quoting *Gingles*, 478 U.S. at 47). These factors—and the majority's lengthy history lesson on past election abuses in Arizona—simply have no bearing on this case. Indeed, pages 47 to 81 of the majority's opinion may properly be ignored as irrelevant.

IV

DNC also contends that the ballot-collection policy violates the Fifteenth Amendment to the United States Constitution.[8] To succeed on a claim of discriminatory intent under the Fifteenth Amendment, the challenger must demonstrate that the state legislature "selected or reaffirmed a particular course of action at least in

[8] The Fifteenth Amendment authorizes Congress to enforce its guarantee that the right "to vote shall not be denied or abridged . . . by appropriate legislation." U.S. Const. amend. XV. Section 2 of the Voting Rights Act is such legislation. *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013).

part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Because discriminatory intent "is a pure question of fact," we again review only for clear error. *Pullman-Standard v. Swint*, 456 U.S. 273, 287–88 (1982). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

The district court concluded that the ballot-collection policy did not violate the Fifteenth Amendment because it made the factual finding that the legislature "was not motivated by a desire to suppress minority voters," although "some individual legislators and proponents of limitations on ballot collection harbored *partisan* motives" that "did not permeate the entire legislative process." *DNC*, 329 F. Supp. 3d at 879, 882 (emphasis added). Instead, "[t]he legislature was motivated by . . . a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." *Id.* at 882. In analyzing DNC's appeal from such finding, the majority, once again, completely ignores our demanding standard of review and instead conducts its own de novo review. Maj. Op. 93. Our duty is only to consider whether the district court clearly erred in *its finding* that the ballot-collection policy was not enacted with discriminatory intent. *See Bessemer City*, 470 U.S. at 573. And "to be clearly erroneous, a decision must . . . strike [a court] as wrong with the force of a five-week old, unrefrigerated dead fish." *Ocean Garden, Inc.*

v. Marktrade Co., Inc., 953 F.2d 500, 502 (9th Cir. 1991) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

The majority therefore fails to offer any basis—let alone a convincing one—for the conclusion that it must reach in order to reverse the decision of the district court: that the district court committed clear error in its factual findings. Given the failure of the majority to conduct its review in the proper manner, I see no reason to engage in a line-by-line debate with its flawed analysis. Rather, it is enough to note two critical errors made by the majority in ignoring the district court's determinations that while some legislators were motivated by partisan concerns, the legislature as a body was motivated by a desire to enact prophylactic measures to prevent voter fraud.

A

First, the majority fails to distinguish between *racial* motives and *partisan* motives. Even when "racial identification is highly correlated with political affiliation," a party challenging a legislative action nonetheless must show that *racial* motives were a motivating factor behind the challenged policy. *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001)). Nonetheless, the majority suggests that a legislator motivated by *partisan* interest to enact a law that disproportionately impacts minorities must necessarily have acted with racially discriminatory intent as well. For example, the district court noted that Arizona State Senator Don Shooter was, "in part motivated by a desire to eliminate what had become an effective Democratic

[Get Out The Vote] strategy." *DNC*, 329 F. Supp. 3d at 879. The majority simply concludes that such finding shows racially discriminatory intent as a motivating factor. But the majority's unsupported inference does not satisfy the required showing. And the majority fails to cite any evidence demonstrating that the district court's finding to the contrary was not "plausible in light of the record viewed in its entirety." *Bessemer City*, 470 U.S. at 574.

B

Second, in defiance of Supreme Court precedent to the contrary, the majority assumes that a legislature's stated desire to prevent voter fraud must be pretextual when there is no direct evidence of voter fraud in the legislative record. In *Crawford*, the Court rejected the argument that *actual* evidence of voter fraud was needed to justify the State's decision to enact prophylactic measures to prevent such fraud. *Crawford*, 553 U.S. at 195–96 . There, the Court upheld an Indiana statute requiring in-person voters to present government-issued photo identification in the face of a constitutional challenge. *Id.* at 185. Although "[t]he record contain[ed] no evidence of [voter] fraud actually occurring in Indiana at any time in its history," the Supreme Court nonetheless determined that the State had a legitimate and important interest "in counting only the votes of eligible voters." *Id.* at 194, 196; *see also id.* at 195 nn.11–13 (citing "fragrant examples of" voter fraud throughout history and in recent years). Given its interest in addressing its valid concerns of voter fraud, Arizona was free to enact prophylactic measures even though no evidence of

actual voter fraud was before the legislature. Yet the majority does not even mention *Crawford*, let alone grapple with its consequences on this case.

And because no evidence of actual voter fraud is required to justify an anti-fraud prophylactic measure, the majority's reasoning quickly collapses. The majority cites Senator Shooter's "false and race-based allegations" and the "LaFaro video," which the district court explained "showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots" and "contained a narration of [i]nnuendos of illegality . . . [and] racially tinged and inaccurate commentary by . . . LaFaro." *DNC*, 329 F. Supp. 3d at 876 (second, third, and fourth alterations in original). The majority contends that although "some members of the legislature who voted for H.B. 2023 had a sincere, though mistaken, non-race-based belief that there had been fraud in third-party ballot collection, and that the problem needed to be addressed," a discriminatory purpose may be attributable to all of them as a matter of law because any sincere belief was "created by Senator Shooter's false allegations and the 'racially tinged' LaFaro video." Maj. Op. 99. The majority claims that these legislators were used as "cat's paws" to "serve the discriminatory purposes of Senator Shooter, Republican Chair LaFaro, and their allies." Maj. Op. 100. Yet, the majority's reliance on such employment discrimination doctrine is misplaced because, unlike employers whose decision may be tainted by the discriminatory motives of a supervisor, each legislator is an independent actor, and bias of some cannot be attributed to all members. The very fact that *some* members had a sincere belief that voter fraud needed

to be addressed is enough to rebut the majority's conclusion. To the contrary, the underlying allegations of voter fraud did not need to be true in order to justify the "legitimacy or importance of the State's interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196. And the majority provides no support for its inference of pretext where there is a sincere and legitimate interest in addressing a valid concern. Maj. Op. at 97–100. Instead, the majority *accepts* the district court's finding that some legislators "had a sincere, non-race-based belief that there was fraud" that needed to be addressed. Nevertheless, unable to locate any discriminatory purpose, it simply attributes one to them using the inapplicable "cat's paw doctrine." Maj. Op. 99. Such argument demonstrates the extraordinary leap in logic the majority must make in order to justify its conclusion.

Let me restate the obvious: we may reverse the district court's intensely factual determination as to discriminatory intent only if we determine that such finding was *clearly erroneous*. Thus, even if the majority disagrees with the district court's finding, it must demonstrate that the evidence was not "plausible in light of the record viewed in its entirety." *Bessemer City*, 470 U.S. at 574. Perhaps if the majority had reminded itself of our appellate standard, it would not have simply re-weighed the same evidence considered by the district court to arrive at its own findings on appeal.

V

The district court properly determined that neither Arizona's out-of-precinct policy nor its ballot-collection

policy violates § 2 of the Voting Rights Act and the Fifteenth Amendment to the Constitution.[9] In concluding otherwise, the majority misperceives the inquiry before us and fails to narrow the scope of its review, instead insisting on acting as a de novo trial court. That, of course, is not our role.

I would therefore affirm the judgment of the district court and must respectfully dissent from the majority opinion.

BYBEE, Circuit Judge, with whom O'SCANNLAIN, CLIFTON, and CALLAHAN, Circuit Judges, join, dissenting:

The right to vote is the most fundamental of our political rights and the basis for our representative democracy. "No right is more precious" because it is a meta-right: it is the means by which we select "those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* Almost as fundamental as the right to vote is the need for the

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[9] Because the majority concludes that the OOP policy and the ballot-collection policy violate § 2 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution, it does not reach DNC's claim that such policies also violate the First and Fourteenth Amendments to the United States Constitution. I will not belabor such claims here; for these purposes, it is sufficient to say that—for many of the reasons and based on much of the evidence cited above—I would also conclude that neither practice violates the First and Fourteenth Amendments.

electorate to have confidence in the rules by which elections are conducted.

I write separately to make a simple point: The Arizona rules challenged here are part of an "electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).[1] The Constitution entrusts the "Times, Places and Manner of holding Elections" to state legislatures, subject to laws enacted by Congress to "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. "'Times, Places, and Manner,' . . . are 'comprehensive words,' which 'embrace authority to provide a complete code for . . . elections.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *see Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

> "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at

[1] I join in full Judge O'Scannlain's dissent. I write separately to place the majority's decision today in context of the American democratic tradition.

> least in some degree—the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) (citation omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Time, place, and manner restrictions are fundamentally differently from provisions that affect the "Qualifications requisite for Electors," U.S. Const. art. I, § 2, cl. 1, and state apportionments "according to their respective Numbers," *id.* art. I, § 2, cl. 3. The Constitution restricts with exactness the qualifications states may require of their voters. *See id.* amend. XV, § 1 ("race, color, or previous condition of servitude"); amend. XIX (sex); amend. XXIV ("failure to pay any poll tax or other tax"); amend. XXVI (those "eighteen years of age or older, . . . on account of age"); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (property ownership). Similarly, the constitutional imperative for one person, one vote demands that apportionment be subject to precision approaching "absolute population equality," *Karcher v. Daggett*, 462 U.S. 725, 732 (1983), "as nearly as practicable," *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

Time, place, and manner restrictions stand on different footing from status-based restraints on vote qualifications and legislative malapportionment. State requirements respecting when and where we vote and how ballots will be counted are "generally-applicable

and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson*, 460 U.S. at 788 n.9. By contrast, for example, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religions and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). Time, place, and manner restrictions are the rules of the game, announced in advance, so that all voters will know what they must do. Parties of all stripes should have an equal interest in rules that are both fair on their face and fairly administered.

Two such rules are challenged here: the rule about how Arizona will count out-of-precinct votes (OOP) and the rule about who may file another person's absentee ballot (H.B. 2023). As rules of general applicability, they apply to all voters, without "account of race or color." 52 U.S.C. § 10301(a).[2] Rather than simply recognizing that Arizona has enacted neutral, color-blind rules, the majority has embraced the premise that § 2 of the VRA is violated when any minority voter

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[2] In relevant part, § 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A violation of § 2(a) may be shown "based on the totality of the circumstances . . . [if] the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens [on account of race or color]." *Id.* § 10301(b).

appears to be adversely affected by Arizona's election laws. Although the majority abjures this premise for now, claiming that it does "not need to go so far" as equating "the case of an individually targeted single minority voter who is denied the right to vote and the case where a facially neutral policy affects a single voter," Maj. Op. at 45, its analysis necessarily rests on that premise. The majority has no limiting principle for identifying a de minimis effect in a facially neutral time, place, or manner rule. The premise finds its clearest expression in the Fourth Circuit's opinion in *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) (emphasis added): "[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 voter is being denied equal electoral opportunities*." *See* Maj. Op. at 41–42, 45–46, 107 (relying on *League of Women Voters*). Such a premise insists on a precision that we have never demanded before.

By contrast, the Supreme Court explained that following *City of Mobile v. Bolden*, 446 U.S. 55 (1980), "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test,' applied . . . in *White v. Regester*, 412 U.S. 755 (1973)." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). Yet in *White*, the Court made clear that it "did not hold . . . that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause." 412 U.S. at 763–64. Rather, the Court recognized that any rule in

an election scheme might suffer "relatively minor population deviations . . . . 'based on legitimate considerations incident to the effectuation of a rational state policy.'" *Id.* at 764 (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

A "rational state policy" surely includes the need for a consistent, neutral set of time, place, and manner rules. The majority's reading of the Voting Rights Act turns § 2 into a "one-minority-vote-veto rule" that may undo any number of time, place, and manner rules. It is entirely results-bound, so much so that under the majority's reading of the Voting Rights Act, the same rules the majority strikes down in Arizona may be perfectly valid in every other state, even states within our circuit. It all depends on the numbers. Indeed, so diaphonous is the majority's holding, that it may be a temporary rule for Arizona. If Arizona were to reenact these provisions again in, say, 2024, the numbers might come out differently and the OOP and ballot collection rules would be lawful once again.

The two Arizona rules at issue here—OOP and H.B. 2023—are rules of general applicability, just like the rules governing voting on the day of the election, registering with the Secretary of State, and bringing identification with you. Such "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–90 (2008) (plurality opinion) (quoting *Anderson*, 460 U.S. at 788 n.9). Both rules the majority strikes down today have widely-held, well-recognized—even distinguished—pedigrees. As I show in Part I, the OOP is a long-

standing rule that remains in place in a majority of American jurisdictions. The rule the majority prefers is a minority rule in the United States and, more importantly, disregards Arizona's interest in encouraging voting in local elections and, in application, may actually disadvantage minority voters. In Part II, I demonstrate that, although H.B. 2023 is of more recent vintage, similar rules are in place in other American jurisdictions, and H.R. 2023 follows carefully the recommendation of a bi-partisan commission on the integrity of American elections.

I

It has long been a feature of American democracy that, on election day, voters must vote in person at an assigned polling venue—an election precinct.

> [I]t is the well established practice in nearly every state to divide the county or city into a number of geographical districts for the purpose of holding elections. Each elector is required to vote at the polling place of his own precinct, which by custom is ordinarily located within the precinct, and, in cities, within a few blocks of his residence.

Joseph P. Harris, *Election Administration in the United States* 206–07 (1934). Like most American jurisdictions, Arizona's election rules require a non-absentee voter's personal presence at the polling place. Ariz. Rev. Stat. § 16-411(A) ("The broad of supervisors of each county . . . shall establish a convenient number of election precincts in the county and define the

boundaries of the precincts."). The reasons for such a venue rule are

> significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows 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 generally puts polling places in closer proximity to voter residences.

Sandusky Cty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004).[3] Precincts help to secure the

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[3] "One of the major voting innovations in certain states was the increase in the number of polling places." Robert J. Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776–1789*, at 96 (1982). Among the states, New York led the way, "enacting a law in 1778 which stated that all future elections should be held 'not by counties but by boroughs, towns, manors, districts, and precincts.'" *Id.* at 97 (quoting Laws of New York, sess. 1, chap. 16 (1778)). In early America, polling places were located where the people were:

> voting . . . in barns, private homes, country stores, and churches—almost anything that could separate voters from the election officials and the ballot boxes they tended. On the frontier, where buildings were even harder to find, votes were sometimes cast in sodhouse saloons, sutler stores near army forts, the front porches of adobe houses, and temporary lean-tos thrown together at desolate desert crossroads. In the larger cities, fire stations, warehouses,

orderly administration of elections, which then assures all voters of the integrity of the election.

A

Arizona's out of precinct rule (OOP) is a standard feature of American democracy. Under Arizona's election code, "[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." Ariz. Rev. Stat. § 16-122. The election code provides extensive instructions for electors who have changed their residence or whose name does not appear on the precinct register; if there is any question of the elector's eligibility to vote in that precinct, Arizona authorizes the filing of a provisional ballot. *See, e.g.*, Ariz. Rev. Stat. §§ 16-135, 16-583, 16-584, 16-592.

There is nothing unusual about Arizona's OOP rule.[4] Although there are variations in the way the rule

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> and livery stables were commonly used. One of the most common venues was liquor establishments. . . . Such an arrangement made an election noisy and, sometimes, violent.

Richard Franklin Bensel, *The American Ballot Box in the Mid-Nineteenth Century* 9 (2004).

[4] For many years, a voter was not even permitted to cast a provisional ballot in a precinct other than her own. *See* Harris, *Election Administration in the United States*, at 287–88. The Help America Vote Act (HAVA) now requires states to permit voters to cast a provisional ballot. 52 U.S.C. § 21082(a). HAVA, however, does not affect a state's rules about how to process a provisional ballot. It does provide that states must create a toll-free number

is formulated, by my count, twenty-six states, the District of Columbia, and three U.S. territories disqualify ballots cast in the wrong precinct.[5] These states represent every region of the country: The Northeast (Connecticut, Vermont), the mid-Atlantic (Delaware, District of Columbia, West Virginia), the South (Alabama, Florida, Kentucky, Mississippi, South Carolina, Tennessee, Virginia, Virgin Islands), the mid-West (Illinois, Indiana, Iowa, Michigan, Missouri, Nebraska, South Dakota, Wisconsin), the Southwest (Arizona, Oklahoma, Texas), the Mountain States (Montana, Wyoming), and the West (American Samoa, Hawaii, Nevada, Northern Mariana Islands). Twenty states and two territories will count out of precinct ballots, although the states are not uniform in what they will count.[6] They also represent a broad spectrum of the country: The Northeast (Maine, Massachusetts,

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that "any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reasons that the vote was not counted." 52 U.S.C. § 21082(a)(5)(B); *see Blackwell*, 387 F.3d at 576 ("HAVA is quintessentially about being able to *cast* a provisional ballot. . . . [B]ut the ultimate legality of the vote cast provisionally is generally a matter of state law.").

[5] I have listed all fifty states, the District of Columbia, and U.S. territories, with relevant citations to their treatment of out of precinct votes, in Appendix A. In Appendix B, I have categorized the jurisdictions by rule.

[6] For example, five states will count an out-of-precinct vote, but only if the ballot is filed in the voter's county (Kansas, New Mexico, Pennsylvania, Utah) or town (Massachusetts). Louisiana and Rhode Island will only count votes for federal office. Puerto Rico will count only votes for Governor and Resident Commissioner.

New York, Rhode Island), the mid-Atlantic (Maryland, New Jersey, Pennsylvania), the South (Arkansas, Louisiana, North Carolina, Georgia, Puerto Rico), the mid-West (Ohio, Kansas), the Southwest (New Mexico), the Mountain States (Colorado, Utah), and the West (Alaska, California, Guam, Oregon, Washington).[7]

Nowhere in its discussion of the "totality of the circumstances" has the majority considered that Arizona's OOP provision is a widely held time, place, or manner rule. It is not a redistricting plan, *see Cooper v. Harris*, 137 S. Ct. 1455 (2017); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Shaw v. Reno*, 509 U.S. 630 (1993); a multimember district, *see Chisom v. Roemer*, 501 U.S. 380 (1991); *Gingles*, 478 U.S. 30; or an at-large system, *see Rogers v. Lodge*, 458 U.S. 613 (1982). Those "circumstances" are as unique as a fingerprint, subject to manipulation, and require "an intensely local appraisal" of the state's plan. *Gingles*, 478 U.S. at 78 (internal quotation marks and citation omitted). Arizona's OOP applies statewide; it is not a unique rule, but a traditional rule, common to the majority of American states. The OOP rule, as a rule of general applicability, is part of a "political process[] . . . equally open to participation" by all Arizona voters. 52 U.S.C. § 10301(b).

B

The majority asserts that "counting or partially counting OOP ballots would [not] threaten the integrity

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[7] Four states (Idaho, Minnesota, New Hampshire, North Dakota) are not accounted for in either list because they allow same-day registration and do not use provisional ballots.

of Arizona's precinct-based system." Maj. Op. at 78. Effectively, the majority holds that Arizona must abandon its traditional polling venue rules and accept the ballots of voters who cast their ballot in the wrong precinct, at least for national and state-wide offices. *Id.* at 76–78 (citing the rules of California, Utah, and New Mexico as an example of states partially counting OOP ballots). Under the majority's preferred scheme, Arizona must count all votes for offices that are not precinct dependent. As to the remainder of the ballot, Arizona may—in accordance with its traditional rule—disqualify the ballot for all offices for which the political geography of the precinct matters. The majority has failed to take into account that the rule it prefers has its own consequences, including adverse consequences for minority voters.

Let's review an example to consider the unintended consequences of the majority's haste. Under Arizona's traditional rules, the state would disqualify the ballot of a voter from Tucson who votes in any precinct other than his assigned precinct. Under the majority's new rule, a voter from Tucson may cross precinct lines and vote in any precinct in Arizona—for instance, in Phoenix. His cross-precinct ballot will be counted for those offices which are common to ballots in his precinct-in-law in Tucson and his new precinct-in-fact in Phoenix—such offices would include the presidency, the U.S. Senate, and any statewide offices. His ballot will be disqualified, however, for all state and local offices defined by geographic boundaries that are not common to the two precincts—for example, the U.S. House of Representatives, the state legislature, and

municipal offices such as mayor, city council, and school board.

The majority's rule will skew future elections in Arizona in two predictable ways. First, it *overvalues* national elections. Ballots for the presidency, the U.S. Senate, and any state offices that would otherwise be disqualified must be counted. Voters—whether intentionally or carelessly—may vote with impunity in the wrong precinct, knowing that their vote will count for the national and statewide offices.

Second, it *undervalues* local elections. Those same ballots will not be counted toward those federal, state, and local offices that are defined by geographic boundaries and for which the voters from the outside precinct are not eligible. Non-conscientious voters—voters who care more about a national or a statewide race than the local races—are permitted to vote wherever they please, while conscientious voters—those concerned with all the offices on the ballot—are burdened by the requirement that they find their way to their proper precinct. And if the conscientious voter can't get to the polling place on time, he will have cast no ballot for any office, national, state, or local.

The net result is that the majority has lowered the cost to voters of determining where they are supposed to vote, but only as to presidential, U.S. Senate, and statewide races. As the majority no doubt intends, persons who didn't know or were confused about their polling place will have their vote counted, but only in select races. But as the majority may not have thought through, anyone in Arizona, including people who know

where they are supposed to vote in an election (but for one reason or another would not have otherwise voted because it was inconvenient or impossible to vote at their home precinct), will also be able to vote—but again, only in select races. Arizona can thus expect more votes in the presidential, senatorial, and state races than would be cast under its traditional rules. I suppose that in theory that's a good thing. What the majority has not counted on is the effect its order will have on the races that depend on geographic boundaries within Arizona: congressional, state-legislative, and local offices. When voters do not go to their local precincts to vote, they cannot vote in those races. Voters who do not take the time to determine their appropriate precinct—for whatever reason—and vote out of precinct have disenfranchised themselves with respect to the local races. That's a bad thing.

Arizona's longstanding, neutral rule gives voters an incentive to figure out where their polling place is, which, in turn, encourages voters to cast ballots in national, state, and local elections. In effect, Arizona has stapled national and statewide elections to other state and local elections. The opportunity to vote in any one race is the opportunity to vote in all races. It's strong medicine, but Arizona's rule is a self-protective rule; it helps encourage voting and, presumably, interest in local elections. The majority's preferred rule gives voters an incentive to vote wherever it is convenient for them which increases the likelihood they will vote in certain national and statewide races, but decreases the likelihood they will vote in other state and local races. It places a burden on voters who wish to exercise their right to vote on all matters to which

they are entitled, a burden that simply would not exist for the less-engaged voter. The majority's rule contradicts our most basic principles of federalism by deeming elections for national and statewide offices more important than those for lesser offices.

The majority's concern is based on the fact that voters who vote in the wrong precinct are more likely to be minorities. Maj. Op. at 42–44. If that fact holds true in the future—and it may not because, as I have explained, any voter in Arizona (including those who know where to vote) may take advantage of the majority's new rule—then minority ballots will be underrepresented in the local races. Under the majority's preferred scheme, it is thus likely that more minorities will fail to vote in local elections—elections that most directly affect the daily lives of ordinary citizens, and often provide the first platform by which citizen-candidates, not endowed with personal wealth or name recognition, seek on the path to obtaining higher office. In any event, the court has just put a big thumb on the scale of the Arizona elections—national, state, and local—with unclear results.

These concerns are magnified when we consider the relatively small number of OOP ballots. *See Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 873 (D. Ariz. 2018). It is more likely that these ballots would make a difference in a local election than in a national or statewide election. Arizona's rule encourages its OOP voters—white, African-American, Hispanic, or other—to vote in the correct precinct. Under Arizona's current OOP rule, a voter, having gone to the trouble of going to a precinct to vote in person and suffering the

indignity of having to fill out a provisional ballot, is less likely to make the same mistake the next year.[8] A voter who has had a ballot disqualified is more likely to figure out the correct precinct next time—or, better yet, sign up for the convenience of early voting, a measure that avoids the conundrum of OOP altogether.[9] The

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[8] The Majority dismisses this point by highlighting how Arizona has frequently changed polling places in some localities. Maj. Op. at 111 (referring to Arizona's high rate of OOP voting). But there is no evidence in the record that the same voters's ballots are excluded as OOP year after year. My point is that a voter who has had her ballot excluded as OOP is more likely to exercise greater care in finding the right polling location next time.

[9] The Majority worries that OOP voters may never come to know that their votes were in fact rejected and, hence, will never learn from the situation. Maj. Op. at 110. Whatever the cause for the Majority's concern, Arizona's statutory law is not to blame. Arizona law specifically requires county recorders to establish "a method of notifying the provisional ballot voter at no cost to the voter whether the voter's ballot was verified and counted and, if not counted, the reason for not counting the ballot." Ariz. Rev. Stat. Ann. § 16-584(F) (2019). Thus, voters should have the opportunity to find out whether their vote was counted.

Further, to the extent that voters inadvertently vote in the wrong precinct, that is not a failing of Arizona law. Instead, the law requires that voters' names be checked on the precinct register. If a voter's name does not appear on the register, then the address is checked to confirm that the voter resides within that jurisdiction. *Id.* § 16-584(B). Once the address is confirmed to be in the precinct or the voter affirms in writing that the voter is eligible to vote in that jurisdiction, the voter "shall be allowed to vote a provisional ballot." *Id.* Accordingly, under Arizona law, no voter should inadvertently vote at the wrong precinct without some indication that something is amiss.

voter who only votes where it is convenient has disenfranchised himself from local elections.

States such as California, Utah, and New Mexico have made the same choice the majority forces on Arizona. Those states may or may not have made the calculus I have set out here and they may or may not have measured the costs and benefits of their new rule; it's theirs to experiment with. They may conclude that the new rule is the right one; they may not. And if any of those states decides that the count-the-ballots-partially rule is not the best rule, those states will be free to adopt a different rule, including the OOP rule the majority strikes down today. After today's decision, Arizona has no such recourse.

II

H.B. 2023 presents a different set of considerations. There is no constitutional or federal statutory right to vote by absentee ballot. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969) ("It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. . . . [T]he absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny . . . the exercise of the franchise . . . ."); *see also Crawford*, 553 U.S. at 209 (Scalia, J., concurring in the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting the claim that there is "a blanket right of registered voters to

vote by absentee ballot" because "it is obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting").[10] Nevertheless, if a state is going to offer absentee ballots, it must do so on an equal basis. Arizona's absentee ballot rule, like its OOP rule, is a neutral time, place, or manner provision to help ensure the integrity of the absentee voting process. In fact, what is at issue here is not the right of Arizona voters to obtain and return an absentee ballot, but the question of who can physically return the ballot.

A

H.B. 2023 provides that "[a] person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony." Ariz. Rev. Stat. Ann. § 16-1005(H) (codifying H.B. 2023). The law does

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[10] "The exercise of a public franchise by proxy was illegal at common law." Cortlandt F. Bishop, *History of Elections in the American Colonies* 129 (1893). The Colonies experimented with proxy votes, with varying degrees of success. Proxy voting was not a success in at least one colony. A 1683 letter to the Governor of South Carolina warned:

> Wee are informed that there are many undue practices in the choyce of members of Parlmt, and that men are admitted to bring papers for others and put in their votes for them, wh is utterly illegal & contrary to the custome of Parliaments & will in time, if suffered, be very mischeevious: you are therefore to take care that such practices be not suffered for the future, but every man must deliver his own vote & noe man suffered to bring the votes of another . . . .

Id. at 139 (spelling in original) (citation omitted).

not apply to three classes of persons: (1) "[a]n election official," (2) "a United States postal service worker or any other person who is allowed by law to transmit United States mail," and (3) "[a] family member, household member or caregiver of the voter." *Id.* § 16-1005(H)–(I)(2).

The Arizona provision is substantially similar to the laws in effect in many other states. In Indiana, for example, it is a felony for anyone to collect a voter's absentee ballot, with exceptions for members of the voter's household, the voter's designated attorney in fact, certain election officials, and mail carriers. Ind. Code § 3-14-2-16(4). Connecticut also restricts ballot collection, permitting only the voter, a designee of an ill or disabled voter, or the voter's immediate family members to mail or return an absentee ballot. Conn. Gen. Stat. § 9-140b(a). New Mexico likewise permits only the voter, a member of the voter's immediate family, or the voter's caregiver to mail or return an absentee ballot. N.M. Stat. Ann. § 1-6-10.1. At least seven other states (Georgia, Missouri, Nevada, North Carolina, Oklahoma, Ohio, and Texas) similarly restrict who can personally deliver an absentee ballot to a voting location. Ga. Code Ann. § 21-2-385(a) (limiting who may personally deliver an absentee ballot to designees of ill or disabled voters or family members); Mo. Rev. Stat. § 115.291(2) (restricting who can personally deliver an absentee ballot); Nev. Rev. Stat. Ann. § 293.330(4) (making it a felony for anyone other than the voter or the voter's family member to return an absentee ballot); Okla. Stat. tit. 26, § 14-108(C) (voter delivering a ballot must provide proof of identity); Ohio Rev. Code Ann. § 3509.05(A) (limiting

who may personally deliver an absent voter's ballot); Tex. Elec. Code Ann. § 86.006(a) (permitting only the voter to personally deliver the ballot).[11]

Other states are somewhat less restrictive than Arizona because they permit a broader range of people to collect early ballots from voters but restrict how many ballots any one person can collect and return. Colorado forbids anyone from collecting more than ten ballots. Colo. Rev. Stat. § 1-7.5-107(4)(b). North Dakota prohibits anyone from collecting more than four ballots, N.D. Cent. Code § 16.1-07-08(1); New Jersey, N.J. Stat. Ann. § 19:63-4(a), and Minnesota, Minn. Stat. Ann. § 203B.08 sbd. 1, three; Arkansas, Ark. Code Ann. § 7-5-403(a)(1), Nebraska, Neb. Rev. Stat. § 32-943(2), and West Virginia, W. Va. Code § 3-3-5(k), two. South Dakota prohibits anyone from collecting more than one ballot without notifying "the person in charge of the election of all voters for whom he is a messenger." S.D. Codified Laws § 12-19-2.2.

Still other states have adopted slightly different restrictions on who may collect early ballots. California, Maine, and North Dakota, for example, make it illegal

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[11] Until recently, two other states had similar provisions on the books. California formerly limited who could return mail ballots to the voter's family or those living in the same household. *Compare* Cal. Elec. Code § 3017(a)(2) (West 2019), *with* Cal. Elec. Code § 3017(a) (West 2015). It only amended its law in 2016. 2016 Cal. Legis. Serv. ch. 820 (West). Illinois also used to make it a felony for anyone but the voter, his or her family, or certain licensed delivery companies to mail or deliver an absentee ballot. 10 Ill. Comp. Stat. Ann. 5/19-6 (1996); 10 Ill. Comp. Stat. 5/29-20(4). Illinois amended that provision in 2015 to let voters authorize others to mail or deliver their ballots. 10 Ill. Comp. Stat. Ann. 5/19-6 (2015).

to collect an absentee ballot for compensation. Cal. Elec. Code § 3017(e)(1); Me. Rev. Stat. Ann. tit. 21-A, § 791(2)(A) (making it a crime to receive compensation for collecting absentee ballots); N.D. Cent. Code § 16.1-07-08(1) (prohibiting a person from receiving compensation for acting as an agent for an elector). Florida and Texas make it a crime to receive compensation for collecting certain numbers of ballots. Fla. Stat. Ann. § 104.0616(2) (making it a misdemeanor to receive compensation for collecting more than two vote-by-mail ballots); Tex. Elec. Code Ann. § 86.0052(a)(1) (criminalizing compensation schemes based on the number of ballots collected for mailing).

Some of these laws are stated as a restriction on how the early voter may return a ballot. In those states, the voter risks having his vote disqualified. *See, e.g.*, *Wrinn v. Dunleavy*, 440 A.2d 261, 272 (Conn. 1982) (disqualifying ballots and ordering a new primary election when an unauthorized individual mailed absentee ballots). In other states, as in Arizona, the statute penalizes the person collecting the ballot. *See* Ind. Code Ann. § 3-14-2-16 (making it a felony knowingly to receive a ballot from a voter); Nev. Rev. Stat. Ann. § 293.330(4) (making it a felony for unauthorized persons to return an absentee ballot); Tex. Elec. Code Ann. § 86.006(f)–(g) (making it a crime for an unauthorized person to possess an official ballot); *see also Murphy v. State*, 837 N.E.2d 591, 594–96 (Ind. Ct. App. 2005) (affirming a denial of a motion to dismiss a charge for unauthorized receipt of a ballot from an absentee voter); *People v. Deganutti*, 810 N.E.2d 191, 198 (Ill. App. Ct. 2004) (affirming conviction for absentee ballot violation). In those states,

the ballot, even if collected improperly, may be valid. *See In re Election of Member of Rock Hill Bd. of Educ.*, 669 N.E.2d 1116, 1122–23 (Ohio 1996) (holding that a ballot will not be disqualified for a technical error).

In sum, although states have adopted a variety of rules, Arizona's ballot collection rule is fully consonant with the broad range of rules throughout the United States.[12]

B

Even more striking than the number of other states with similar provision is that H.B. 2023 follows precisely the recommendation of the bi-partisan Carter-Baker Commission on Federal Election Reform.[13] The Carter-Baker Commission found:

> Absentee ballots remain the largest source of potential voter fraud. . . . Absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.

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[12] For context, Appendix C provides the relevant provisions of the laws from all fifty states, the District of Columbia, and the U.S. territories regarding the collection and mailing of absentee ballots.

[13] The Commission on Federal Election Reform was organized by American University's Center for Democracy and Election Management and supported by the Carnegie Corporation of New York, The Ford Foundation, the John S. and James L. Knight Foundation, and the Omidyar Network. It was co-chaired by former President Jimmy Carter and former Secretary of State James Baker.

> Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots.

Comm'n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005) ("*Building Confidence*") (footnote omitted). The Carter-Baker Commission recommended that "States . . . should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id.* It made a formal recommendation:

> State and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials. The practice in some states of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated.

Id. at 47 (Recommendation 5.2.1).

The Carter-Baker Commission recommended that states limit the persons, other than the voter, who handle or collect absentee ballots to three classes of persons: (1) family members, (2) employees of the U.S. Postal Service or another recognized shipper, and (3) election officials. H.B. 2013 allows two classes of persons to collect absentee ballots: (1) election officials and (2) employees of the U.S. Postal Service "or any

other person who is allowed by law to transmit United States mail." Ariz. Rev. Stat. § 16-1005(H). H.B. 2023 also provides that the prior restriction on collection of ballots does not apply to "[a] family member, household member or caregiver of the voter." *Id.* § 16-1005(I)(2). With respect to election officials and mail delivery workers, Arizona tracks exactly the recommendation from the Commission. With respect to family, however, Arizona's provision is *more generous* than the Carter-Baker Commission's recommendation. Whereas the Commission recommended that only family members be permitted to handled a voter's absentee ballot, Arizona expanded the class of absentee ballot handlers to "household member[s]" and "caregiver[s]."

I don't see how Arizona can be said to have violated the VRA when it followed bipartisan recommendations for election reform in an area the Carter-Baker Commission found to be fraught with the risk of voter fraud. Nothing could be more damaging to confidence in our elections than fraud at the ballot box. And there is evidence that there is voter fraud in the collecting of absentee ballots. As the Seventh Circuit described it: "Voting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting. . . . [A]bsentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin*, 385 F.3d at 1130–31; *see also Wrinn*, 440 A.2d at 270 ("[T]here is considerable room for fraud in absentee voting and . . . a failure to comply with the regulatory provision governing absentee voting increases the opportunity for fraud." (citation omitted)); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) ("[T]he integrity of a vote is even more

susceptible to influence and manipulation when done by absentee ballot."); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. Times (Oct. 6, 2012), http://nyti.ms/QUbcrg (discussing a variety of problems in states).[14]

Organized absentee ballot fraud of sufficient scope to corrupt an election is no doomsday hypothetical: it happened as recently as 2018 in North Carolina. In the state's Ninth Congressional District, over 282,000 voters cast ballots, either in person or absentee. *See* Brief of Dan McCready at 7, *In re Investigation of Election Irregularities Affecting Ctys. Within the 9th Cong. Dist.* (N.C. State Bd. of Elections Feb. 12, 2019) [hereinafter McCready Br.]. North Carolina permits "[a]ny qualified voter" in the state to vote by absentee ballot. N.C. Gen. Stat. § 163A-1295. However, like Arizona, the state adheres to the Commission's recommendations and restricts the categories of persons who may collect a voter's absentee ballot. It is a Class I felony in North Carolina for "any person except the voter's near relative or the voter's verifiable legal guardian to assist the voter to vote an absentee ballot." *Id.* § 163A-1298.

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[14] Pressure on absentee voters has long been noted. *See* Harris, *Election Administration in the United States*, at 302 ("The amount of intimidation now exercised by the precinct captain in many sections of large cities is very great; with mail voting it would be enormously increased. The overbearing and dominant precinct captain would insist upon seeing how each voter under obligation to him had marked his ballot, and the voter would have no protection against such tactics.").

In last year's election in the Ninth Congressional District, evidence suggested that a political activist hired by the Republican nominee paid employees to collect absentee ballots—possibly more than 1,000—from voters in violation of § 163A-1298. *See* Indictment, *State v. Dowless*, No. 19CRS001934 (N.C. Super. Ct. July 30, 2019); McCready Br. at app. 2–3. An employee of the suspected activist testified that she personally collected about three dozen ballots. *See* Transcript of Evidentiary Hearing at 150, *In re Investigation of Election Irregularities Affecting Ctys. Within the 9th Cong. Dist.* (N.C. State Bd. of Elections Feb. 18, 2019). She also helped fill in about five or ten incomplete, unsealed ballots in favor of Republican candidates. *Id.* at 67, 99, 152–53. The ballots were kept at the activist's home and office for days or longer before they were turned in. *Id.* at 69. A voter testified that she turned over her blank ballot to the activist's employees in an unsealed envelope, trusting that the activist would make a good decision for her. *Id.* at 207–08, 214–15.

This coordinated ballot fraud led the state Board of Elections to invalidate the results of the election, which had been decided by only 905 votes—fewer than the amount of suspected fraudulent ballots. Order at 10, 44–45, *In re Investigation of Election Irregularities Affecting Ctys. Within the 9th Cong. Dist.* (N.C. State Bd. of Elections Mar. 13, 2019). The residents of the district—some 778,447 Americans—were thus unrepresented in the House of Representatives for the better part of a year. Perhaps the more devastating injury will be the damage this episode does to North Carolinians' confidence in their election system.

The majority acknowledges that the Democratic Party disproportionately benefits from get-out-the-vote efforts by collecting mail-in ballots. *See, e.g.*, Maj. Op. at 83 (quoting *Reagan*, 329 F. Supp. 3d at 870). Further, the majority acknowledges that Democratic activists have often led such collection efforts. *Id.* Yet the experience of North Carolina with Republican activists shows starkly the inherent danger to allowing political operatives to conduct collections of mail-in ballots. Arizona is well within its right to look at the perils endured by its sister states and enact prophylactic measures to curtail any similar schemes. By prohibiting overtly political operatives and activists from playing a role in the ballot-collection process, Arizona mitigates this risk. And the State's well-acknowledged past sins should not prevent it from using every available avenue to keep safe the public's trust in the integrity of electoral outcomes.

Indeed, Arizona does not have to wait until it has proof positive that its elections have been tainted by absentee ballot fraud before it may enact neutral rules. "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). In *Crawford*, the Supreme Court quoted with approval the Carter-Baker Commission:

> There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter

> or detect fraud or to confirm the identity of voters.

Crawford, 553 U.S. at 194 (quoting *Building Confidence* at 18) (footnote omitted).

The majority today holds that, as a matter of federal law, Arizona may not enforce a neutrally drawn statute recommended by a bi-partisan commission criminalizing the very conduct that produced a fraudulent outcome in a race for Congress less than a year ago. When the Voting Rights Act requires courts to consider the "totality of the circumstances," it is a poor understanding of the Act that would strike common time, place, and manner restrictions designed to build confidence in the very voting system that it now leaves vulnerable.

III

As citizens of a democratic republic, we understand intuitively that we have a legal right and a moral duty to cast a ballot in free elections. The states have long had the power to fashion the rules by which its citizens vote for their national, state, and local officials. Once we consider that "totality of the circumstances" must take account of long-held, widely adopted measures, we must conclude that Arizona's time, place, and manner rules are well within our American democratic-republican tradition. Nothing in the Voting Rights Act makes "'evenhanded restrictions that protect the integrity and reliability of the electoral process' . . . invidious." *Crawford*, 553 U.S. at 189–90 (quoting *Anderson*, 460 U.S. at 788 n.9).

I would affirm the judgment of the district court, and I respectfully dissent.

Appendix A

State and Territory Laws Regarding Treatment of Out-of-Precinct Provisional Ballots

Jurisdiction	Citation
Alabama	Ala. Code § 17-9-10 (2019) (providing that voters must vote in their "county and voting place" of domicile); *see also Davis v. Bennett*, 154 So. 3d 114, 131 (Ala. 2014) (affirming that Alabama law requires voters to cast ballots at the correct voting place).
Alaska	Alaska Stat. Ann. § 15.20.207(b) (West 2019) (failing to list out-of-precinct voting as grounds for rejecting a ballot); Alaska Stat. Ann. § 15.20.211(a) (West 2019) (providing that a voter may cast a vote in another house district for statewide and federal offices); *see also Hammond v. Hickel*, 588 P.2d 256, 264 (Alaska 1978) ("There is no constitutional requirement of precinct residency, and there is clear statutory authorization for persons claiming to be registered voters to vote a questioned ballot if there is no evidence of registration in the precinct in which the voter seeks to vote.").

American Samoa	Am. Samoa Code Ann. § 6.0223(b)–(c) (providing that a voter's right to vote may be challenged if the voter "is not entitled to vote in that district" and, if true, the ballot will be rejected).
Arizona	Ariz. Rev. Stat. Ann. § 16-584(D)–(E) (2018) (requiring confirmation that the voter resided in the precinct).
Arkansas	Ark. Code Ann. § 7-5-308(f) (West 2017) (requiring only that voters be registered to vote in the state).
California	Cal. Elec. Code § 14310(c)(3) (West 2019) ("The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.").
Colorado	8 Colo. Code Regs. § 1505-1:17.2.9 (2019) (providing that if an elector used the wrong ballot, then "only races and issues for which the elector [was] qualified to vote may be counted").
Connecticut	Conn. Gen. Stat. Ann. §§ 9-232, 9-232n (West 2019) (requiring that only provisional ballots by

	applicants eligible to vote in a given town may be counted).
Delaware	Del. Code Ann. tit. 15, § 4948(h)(7)–(8) (West 2015) (explaining that provisional ballots may not be counted if cast by voters outside of their election districts).
District of Columbia	D.C. Code Ann. § 1-1001.09(b)(3) (West 2017) (providing that, aside from those requiring accessible entrances, "[n]o registered qualified elector of the District may cast a vote in a precinct that does not serve his or her current residence"); D.C. Mun. Regs. tit. 3, § 807 (2019) (stating that a provisional ballot may be tabulated if, *inter alia*, "the voter cast the Special Ballot at the precinct in which the voter maintains residence or at an early voting center designated by the Board").
Florida	Fla. Stat. Ann. § 101.048(2)(a) (West 2019) ("The county canvassing board shall examine each Provisional Ballot Voter's Certificate and Affirmation to determine if the person voting that

	ballot was entitled to vote at the precinct where the person cast a vote in the election . . . .”).
Georgia	Ga. Code Ann. § 21-2-419(c)(2) (West 2019) (stating that if a voter voted in the wrong precinct, then races for which the voter was entitled to vote shall be counted).
Guam	3 Guam Code Ann. § 14105(a) (2016) (“When a provisional voter casts a provisional ballot in the incorrect precinct, election officials shall count the votes on that ballot in every race for which the voter would be entitled to vote if he or she had been in the correct precinct.”).
Hawai‘i	Haw. Code R. § 3-172-140(c)(3) (2017) (“If [the] county clerk determines the individual is not eligible to vote in the precinct where the provisional ballot was cast, the provisional ballot shall not be counted.”).
Idaho	Does not use provisional ballots because the state allows for election-day registration. *See* Idaho Code Ann. § 34-408A (West 2019).
Illinois	10 Ill. Comp. Stat. Ann. 5/18A-15(b)(1) (West 2015) (explaining

	that a provisional ballot is valid if, *inter alia*, "the provisional voter cast the provisional ballot in the correct precinct").
Indiana	Ind. Code Ann. § 3-11.7-5-3(a) (West 2019) (providing that a ballot is invalid and may not be counted if "the provisional voter is not a qualified voter of the precinct").
Iowa	Iowa Code Ann. § 49.9 (West 2019) (explaining that "a person shall not vote in any precinct but that of the person's residence").
Kansas	Kan. Stat. Ann. § 25-3002(b)(3) (West 2019) (explaining that if a voter cast a ballot for the wrong precinct, but was still within the same county, then votes for which the voter was eligible will be counted).
Kentucky	31 Ky. Admin. Regs. 6:020(14) (2019) ("If the county board of elections determines the individual is ineligible to vote in the precinct in the election, the vote shall not be counted . . . .").
Louisiana	La. Stat. Ann. § 18:556.2(F)(3)(a)–(b) (2017) (stating that a provisional ballot may be counted if the voter was a registered voter

	in the parish and was eligible to vote for the federal offices cast).
Maine	Me. Stat. tit. 11, § 50 (2019) (providing that all ballots cast in Maine will be counted so long as "challenged ballots are insufficient in number to affect the result of the election").
Maryland	Md. Code Ann., Elec. Law § 11-303(e)(2) (West 2019) (stating that if the voter voted out of precinct, "only the votes cast by the voter for each candidate or question applicable to the precinct in which the voter resides" will get counted).
Massachusetts	Mass. Gen. Laws Ann. ch. 54, § 76C(d) (West 2004) ("A provisional ballot cast by a person whose name is not on the voting list for the city or town in which they are claiming the right to vote, but whom the city or town clerk determines to be eligible to vote in another precinct of the same city or town, shall be counted in the precinct in which the person cast the provisional ballot for all offices for which the person is eligible to vote.").
Michigan	Mich. Comp. Laws Ann. § 168.813(1) (West 2018) (stating

	that provisional ballots may only be counted "if the identity and residence of the elector is established").
Minnesota	Does not use provisional ballots because the state allows for election-day registration. *See* Minn. Stat. Ann. § 201.061 subd. 3(a) (West 2017).
Mississippi	1 Miss. Admin. Code Pt. 10, Exh. A (2019) ("Poll managers shall advise an affidavit voter his/her ballot will not count if he/she is voting at the wrong polling place.").
Missouri	Mo. Ann. Stat. § 115.430(2)(1) (West 2019) (explaining that ballots voted in a polling place where the voter was not eligible to vote will not be counted).
Montana	Mont. Code Ann. § 13-15-107 (West 2019) (stating that a ballot must be rejected if the voter's identity and eligibility cannot be verified).
Nebraska	Neb. Rev. Stat. Ann. § 32-1002(5)(e) (West 2019) (providing that a provisional ballot shall not be counted if "[t]he residence address provided on the registration application completed

	. . . is in a different county or in a different precinct than the county or precinct in which the voter voted").
Nevada	Nev. Rev. Stat. Ann. § 293.3085 (West 2019) ("A provisional ballot must not be counted if the county or city clerk determines that the person who cast the provisional ballot cast the wrong ballot for the address at which the person resides.").
New Hampshire	Does not use provisional ballots because the state allows for election-day registration. *See* N.H. Rev. Stat. Ann. § 654:7-a (2017).
New Jersey	N.J. Stat. Ann. § 19:53C-17 (West 2019) ("If, for any reason, a provisional ballot voter votes a ballot other than the ballot for the district in which the voter is qualified to vote, the votes for those offices and questions for which the voter would be otherwise qualified to vote shall be counted. All other votes shall be void.").
New Mexico	N.M. Stat. Ann. § 1-12-25.4(F) (West 2019) ("If the voter is a registered voter in the county but has voted on a provisional paper ballot other than the ballot of the

	voter's correct precinct, the county canvassing board shall ensure that only those votes for the positions or measures for which the voter was eligible to vote are counted.").
New York	N.Y. Elec. Law § 9-209(2)(a)(iii) (McKinney 2019) ("If the board of elections determines that a person was entitled to vote at such election, the board shall cast and canvass such ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district.").
North Carolina	N.C. Gen. Stat. Ann. § 163A-1169(a)(4) (West 2019) ("If the county board of elections finds that an individual voting a provisional official ballot (i) was registered in the county as provided in G.S. 163A-1166, (ii) voted in the proper precinct under G.S. 163A-841 and G.S. 163A-842, and (iii) was otherwise eligible to vote, the provisional official ballots shall be counted by the county board of elections before the canvass. Except as provided in G.S. 163A-1184(e), if the county board finds that an individual voting a

	provisional official ballot (i) did not vote in the proper precinct under G.S. 163A-841 and G.S. 163A-842, (ii) is not registered in the county as provided in G.S. 163A-860, or (iii) is otherwise not eligible to vote, the ballot shall not be counted. If a voter was properly registered to vote in the election by the county board, no mistake of an election official in giving the voter a ballot or in failing to comply with G.S. 163A-1184 or G.S. 163A-1142 shall serve to prevent the counting of the vote on any ballot item the voter was eligible by registration and qualified by residency to vote.").
North Dakota	North Dakota does not require voters to be registered and does not utilize provisional ballots. *See* N.D. Cent. Code Ann. § 16.1-01-04 (West 2019).
Northern Mariana Islands	1 N. Mar. I. Code § 6215(b)–(c) (2014) (providing that a voter's right to vote may be challenged if the voter "is not entitled to vote in that election district" and, if true, the ballot will be rejected).
Ohio	Ohio Rev. Code Ann. § 3505.183(D) (West 2019) (stating that under certain circumstances,

	if a voter cast a ballot in the wrong precinct due to poll-worker error, then the votes for which the voter would have been eligible to cast are counted).
Oklahoma	Okla. Stat. Ann. tit. 26, § 7-116.1(C) (West 2019) ("A provisional ballot shall be counted only if it is cast in the precinct of the voter's residence . . . .").
Oregon	Or. Rev. Stat. Ann. § 254.408(6) (West 2018) (explaining that provisional votes will be counted according to whether "the elector is qualified to vote for the particular office or on the measure").
Pennsylvania	25 Pa. Stat. and Cons. Stat. Ann. § 3050(a.4)(7) (West 2012) (providing that so long as a ballot is cast within the voter's county, if it is cast in the wrong election district, then only votes which the voter was entitled to make will be counted).
Puerto Rico	P.R. Laws Ann. tit. 16, § 4062 (2011) ("If a voter votes in a precinct other than the one where he/she is registered, only the vote cast for the offices of Governor and Resident Commissioner shall be

	adjudicated during the general canvass.").
Rhode Island	410 R.I. Code R. § 20-00-13.7(C)(1)(b) (2012) (stating that when a voter who cast a provisional ballot lives outside of the precinct, the ballot shall be marked "Federal Offices Only" and only votes for federal officials for whom the voter was eligible to vote shall be counted).
South Carolina	S.C. Code Ann. § 7-13-830 (2019) ("If the board certifies the person challenged is not a qualified elector of the precinct, this certification is considered an administrative challenge and is clear and convincing evidence for the meeting authority to disallow the ballot.").
South Dakota	S.D. Codified Laws § 12-20-5.1 (2019) ("Prior to the official canvass, the person in charge of the election shall determine if the person voting by provisional ballot was legally qualified to vote in the precinct in which the provisional ballot was cast.").
Tennessee	Tenn. Code Ann. § 2-7-112(a)(3)(B)(v) (West 2018) (explaining that a ballot shall be rejected if it is determined that the

	voter should not have cast the ballot in the precinct).
Texas	Tex. Elec. Code Ann. § 65.054(b)(1) (West 2012) (stating that a provisional ballot shall be accepted only if the voter was qualified to cast it); *see also Morales v. Segura*, No. 04-15-365, 2015 WL 8985802, at *4 (Tex. App. Dec. 16, 2015) (upholding the rejection of a ballot voted in the wrong precinct).
Utah	Utah Code Ann. § 20A-4-107(a)–(c) (West 2019) (explaining that a ballot voted in the wrong precinct but the right county is able to have any votes counted for which the voter was eligible to vote).
Vermont	Vt. Stat. Ann. tit. 17, § 2121(a) (West 2019) (explaining that a voter is qualified to "register to vote in the town of his or her residence"); *see also id.* § 2557(a) (stating that a provisional ballot may be accepted once the town clerk "determine[s] whether the applicant meets all of the registration eligibility requirements").
Virgin Islands	V.I. Code Ann. tit. 18, §§ 581(a), 587 (2019) (providing that voters must reside in their election districts and that poll workers

	must challenge an individual that they believe does not reside within the district).
Virginia	Va. Code Ann. § 24.2-653(B) (West 2015) ("The electoral board shall . . . determine whether each person having submitted such a provisional vote was entitled to do so as a qualified voter in the precinct in which he offered the provisional vote.").
Washington	Wash. Admin. Code § 434-262-032 (2019) (listing situations where a ballot must be struck and failing to provide out-of-precinct voting as reason for disqualifying a ballot).
West Virginia	W. Va. Code Ann. § 3-1-41(d) (West 2016) (stating that poll clerks must warn "that if the voter is casting a ballot in the incorrect precinct, the ballot cast may not be counted for that election").
Wisconsin	Wis. Stat. Ann. § 6.97(4) (West 2018) (providing that there must be a determination of whether the "individual who has voted under this section is qualified to vote in the ward or election district where the individual's ballot is cast").

Wyoming	Wyo. Stat. Ann. § 22-15-105(b) (West 2019) (requiring voters to swear that they are entitled to vote in the given precinct).

Appendix B

State and Territory Treatment of Out-of-Precinct Provisional Ballots[15]

Do Not Tabulate Out-of-Precinct Ballots	Tabulate Out-of-Precinct Ballots
Alabama	Alaska
American Samoa	Arkansas
Arizona	California
Connecticut	Colorado
Delaware	Georgia
District of Columbia	Guam
Florida	Kansas*
Hawai'i	Louisiana†
Illinois	Maine
Indiana	Maryland
Iowa	Massachusetts*
Kentucky	New Jersey
Michigan	New Mexico*
Mississippi	New York
Missouri	North Carolina‡
Montana	Ohio††

[15] Idaho, Minnesota, New Hampshire, and North Dakota are not included because they do not use provisional ballots. *See supra* Appendix A.

Nebraska	Oregon
Nevada	Pennsylvania*
Northern Mariana Islands	Puerto Rico**
Oklahoma	Rhode Island†
South Carolina	Utah*
South Dakota	Washington
Tennessee	
Texas	
Vermont	
Virgin Islands	
Virginia	
West Virginia	
Wisconsin	
Wyoming	

* Requires the voter to be in the correct county, city, or town.

† Tabulates votes for federal offices only.

‡ There is some divergence among secondary sources regarding whether North Carolina counts OOP ballots. *Compare Provisional Ballots*, Nat'l Conf. of St. Legislatures (Oct. 15, 2018), http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx, *with What Is Provisional Voting? Explained*, democracy N.C., https://democracync.org/resources/what-is-provisional-voting-explained

(last visited Oct. 15, 2019). North Carolina law generally disfavors counting only provisional ballots cast within the correct precinct. *See* N.C. Gen. Stat. Ann. § 163A-1169(a)(4) (West 2019) ("[I]f the county board finds that an individual voting a provisional official ballot (i) did not vote in the proper precinct . . . the ballot shall not be counted."); *see also James v. Bartlett*, 607 S.E.2d 638, 642 (N.C. 2005) ("[V]oters must cast ballots on election day in their precincts of residence."). Nevertheless, North Carolina law appears to allow an OOP vote to be tabulated in very narrow exceptions—such as election-official error. *See* N.C. Gen. Stat. Ann. § 163A-1169(a)(4) ("If a voter was properly registered to vote in the election by the county board, no mistake of an election official in giving the voter a ballot or in failing to comply with G.S. 163A-1184 or G.S. 163A-1142 shall serve to prevent the counting of the vote on any ballot item the voter was eligible by registration and qualified by residency to vote."). This dissent resolves doubt in favor of listing North Carolina as a state that counts OOP ballots—even though its current law and practice are not entirely clear.

†† The ballot may be counted if, among other things, the casting of the wrong ballot was a result of poll-worker error. Only offices for which the voter would have been eligible to vote will be counted.

** Only the votes for Governor and Resident Commissioner will be canvassed.

Appendix C

State and Territory Laws Regarding the Collection of Absentee Ballots

Jurisdiction	Citation
Alabama	Ala. Code § 17-11-4 (2019): An application for a voter who requires emergency treatment by a licensed physician within five days before an election pursuant to Section 17-11-3 may be forwarded to the absentee election manager by the applicant or his or her designee.
Alaska	Alaska Stat. Ann. § 15.20.072 (West 2019) (providing a method a personal representative to handle and deliver ballots for a special needs voter).
American Samoa	Am. Samoa Code Ann. 6.1104(a): The reply envelope shall bear upon the face thereof the name, official title, and post office address of the Chief Election Officer and the words "Absentee Ballot Enclosed". The back of the reply envelope shall contain a statement to be subscribed to by the qualified elector which affirms

	the fact that he is the person voting.
Arizona	Ariz. Rev. Stat. Ann. § 16-1005(H)–(I) (2016): H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties. I. Subsection H of this section does not apply to: 1. An election held by a special taxing district formed pursuant to title 481 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48. 2. A family member, household member or caregiver of the voter.

	For the purposes of this paragraph: (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home. (b) "Collects" means to gain possession or control of an early ballot. (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship. (d) "Household member" means a person who resides at the same residence as the voter.
Arkansas	Ark. Code Ann. § 7-5-403(a) (West 2019): (1) A designated bearer may obtain absentee ballots for no

	more than two (2) voters per election. (2)(A) A designated bearer shall not have more than two (2) absentee ballots in his or her possession at any time. (B) If the county clerk knows or reasonably suspects that a designated bearer has more than two (2) absentee ballots in his or her possession, the county clerk shall notify the prosecuting attorney. (3)(A) A designated bearer receiving an absentee ballot from the county clerk for a voter shall obtain the absentee ballot directly from the county clerk and deliver the absentee ballot directly to the voter. (B) A designated bearer receiving an absentee ballot from a voter shall obtain the absentee ballot directly from the voter and deliver the absentee ballot directly to the county clerk. (4)(A) A designated bearer may deliver to the county clerk the

	absentee ballots for not more than two (2) voters. (B) The designated bearer shall be named on the voter statement accompanying the absentee ballot.
California	Cal. Elec. Code § 3017(a)(2) (West 2019): A vote by mail voter who is unable to return the ballot may designate another person to return the ballot to the elections official who issued the ballot, to the precinct board at a polling place or vote center within the state, or to a vote by mail ballot dropoff location within the state that is provided pursuant to Section 3025 or 4005. The person designated shall return the ballot in person, or put the ballot in the mail, no later than three days after receiving it from the voter or before the close of the polls on election day, whichever time period is shorter. Notwithstanding subdivision (d), a ballot shall not be disqualified from being counted solely because it was returned or mailed more than three days after the designated person received it from

	the voter, provided that the ballot is returned by the designated person before the close of polls on election day.
Colorado	Colo. Rev. Stat. Ann. § 1-7.5-107(4)(b)(I) (West 2019) The eligible elector may: (A) Return the marked ballot to the county clerk and recorder or designated election official by United States mail or by depositing the ballot at the office of the county clerk and recorder or designated election official or at any voter service and polling center, drop box, or drop-off location designated by the county clerk and recorder or designated election official as specified in the election plan filed with the secretary of state. The ballot must be returned in the return envelope. (B) Deliver the ballot to any person of the elector's own choice or to any duly authorized agent of the county clerk and recorder or designated election official for mailing or personal delivery;

	except that no person other than a duly authorized agent of the county clerk and recorder or designated election official may receive more than ten mail ballots in any election for mailing or delivery; or (C) Cast his or her vote in person at the voter service and polling center.
Connecticut	Conn. Gen. Stat. Ann. § 9-140b(a) (West 2019): An absentee ballot shall be cast at a primary, election or referendum only if: (1) It is mailed by (A) the ballot applicant, (B) a designee of a person who applies for an absentee ballot because of illness or physical disability, or (C) a member of the immediate family of an applicant who is a student, so that it is received by the clerk of the municipality in which the applicant is qualified to vote not later than the close of the polls; (2) it is returned by the applicant in person to the clerk by the day before a regular election, special election or primary or prior to the opening of the polls on the day of a

	referendum; (3) it is returned by a designee of an ill or physically disabled ballot applicant, in person, to said clerk not later than the close of the polls on the day of the election, primary or referendum; (4) it is returned by a member of the immediate family of the absentee voter, in person, to said clerk not later than the close of the polls on the day of the election, primary or referendum; (5) in the case of a presidential or overseas ballot, it is mailed or otherwise returned pursuant to the provisions of section 9-158g; or (6) it is returned with the proper identification as required by the Help America Vote Act, P.L. 107-252,1 as amended from time to time, if applicable, inserted in the outer envelope so such identification can be viewed without opening the inner envelope. A person returning an absentee ballot to the municipal clerk pursuant to subdivision (3) or (4) of this subsection shall present identification and, on the outer envelope of the absentee ballot, sign his name in the presence of the municipal clerk, and indicate his address, his

	relationship to the voter or his position, and the date and time of such return. As used in this section, "immediate family" means a dependent relative who resides in the individual's household or any spouse, child or parent of the individual.
Delaware	Del. Code Ann. tit. 15, § 5507(4) (West 2018): The elector shall return the sealed ballot envelope to the Department by: a. Depositing it in a United States postal mailbox, thereby mailing it to the Department; or b. Delivering it, or causing it to be delivered, to the Department before the polls close on the day of the election.
District of Columbia	D.C. Mun. Regs. tit. 3, § 722.2 (2019): A duly registered voter shall apply to vote by emergency absentee ballot according to the following procedure:

	(a) The registered voter shall, by signed affidavit on a form provided by the Board, set forth: (1) The reason why he or she is unable to be present at the polls on the day of the election; and (2) Designate a duly registered voter to serve as agent for the purpose of delivering the absentee ballot to the voter, except than an officer of the court in charge of a jury sequestered on election day may act as agent for any registered voter sequestered regardless of whether the officer is a registered voter in the District. (b) Upon receipt of the application, the Executive Director, or his or her designee, if satisfied that the person cannot, in fact, be present at the polling place on the day of the election shall issue to the voter, through the voter's duly authorized agent, an absentee ballot which shall be marked by the voter, placed in a sealed envelope and returned to the Board before the close of the polls on election day.

	(c) The person designated as agent shall, by signed affidavit on a form prescribed by the Board, state the following: (1) That the ballot will be delivered by the voter who submitted the application for the ballot; and (2) That the ballot shall be marked by the voter and placed in a sealed envelope in the agent's presence, and returned, under seal to the Board by the agent.
Florida	Fla. Stat. Ann. § 104.0616 (West 2016): (1) For purposes of this section, the term "immediate family" means a person's spouse or the parent, child, grandparent, or sibling of the person or the person's spouse. (2) Any person who provides or offers to provide, and any person who accepts, a pecuniary or other benefit in exchange for distributing, ordering, requesting, collecting, delivering, or otherwise physically possessing more than

	two vote-by-mail ballots per election in addition to his or her own ballot or a ballot belonging to an immediate family member, except as provided in ss. 101.6105–101.694, commits a misdemeanor of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
Georgia	Ga. Code Ann. § 21-2-385 (West 2019): (a) . . . Such envelope shall then be securely sealed and the elector shall then personally mail or personally deliver same to the board of registrars or absentee ballot clerk, provided that mailing or delivery may be made by the elector's mother, father, grandparent, aunt, uncle, brother, sister, spouse, son, daughter, niece, nephew, grandchild, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, sister-in-law, or an individual residing in the household of such elector. The absentee ballot of a disabled elector may be mailed or delivered by the caregiver of such disabled elector, regardless of whether such caregiver resides in

	such disabled elector's household. The absentee ballot of an elector who is in custody in a jail or other detention facility may be mailed or delivered by any employee of such jail or facility having custody of such elector. An elector who is confined to a hospital on a primary or election day to whom an absentee ballot is delivered by the registrar or absentee ballot clerk shall then and there vote the ballot, seal it properly, and return it to the registrar or absentee ballot clerk. . . . (b) A physically disabled or illiterate elector may receive assistance in preparing his or her ballot from any person of the elector's choice other than such elector's employer or the agent of such employer or an officer or agent of such elector's union; provided, however, that no person whose name appears on the ballot as a candidate at a particular primary, election, or runoff nor [specified relatives of a candidate] to any elector who is not related to such candidate. . . . The person rendering assistance to the elector in preparing the ballot shall sign

	the oath printed on the same envelope as the oath to be signed by the elector. Any person who willfully violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be sentenced to imprisonment for not less than one nor more than ten years or to pay a fine not to exceed $100,000.00, or both, for each such violation.
Guam	3 Guam Code Ann. § 10107 (2016): The Commission shall deliver a ballot to any qualified elector applying in person at the office of said Commission; provided, however, that such applicant shall complete and subscribe the application heretofore prescribed by this Chapter; provided further, that said application shall be made not more than thirty (30) days nor less than one (1) day before the date of the election for which the vote is being cast. It is provided further, that said ballot shall be immediately marked, enclosed in the ballot envelope, placed in the return envelope with the proper affidavit enclosed, and

	immediately returned to the Commission.
Hawai‘i	Haw. Rev. Stat. Ann. § 15-9 (West 2019): (a) The return envelope shall be: (1) Mailed and must be received by the clerk issuing the absentee ballot no later than the closing hour on election day in accordance with section 11-131; or (2) Delivered other than by mail to the clerk issuing the absentee ballot, or to a voter service center no later than the closing hour on election day in accordance with section 11-131. (b) Upon receipt of the return envelope from any person voting under this chapter, the clerk may prepare the ballots for counting pursuant to this section and section 15-10. (c) Before opening the return and ballot envelopes and counting the ballots, the return envelopes shall be checked for the following:

	(1) Signature on the affirmation statement; (2) Whether the signature corresponds with the absentee request or register as prescribed in the rules adopted by the chief election officer; and (3) Whether the person is a registered voter and has complied with the requirements of sections 11-15 and 11-16. (d) If any requirement listed in subsection (c) is not met or if the return or ballot envelope appears to be tampered with, the clerk or the absentee ballot team official shall mark across the face of the envelope "invalid" and it shall be kept in the custody of the clerk and disposed of as prescribed for ballots in section 11-154.
Idaho	Idaho Code Ann. § 34-1005 (West 2019): The return envelope shall be mailed or delivered to the officer who issued the same; provided, that an absentee ballot must be received by the issuing officer by

	8:00 p.m. on the day of election before such ballot may be counted.
Illinois	10 Ill. Comp. Stat. Ann. § 5/19-6 (West 2015): It shall be unlawful for any person not the voter or a person authorized by the voter to take the ballot and ballot envelope of a voter for deposit into the mail unless the ballot has been issued pursuant to application by a physically incapacitated elector under Section 3-3 or a hospitalized voter under Section 19-13, in which case any employee or person under the direction of the facility in which the elector or voter is located may deposit the ballot and ballot envelope into the mail. If the voter authorized a person to deliver the ballot to the election authority, the voter and the person authorized to deliver the ballot shall complete the authorization printed on the exterior envelope supplied by an election authority for the return of the vote by mail ballot.

Indiana	Ind. Code Ann. § 3-14-2-16(4) (West 2019): A person who knowingly does any of the following commits a Level 6 felony: . . . (4) Receives from a voter a ballot prepared by the voter for voting, except: (A) the inspector; (B) a member of the precinct election board temporarily acting for the inspector; (C) a member or an employee of a county election board (acting under the authority of the board and state law) or an absentee voter board member acting under IC 3-11-10; or (D) a member of the voter's household, an individual designated as attorney in fact for the voter, or an employee of: (i) the United States Postal Service; or (ii) a bonded courier company;

	(acting in the individual's capacity as an employee of the United States Postal Service or a bonded courier company) when delivering an envelope containing an absentee ballot under IC 3-11-10-1.
Iowa	Iowa Code Ann. § 53.17(1) (West 2019): a. The sealed return envelope may be delivered by the registered voter, by the voter's designee, or by the special precinct election officials designated pursuant to section 53.22, subsection 2, to the commissioner's office no later than the time the polls are closed on election day. However, if delivered by the voter's designee, the envelope shall be delivered within seventy-two hours of retrieving it from the voter or before the closing of the polls on election day, whichever is earlier. b. The sealed return envelope may be mailed to the commissioner by the registered voter or by the voter's designee. If mailed by the voter's designee, the envelope must be mailed within seventy-

	two hours of retrieving it from the voter or within time to be postmarked or, if applicable, to have the postal service barcode traced to a date of entry into the federal mail system not later than the day before the election, as provided in section 53.17A, whichever is earlier.
Kansas	Kan. Stat. Ann. § 25-1221 (West 2019): After such voter has marked the official federal services absentee ballot, he or she shall place it in the official ballot envelope and secretly seal the same. Such voter shall then fill out in full the form printed upon the official ballot envelope and sign the same. Such ballot envelope shall then be placed in the envelope provided for such purpose and mailed by the voter to the county election officer of the county of the voter's residence. Kan. Stat. Ann. § 25-1124(d) (West 2019): Any voted ballot may be transmitted to the county election

	officer by the voter or by another person designated in writing by the voter, except if the voter has a disability preventing the voter from writing and signing a statement, the written and signed statement required by subsection (e) shall be sufficient.
Kentucky	Ky. Rev. Stat. Ann. § 117.086(1) (West 2019): The voter returning his absentee ballot by mail shall mark his ballot, seal it in the inner envelope and then in the outer envelope, and mail it to the county clerk as shall be provided by this chapter. The voter shall sign the detachable flap and the outer envelope in order to validate the ballot. A person having power of attorney for the voter and who signs the detachable flap and outer envelope for the voter shall complete the voter assistance form as required by KRS 117.255. The signatures of two (2) witnesses are required if the voter signs the form with the use of a mark instead of the voter's signature. A resident of Kentucky who is a covered voter as defined in KRS

	117A.010 who has received an absentee ballot transmitted by facsimile machine or by means of the electronic transmission system established under KRS 117A.030(4) shall transmit the voted ballot to the county clerk by mail only, conforming with ballot security requirements that may be promulgated by the state board by administrative regulation. In order to be counted, the ballots shall be received by the clerk by at least the time established by the election laws generally for the closing of the polls, which time shall not include the extra hour during which those voters may vote who were waiting in line to vote at the scheduled poll closing time.
Louisiana	La. Stat. Ann. § 18:1308(B) (2017): The ballot shall be marked as provided in R.S. 18:1310 and returned to the registrar by the United States Postal Service, a commercial courier, or hand delivery. If delivered by other than the voter, a commercial courier, or the United States Postal Service, the registrar shall require that the

	person making such delivery sign a statement, prepared by the secretary of state, certifying that he has the authorization and consent of the voter to hand deliver the marked ballot. For purposes of this Subsection, "commercial courier" shall have the same meaning as provided in R.S. 13:3204(D). No person except the immediate family of the voter, as defined in this Code, shall hand deliver more than one marked ballot to the registrar.
Maine	Me. Rev. Stat. Ann. tit. 21-A, § 791(2)(A) (2009): A person commits a Class D crime if that person [d]elivers, receives, accepts, notarizes or witnesses an absentee ballot for any compensation. This paragraph does not apply to a governmental employee handling ballots in the course of that employee's official duties or a person who handles absentee ballots before the unvoted ballots are delivered to the municipality or after the voted ballots are returned to the clerk.
Maryland	Md. Code Ann., Elec. Law § 9-307 (West 2019):

	(a) A qualified applicant may designate a duly authorized agent to pick up and deliver an absentee ballot under this subtitle. (b) An agent of the voter under this section: (1) must be at least 18 years old; (2) may not be a candidate on that ballot; (3) shall be designated in a writing signed by the voter under penalty of perjury; and (4) shall execute an affidavit under penalty of perjury that the ballot was: (i) delivered to the voter who submitted the application; (ii) marked and placed in an envelope by the voter, or with assistance as allowed by regulation, in the agent's presence; and (iii) returned to the local board by the agent.

Massachusetts	Mass. Gen. Laws Ann. ch. 54, § 92(a) (West 2019): A voter who receives the ballot by mail, as provided in subsection (a) of section ninety-one B, may return it by mail to the city or town clerk in the envelope provided pursuant to subsection (d) of section eighty-seven, or such voter or a family member may deliver it in person to the office of the city or town clerk. A voter to whom a ballot was delivered in person at the office of the clerk as provided in said subsection (a) of said section ninety-one B shall return it without removing the ballot from such office.
Michigan	Mich. Comp. Laws Ann. § 168.764a (West 2019): Step 5. Deliver the return envelope by 1 of the following methods: (a) Place the necessary postage upon the return envelope and deposit it in the United States mail or with another public postal service, express mail service,

	parcel post service, or common carrier. (b) Deliver the envelope personally to the office of the clerk, to the clerk, or to an authorized assistant of the clerk. (c) In either (a) or (b), a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in- law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or a person residing in the voter's household may mail or deliver a ballot to the clerk for the voter. (d) You may request by telephone that the clerk who issued the ballot provide assistance in returning the ballot. The clerk is required to provide assistance if you are unable to return your absent voter ballot as specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pickup the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered. Your absent voter

	ballot will then be picked up by the clerk or an election assistant sent by the clerk. All persons authorized to pick up absent voter ballots are required to carry credentials issued by the clerk. If using this absent voter ballot return method, do not give your ballot to anyone until you have checked their credentials. . . . All of the following actions are violations of the Michigan election law and are illegal in this state: . . . . (4) For a person other than those listed in these instructions to return, offer to return, agree to return, or solicit to return an absent voter ballot to the clerk.
Minnesota	Minn. Stat. Ann. § 203B.08 subd. 1 (West 2015): The voter may designate an agent to deliver in person the sealed absentee ballot return envelope to the county auditor or municipal clerk or to deposit the return envelope in the mail. An agent may deliver or mail the return envelopes of not more than three

	voters in any election. Any person designated as an agent who tampers with either the return envelope or the voted ballots or does not immediately mail or deliver the return envelope to the county auditor or municipal clerk is guilty of a misdemeanor.
Mississippi	Miss. Code Ann. § 23-15-631(f) (West 2019): Any voter casting an absentee ballot who declares that he or she requires assistance to vote by reason of blindness, temporary or permanent physical disability or inability to read or write, shall be entitled to receive assistance in the marking of his or her absentee ballot and in completing the affidavit on the absentee ballot envelope. The voter may be given assistance by anyone of the voter's choice other than a candidate whose name appears on the absentee ballot being marked, the spouse, parent or child of a candidate whose name appears on the absentee ballot being marked or the voter's employer, an agent of that employer or a union representative; however, a

	candidate whose name is on the ballot or the spouse, parent or child of such candidate may provide assistance upon request to any voter who is related within the first degree. In order to ensure the integrity of the ballot, any person who provides assistance to an absentee voter shall be required to sign and complete the "Certificate of Person Providing Voter Assistance" on the absentee ballot envelope.
Missouri	Mo. Ann. Stat. § 115.291(2) (West 2018): Except as provided in subsection 4 of this section, each absentee ballot that is not cast by the voter in person in the office of the election authority shall be returned to the election authority in the ballot envelope and shall only be returned by the voter in person, or in person by a relative of the voter who is within the second degree of consanguinity or affinity, by mail or registered carrier or by a team of deputy election authorities; except that covered voters, when sent from a location determined by the

	secretary of state to be inaccessible on election day, shall be allowed to return their absentee ballots cast by use of facsimile transmission or under a program approved by the Department of Defense for electronic transmission of election materials.
Montana	Mont. Code Ann. § 13-13-201 (West 2019): (1) A legally registered elector or provisionally registered elector is entitled to vote by absentee ballot as provided for in this part. (2) The elector may vote absentee by: (a) marking the ballot in the manner specified; (b) placing the marked ballot in the secrecy envelope, free of any identifying marks; (c) placing the secrecy envelope containing one ballot for each election being held in the signature envelope;

	(d) executing the affirmation printed on the signature envelope; and (e) returning the signature envelope with all appropriate enclosures by regular mail, postage paid, or by delivering it to: (i) the election office; (ii) a polling place within the elector's county; (iii) pursuant to 13-13-229, the absentee election board or an authorized election official; or (iv) in a mail ballot election held pursuant to Title 13, chapter 19, a designated place of deposit within the elector's county. (3) Except as provided in 13-21-206 and 13-21-226, in order for the ballot to be counted, each elector shall return it in a manner that ensures the ballot is received prior to 8 p.m. on election day.

Nebraska	Neb. Rev. Stat. § 32-943(2) (West 2019): A candidate for office at such election and any person serving on a campaign committee for such a candidate shall not act as an agent for any registered voter requesting a ballot pursuant to this section unless such person is a member of the registered voter's family. No person shall act as agent for more than two registered voters in any election.
Nevada	Nev. Rev. Stat. Ann. § 293.330(4) (West 2017): [I]t is unlawful for any person to return an absent ballot other than the voter who requested the absent ballot or, at the request of the voter, a member of the voter's family. A person who returns an absent ballot and who is a member of the family of the voter who requested the absent ballot shall, under penalty of perjury, indicate on a form prescribed by the county clerk that the person is a member of the family of the voter who requested the absent ballot and that the voter requested that the

	person return the absent ballot. A person who violates the provisions of this subsection is guilty of a category E felony . . . .
New Hampshire	New Hampshire recently enacted legislation adding greater specificity to is provision governing the delivery of absentee ballots—N.H. Rev. Stat. Ann. § 657:17. The new statute will read: I. . . . . The voter or the person assisting a blind voter or voter with a disability shall then endorse on the outer envelope the voter's name, address, and voting place. The absentee ballot shall be delivered to the city or town clerk from whom it was received in one of the following ways: (a) The voter or the voter's delivery agent may personally deliver the envelope; or (b) The voter or the person assisting the blind voter or voter with a disability may mail the envelope to the city or town clerk, with postage affixed.

	II. As used in this section, "delivery agent" means: (a) The voter's spouse, parent, sibling, child, grandchild, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepparent, stepchild; or (b) If the voter is a resident of a nursing home as defined in RSA 151–A:1, IV, the nursing home administrator, licensed pursuant to RSA 151–A:2, or a nursing home staff member designated in writing by the administrator to deliver ballots; or (c) If the voter is a resident of a residential care facility licensed pursuant to RSA 151:2, I(e) and described in RSA 151:9, VII(a)(1) and (2), the residential care facility administrator, or a residential care facility staff member designated in writing by the administrator to deliver ballots; or (d) A person assisting a blind voter or a voter with a disability who has signed a statement on the

	affidavit envelope acknowledging the assistance. III. The city or town clerk, or ward clerk on election day at the polls, shall not accept an absentee ballot from a delivery agent unless the delivery agent completes a form provided by the secretary of state, which shall be maintained by the city or town clerk, and the delivery agent presents a government-issued photo identification or has his or her identity verified by the city or town clerk. Absentee ballots delivered through the mail or by the voter's delivery agent shall be received by the town, city, or ward clerk no later than 5:00 p.m. on the day of the election. A delivery agent who is assisting a voter who is blind or who has a disability pursuant to this section may not personally deliver more than 4 absentee ballots in any election, unless the delivery agent is a nursing home or residential care facility administrator, an administrator designee, or a family member, each as authorized by this section.

New Jersey	N.J. Stat. Ann. § 19:63-4(a) (West 2015): A qualified voter is entitled to apply for and obtain a mail-in ballot by authorized messenger, who shall be so designated over the signature of the voter and whose printed name and address shall appear on the application in the space provided. The authorized messenger shall be a family member or a registered voter of the county in which the application is made and shall place his or her signature on the application in the space so provided in the presence of the county clerk or the designee thereof. No person shall serve as an authorized messenger or as a bearer for more than three qualified voters in an election. No person who is a candidate in the election for which the voter requests a mail-in ballot shall be permitted to serve as an authorized messenger or bearer. The authorized messenger shall show a photo identification card to the county clerk, or the designee thereof, at the time the messenger submits the application form. The

	county clerk or the designee thereof shall authenticate the signature of the authorized messenger in the event such a person is other than a family member, by comparing it with the signature of the person appearing on a State of New Jersey driver's license, or other identification issued or recognized as official by the federal government, the State, or any of its political subdivisions, providing the identification carries the full address and signature of the person. After the authentication of the signature on the application, the county clerk or the designee thereof is authorized to deliver to the authorized messenger a ballot to be delivered to the qualified voter.
New Mexico	N.M. Stat. Ann. § 1-6-10.1 (West 2019): A. A voter, caregiver to that voter or member of that voter's immediate family may deliver that voter's absentee ballot to the county clerk in person or by mail; provided that the voter has subscribed the official mailing envelope of the absentee ballot.

	B. As used in this section, "immediate family" means the spouse, children, parents or siblings of a voter.
New York	N.Y. Elec. Law § 8-410 (McKinney 2019): The absentee voter shall mark an absentee ballot as provided for paper ballots or ballots prepared for counting by ballot counting machines. He shall make no mark or writing whatsoever upon the ballot, except as above prescribed, and shall see that it bears no such mark or writing. He shall make no mark or writing whatsoever on the outside of the ballot. After marking the ballot or ballots he shall fold each such ballot and enclose them in the envelope and seal the envelope. He shall then take and subscribe the oath on the envelope, with blanks properly filled in. The envelope, containing the ballot or ballots, shall then be mailed or delivered to the board of elections of the county or city of his residence.

North Carolina	N.C. Gen. Stat. Ann. § 163A-1310(b)(1) (West 2018): All ballots issued under the provisions of this Part and Part 2 of Article 21 of this Chapter shall be transmitted by mail or by commercial courier service, at the voter's expense, or delivered in person, or by the voter's near relative or verifiable legal guardian and received by the county board not later than 5:00 p.m. on the day of the statewide primary or general election or county bond election. Ballots issued under the provisions of Part 2 of Article 21 of this Chapter may also be electronically transmitted.
North Dakota	N.D. Cent. Code Ann. § 16.1-07-08(1) (West 2019): Upon receipt of an application for an official ballot properly filled out and duly signed, or as soon thereafter as the official ballot for the precinct in which the applicant resides has been prepared, the county auditor, city auditor, or business manager of the school district, as the case may be, shall

	send to the absent voter by mail, at the expense of the political subdivision conducting the election, one official ballot, or personally deliver the ballot to the applicant or the applicant's agent, which agent may not, at that time, be a candidate for any office to be voted upon by the absent voter. The agent shall sign the agent's name before receiving the ballot and deposit with the auditor or business manager of the school district, as the case may be, authorization in writing from the applicant to receive the ballot or according to requirements set forth for signature by mark. The auditor or business manager of the school district, as the case may be, may not provide an absent voter's ballot to a person acting as an agent who cannot provide a signed, written authorization from an applicant. No person may receive compensation, including money, goods, or services, for acting as an agent for an elector, nor may a person act as an agent for more than four electors in any one election. A voter voting by absentee ballot may not require the political subdivision providing

	the ballot to bear the expense of the return postage for an absentee ballot.
Northern Mariana Islands	1 N. Mar. I. Code § 6212(a) (2010): The Commission shall provide to any registered voter entitled to vote by absentee ballot and who applied for one, an official ballot, a ballot envelope, an affidavit prescribed by the Commission, and a reply envelope. The absentee voter shall mark the ballot in the usual manner provided by law and in a manner such that no other person can know how the ballot is marked. The absentee voter shall then deposit the ballot in the ballot envelope and securely seal it. The absentee voter shall then complete and execute the affidavit. The ballot envelope and the affidavit shall then be enclosed and sealed in the covering reply envelope and mailed via standard U.S. First Class Mail only or sent by commercial courier service to the commission at the expense of the voter. Such ballots and affidavits will not be counted by the Commission unless mailed. For

	the purpose of this part, the word "mailed" includes ballots and affidavits sent through the postal or courier services.
Ohio	Ohio Rev. Code Ann. § 3509.05(A) (West 2016): The elector shall mail the identification envelope to the director from whom it was received in the return envelope, postage prepaid, or the elector may personally deliver it to the director, or the spouse of the elector, the father, mother, father-in-law, mother-in-law, grandfather, grandmother, brother, or sister of the whole or half blood, or the son, daughter, adopting parent, adopted child, stepparent, stepchild, uncle, aunt, nephew, or niece of the elector may deliver it to the director.
Oklahoma	Okla. Stat. Ann. tit. 26, § 14-108(C) (West 2019): Any voter who hand delivers his or her ballot as provided in subsection A of this section shall provide proof of identity to the county election board and shall hand deliver the ballot no later

	than the end of regular business hours on the day prior to the date of the election. For purposes of this section, "proof of identity" shall have the same meaning as used in subsection A of Section 7-114 of this title.
Oregon	Or. Rev. Stat. Ann. § 254.470(6) (West 2018): (6)(a) Upon receipt of any ballot described in this section, the elector shall mark the ballot, sign the return identification envelope supplied with the ballot and comply with the instructions provided with the ballot. (b) The elector may return the marked ballot to the county clerk by United States mail or by depositing the ballot at the office of the county clerk, at any place of deposit designated by the county clerk or at any location described in ORS 254.472 or 254.474. (c) The ballot must be returned in the return identification envelope. If the elector returns the ballot by mail, the elector must provide the postage.

	(d) Subject to paragraph (e) of this subsection, if a person returns a ballot for an elector, the person shall deposit the ballot in a manner described in paragraph (b) of this subsection not later than two days after receiving the ballot.
Pennsylvania	25 Pa. Stat. and Cons. Stat. Ann. § 3146.6(a)(1) (West 2019) (footnote omitted): Any elector who submits an Emergency Application and receives an absentee ballot in accordance with section 1302.1(a.2) or (c) shall mark the ballot on or before eight o'clock P.M. on the day of the primary or election. This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. The elector shall then fill out, date and sign the declaration printed on such envelope. Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in

	person to said county board of election.
Puerto Rico	P. R. Laws Ann. tit. 16, § 4177 (2010): Any voter entitled to vote as an absentee voter in a specific election, as established in § 4176 of this title, shall cast his/her vote in accordance with the procedure provided by the Commission through regulations. Only those absentee ballots sent on or before an election, and received on or before the last day of general canvass for that election, shall be considered validly cast pursuant to this Section. The Commission shall establish through regulations the manner in which the mailing date of absentee ballots shall be validated.
Rhode Island	17 R.I. Gen. Laws Ann. § 17-20-2.1(d) (West 2019): In addition to those requirements set forth elsewhere in this chapter, a mail ballot, in order to be valid, must have been cast in conformance with the following procedures:

	(1) All mail ballots issued pursuant to subdivision 17-20-2(1) shall be mailed to the elector at the Rhode Island address provided by the elector on the application. In order to be valid, the signature on all certifying envelopes containing a voted ballot must be made before a notary public or before two (2) witnesses who shall set forth their addresses on the form. (2) All applications for mail ballots pursuant to § 17-20-2(2) must state under oath the name and location of the hospital, convalescent home, nursing home, or similar institution where the elector is confined. All mail ballots issued pursuant to subdivision 17-20-2(2) shall be delivered to the elector at the hospital, convalescent home, nursing home, or similar institution where the elector is confined; and the ballots shall be voted and witnessed in conformance with the provisions of § 17-20-14. (3) All mail ballots issued pursuant to subdivision 17-20-2(3) shall be mailed to the address

	provided by the elector on the application or sent to the board of canvassers in the city or town where the elector maintains his or her voting residence. In order to be valid, the signature of the elector on the certifying envelope containing voted ballots does not need to be notarized or witnessed. Any voter qualified to receive a mail ballot pursuant to subdivision 17-20-2(3) shall also be entitled to cast a ballot pursuant to the provisions of United States Public Law 99-410 ("UOCAVA Act"). (4) All mail ballots issued pursuant to subdivision 17-20-2(4) may be mailed to the elector at the address within the United States provided by the elector on the application or sent to the board of canvassers in the city or town where the elector maintains his or her voting residence. In order to be valid, the signature on all certifying envelopes containing a voted ballot must be made before a notary public, or other person authorized by law to administer oaths where signed, or where the elector voted, or before two (2)

	witnesses who shall set forth their addresses on the form. In order to be valid, all ballots sent to the elector at the board of canvassers must be voted in conformance with the provisions of § 17-20-14.2.
South Carolina	S.C. Code Ann. § 7-15-385 (2019): Upon receipt of the ballot or ballots, the absentee ballot applicant must mark each ballot on which he wishes to vote and place each ballot in the single envelope marked "Ballot Herein" which in turn must be placed in the return-addressed envelope. The applicant must then return the return-addressed envelope to the board of voter registration and elections by mail, by personal delivery, or by authorizing another person to return the envelope for him. The authorization must be given in writing on a form prescribed by the State Election Commission and must be turned in to the board of voter registration and elections at the time the envelope is returned. The voter must sign the form, or in the event the voter cannot write

	because of a physical handicap or illiteracy, the voter must make his mark and have the mark witnessed by someone designated by the voter. The authorization must be preserved as part of the record of the election, and the board of voter registration and elections must note the authorization and the name of the authorized returnee in the record book required by Section 7-15-330. A candidate or a member of a candidate's paid campaign staff including volunteers reimbursed for time expended on campaign activity is not permitted to serve as an authorized returnee for any person unless the person is a member of the voter's immediate family as defined in Section 7-15-310. The oath set forth in Section 7-15-380 must be signed and witnessed on each returned envelope. The board of voter registration and elections must record in the record book required by Section 7-15-330 the date the return-addressed envelope with witnessed oath and enclosed ballot or ballots is received by the board. The board must securely store the envelopes in a locked box within

	the office of the board of voter registration and elections.
South Dakota	S.D. Codified Laws § 12-19-2.2 (2019): If a person is an authorized messenger for more than one voter, he must notify the person in charge of the election of all voters for whom he is a messenger.
Tennessee	Tenn. Code Ann. § 2-6-202(e) (West 2017): After receiving the absentee voting supplies and completing the ballot, the voter shall sign the appropriate affidavit under penalty of perjury. The effect of the signature is to verify the information as true and correct and that the voter is eligible to vote in the election. The voter shall then mail the ballot.
Texas	Tex. Elec. Code Ann. § 86.006(f) (West 2017) (footnote omitted): A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person

	possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was: (1) related to the voter within the second degree by affinity or the third degree by consanguinity, as determined under Subchapter B, Chapter 573, Government Code; (2) physically living in the same dwelling as the voter; (3) an early voting clerk or a deputy early voting clerk; (4) a person who possesses a ballot or carrier envelope solely for the purpose of lawfully assisting a voter who was eligible for assistance under Section 86.010 and complied fully with: (A) Section 86.010; and (B) Section 86.0051, if assistance was provided in order to deposit the envelope in the mail or with a common or contract carrier;

	(5) an employee of the United States Postal Service working in the normal course of the employee's authorized duties; or (6) a common or contract carrier working in the normal course of the carrier's authorized duties if the official ballot is sealed in an official carrier envelope that is accompanied by an individual delivery receipt for that particular carrier envelope.
Texas	Tex. Elec. Code Ann. § 86.0052(a)(1) (West 2013) (making it a crime if a person "compensates another person for depositing the carrier envelope in the mail or with a common or contract carrier as provided by Section 86.0051(b), as part of any performance-based compensation scheme based on the number of ballots deposited or in which another person is presented with a quota of ballots to deposit").
Utah	Utah Code Ann. § 20A-3-306 (West 2019): (1)(a) Except as provided by Section 20A-1-308, to vote a mail-in absentee ballot, the absentee

	voter shall: (i) complete and sign the affidavit on the envelope; (ii) mark the votes on the absentee ballot; (iii) place the voted absentee ballot in the envelope; (iv) securely seal the envelope; and (v) attach postage, unless voting in accordance with Section 20A-3-302, and deposit the envelope in the mail or deliver it in person to the election officer from whom the ballot was obtained. (b) Except as provided by Section 20A-1-308, to vote an absentee ballot in person at the office of the election officer, the absent voter shall: (i) complete and sign the affidavit on the envelope; (ii) mark the votes on the absent-voter ballot; (iii) place the voted absent-voter

	ballot in the envelope; (iv) securely seal the envelope; and (v) give the ballot and envelope to the election officer. (2) Except as provided by Section 20A-1-308, an absentee ballot is not valid unless: (a) in the case of an absentee ballot that is voted in person, the ballot is: (i) applied for and cast in person at the office of the appropriate election officer before 5 p.m. no later than the Tuesday before election day; or (ii) submitted on election day at a polling location in the political subdivision where the absentee voter resides; (b) in the case of an absentee ballot that is submitted by mail, the ballot is: (i) clearly postmarked before election day, or otherwise clearly marked by the post office as

	received by the post office before election day; and (ii) received in the office of the election officer before noon on the day of the official canvass following the election; or (c) in the case of a military-overseas ballot, the ballot is submitted in accordance with Section 20A-16-404. (3) An absentee voter may submit a completed absentee ballot at a polling location in a political subdivision holding the election, if the absentee voter resides in the political subdivision. (4) An absentee voter may submit an incomplete absentee ballot at a polling location for the voting precinct where the voter resides, request that the ballot be declared spoiled, and vote in person.
Vermont	Vt. Stat. Ann. tit. 17, § 2543 (West 2019): (a) After marking the ballots and signing the certificate on the envelope, the early or absentee

	voter to whom the same are addressed shall return the ballots to the clerk of the town in which he or she is a voter, in the manner prescribed, except that in the case of a voter to whom ballots are delivered by justices, the ballots shall be returned to the justices calling upon him or her, and they shall deliver them to the town clerk. (b) Once an early voter absentee ballot has been returned to the clerk in the envelope with the signed certificate, it shall be stored in a secure place and shall not be returned to the voter for any reason. (c) If a ballot includes more than one page, the early or absentee voter need only return the page upon which the voter has marked his or her vote. (d)(1) All early voter absentee ballots returned as follows shall be counted: (A) by any means, to the town clerk's office before the close of

	business on the day preceding the election; (B) by mail, to the town clerk's office before the close of the polls on the day of the election; and (C) by hand delivery to the presiding officer at the voter's polling place. (2) An early voter absentee ballot returned in a manner other than those set forth in subdivision (1) of this subsection shall not be counted.
Virgin Islands	V.I. Code Ann. tit. 18, § 665 (2018): (a) An absentee who has received an absentee ballot may vote by mailing or causing to be delivered to the board of elections for the proper election district such ballot marked and sworn to, as follows: After marking the ballot, the voter shall enclose and seal it in the envelope provided for that purpose. He shall then swear and subscribe to a self-administered oath which shall be provided to

	the absentee on a printed form along with the absentee ballot and he shall further execute the affidavit on such envelope and shall enclose and seal the envelope containing the ballot in the return mailing envelope printed, as provided in paragraph 3 of subsection (a) of section 663 of this title, with the name and address of the board of elections for the election district in which he desires to vote, endorse thereon his name and return address, and shall then mail the envelope, or cause it to be delivered, to the board of elections; provided that such envelope must be received by the board no later than ten days after the day of election for the absentee vote to be counted. Absentee ballots received from overseas in franked envelopes, or from persons who are members of the Uniformed Services of the United States or a spouse of any member of the Uniformed Services of the United States, shall be counted if they are received by the board no later than ten (10) days after the day of the election. In the case of a recount authorized by the board, any ballot received by the

	board no later than 5 p.m. the day before the recount shall be counted. (b) Any envelope containing an absentee ballot mistakenly mailed by the absentee voter to the Supervisor of Elections contrary to the provisions of this section shall be mailed or delivered by the Supervisor of Elections to the proper board of elections if it can be so mailed or delivered by him before the time for the closing of the polls on the day of election, and if the proper board can be determined without breaking open the inner envelope containing the ballot. (c) All mailing envelopes containing absentee ballots received by a board of elections under this section, whether received in sufficient time for the ballots to be counted as provided in this chapter, or not, shall be stamped or endorsed by a member of the board or the clerk with the date of their receipt in the board's office, and, if received on the day of election, with the actual time of

	day received, and such record shall be signed or initialed by the board member or clerk making it.
Virginia	Va. Code Ann. § 24.2-707(A) (West 2019): After the voter has marked his absentee ballot, he shall (a) enclose the ballot in the envelope provided for that purpose, (b) seal the envelope, (c) fill in and sign the statement printed on the back of the envelope in the presence of a witness, who shall sign the same envelope, (d) enclose the ballot envelope and any required assistance form within the envelope directed to the general registrar, and (e) seal that envelope and mail it to the office of the general registrar or deliver it personally to the general registrar. A voter's failure to provide in the statement on the back of the envelope his full middle name or his middle initial shall not be a material omission, rendering his ballot void, unless the voter failed to provide in the statement on the back of the envelope his full first and last name. A voter's failure to provide

	the date, or any part of the date, including the year, on which he signed the statement printed on the back of the envelope shall not be considered a material omission and shall not render his ballot void. For purposes of this chapter, "mail" shall include delivery by a commercial delivery service, but shall not include delivery by a personal courier service or another individual except as provided by §§ 24.2-703.2 and 24.2-705.
Washington	Wash. Rev. Code Ann. § 29A.40.091(4) (West 2019): The voter must be instructed to either return the ballot to the county auditor no later than 8:00 p.m. the day of the election or primary, or mail the ballot to the county auditor with a postmark no later than the day of the election or primary. Return envelopes for all election ballots must include prepaid postage. Service and overseas voters must be provided with instructions and a privacy sheet for returning the ballot and signed declaration by fax or email. A voted ballot and signed declaration returned by fax or

	email must be received by 8:00 p.m. on the day of the election or primary.
West Virginia	W. Va. Code Ann. § 3-3-5(k) (West 2010): Absentee ballots which are hand delivered are to be accepted if they are received by the official designated to supervise and conduct absentee voting no later than the day preceding the election: Provided, That no person may hand deliver more than two absentee ballots in any election and any person hand delivering an absentee ballot is required to certify that he or she has not examined or altered the ballot. Any person who makes a false certification violates the provisions of article nine of this chapter and is subject to those provisions.
Wisconsin	Wis. Stat. Ann. § 6.87(4)(b) (West 2019): The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots.

Wyoming	Wyo. Stat. Ann. § 22-9-113 (West 2019): Upon receipt, a qualified elector shall mark the ballot and sign the affidavit. The ballot shall then be sealed in the inner ballot envelope and mailed or delivered to the clerk.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15845
D.C. No. 2:16-cv-01065-DLR

[Filed September 12, 2018]

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEMOCRATIC PARTY, *Plaintiffs-Appellants*,	)
v.	)
MICHELE REAGAN, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General, *Defendants-Appellees*,	)
THE ARIZONA REPUBLICAN PARTY; BILL GATES, Councilman; SUZANNE KLAPP, Councilwoman; DEBBIE LESKO, Sen.; TONY RIVERO, Rep., *Intervenor-Defendants-Appellees.*	)

OPINION

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted July 20, 2018
San Francisco, California

Filed September 12, 2018

Before: Sidney R. Thomas, Chief Judge, and Carlos T. Bea and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta;
Dissent by Chief Judge Thomas

SUMMARY*

Civil Rights

The panel affirmed the district court's judgment, entered following a bench trial, in an action challenging under the First, Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act, two state of Arizona election practices: (1) Arizona's requirement that in-person voters cast their ballots in their assigned precinct, which Arizona enforces by not counting ballots cast in the wrong precinct; and (2) House Bill 2023, which makes it a felony for third parties to collect early ballots from voters, unless the collector falls into one of several exceptions.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court did not err in holding that H.B. 2023 and the out of precinct policy did not violate the First and Fourteenth Amendments because the provisions imposed only a minimal burden on voters and were adequately designed to serve Arizona's important regulatory interests. The panel also concluded that the district court did not err in holding that H.B. 2023 and the out of precinct policy did not violate § 2 of the Voting Rights Act. The panel held that given the minimal burden imposed by these election practices, plaintiffs failed to show that minority voters were deprived of an equal opportunity to participate in the political process and elect candidates of their choice. Finally, the panel concluded that that the district court did not err in holding that H.B. 2023 did not violate the Fifteenth Amendment because plaintiffs failed to carry their burden of showing that H.B. 2023 was enacted with discriminatory intent.

Dissenting, Chief Judge Thomas stated that Arizona's policy of wholly discarding—rather than partially counting—votes cast out-of-precinct had a disproportionate effect on racial and ethnic minority groups. He stated that the policy violated § 2 of the Voting Rights Act, and it unconstitutionally burdened the right to vote guaranteed by the First Amendment and incorporated against the states under the Fourteenth Amendment. He further wrote that H.B. 2023, which criminalizes most ballot collection, served no purpose aside from making voting more difficult, and keeping more African American, Hispanic, and Native American voters from the polls than white voters.

COUNSEL

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Brett W. Johnson (argued) and Colin P. Ahler, Snell & Wilmer LLP, Phoenix, Arizona, for Intervenor-Defendants-Appellees.

OPINION

IKUTA, Circuit Judge:

The Democratic National Committee (DNC) and other appellants[1] sued the state of Arizona,[2] raising

[1] The appellants here (plaintiffs below) are the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party. For convenience, we refer to the appellants as "DNC."

[2] The appellees here (defendants below) are Arizona Secretary of State Michele Reagan, in her official capacity, and Arizona Attorney General Mark Brnovich, in his official capacity. The intervenor-defendants/appellees are the Arizona Republican Party; Debbie Lesko, an Arizona member of the U.S. House of Representatives; Tony Rivero, a member of the Arizona House of Representatives; Bill Gates, a member of the Maricopa County

several challenges under the First, Fourteenth and Fifteenth Amendments, and § 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10301, against two state election practices: (1) Arizona's longstanding requirement that in-person voters cast their ballots in their assigned precinct, which Arizona enforces by not counting ballots cast in the wrong precinct (referred to by DNC as the out-of-precinct or OOP policy), and (2) H.B. 2023, a recent legislative enactment which precludes most third parties from collecting early ballots from voters. After a lengthy trial involving the testimony of 51 witnesses and over 230 evidentiary exhibits, the district court rejected each of DNC's claims. *Democratic Nat'l Comm. v. Reagan*, —, F.Supp.3d —, No. CV-16-01065-PHX-DLR, 2018 WL 2191664 (D. Ariz. May 10, 2018).

In deciding this case, the district court was tasked with making primarily factual determinations. For instance, a First and Fourteenth Amendment challenge to an election rule involves the "intense[ly] factual inquiry" of whether a plaintiff has carried the burden of showing that challenged election laws impose a severe burden on Arizona voters, or a subgroup thereof. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007). A Fifteenth Amendment claim involves the "pure question of fact" of whether the plaintiff has carried the burden of showing that the state legislature enacted the challenged law with a discriminatory intent. *Pullman-Standard v. Swint*, 456 U.S. 273,

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Board of Supervisors; and Suzanne Klapp, a City of Scottsdale Councilwoman and Precinct Committeewoman. For convenience, we refer to the appellees as "Arizona."

287–88 (1982). And in a VRA challenge, we defer to "the district court's superior factfinding capabilities," *Smith v. Salt River Project Agric. Improvements & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997), regarding whether the plaintiff has carried the burden of showing that an election practice offers minorities less opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see also Chisom v. Roemer*, 501 U.S. 380, 397 (1991). We must affirm these factual findings unless they are "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

In its detailed 83-page opinion, the district court found that DNC failed to meet its burden on these critical factual questions. Its analysis on these factual inquiries was thorough and evenhanded, with findings well-supported by the record. Given the district court's extensive factual findings, much of DNC's appeal amounts to a request that we reweigh and reevaluate the evidence in the record. But we may not "duplicate the role of the lower court" or reject factual findings that, as here, are not clearly erroneous. *Id.* at 573. Nor did the district court err in identifying and applying the correct legal standard to each of DNC's claims.

Accordingly, we conclude that the district court did not err in holding that H.B. 2023 and the OOP policy did not violate the First and Fourteenth Amendments because they imposed only a minimal burden on voters and were adequately designed to serve Arizona's important regulatory interests. We also conclude that the district court did not err in holding that H.B. 2023 and the OOP policy did not violate § 2 of the VRA.

Given the minimal burden imposed by these election practices, DNC failed to show that minority voters were deprived of an equal opportunity to participate in the political process and elect candidates of their choice. Finally, we conclude that the district court did not err in holding that H.B. 2023 did not violate the Fifteenth Amendment, because DNC failed to carry its burden of showing that H.B. 2023 was enacted with discriminatory intent. We reject DNC's urging to toss out the district court's findings, reweigh the facts and reach opposite conclusions. As such, we affirm the district court.

I

The district court's order denying DNC's claims sets forth the facts in detail, *Reagan*, 2018 WL 2191664, at *1–9, so we provide only a brief factual and procedural summary here. The district court's factual findings are discussed in detail as they become relevant to our analysis.

A

We begin by reviewing Arizona's election system. Arizona permits voters to vote either in person on Election Day or by early mail ballot. *Id*. at *7, *12. The vast majority of Arizonans vote by early ballot. For instance, only about 20 percent of the votes in the 2016 general election were cast in person. *Id*. at *12.

Most Arizona counties conduct in-person voting through a precinct-based system. Arizona gives each county the responsibility to "establish a convenient number of election precincts in the county and define the boundaries of [those] precincts." Ariz. Rev. Stat.

§ 16-411(A). Before an election, the County Board of Supervisors (the County's legislative unit) must designate at least one polling place per precinct. *Id.* § 16-411(B). Arizona law provides some flexibility for counties to combine precincts if each county's board of supervisors makes specific findings. *See id.* § 16-411(B)(2).

Arizona has long required in-person voters to cast their ballots in their assigned precinct and has enforced this system, since at least 1970, by counting only votes cast in the correct precinct. *See* Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584 (codified in 1979); 1970 Ariz. Sess. Laws, ch. 151, § 64 (amending Ariz. Rev. Stat. § 16-895); Ariz. Rev. Stat. § 16-102 (1974). If an Arizona voter's name does not appear on the voting register at the polling place on Election Day (either because the voter recently moved or due to inaccuracies in the official records), the voter may vote only by provisional ballot. Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584. Later, the state reviews all provisional ballots and counts those votes cast by voters confirmed to be eligible to vote. *Id.* §§ 16-135(D), 16-584(D). A provisional ballot cast outside of the voter's correct precinct is not counted. *Id.* (As mentioned above, DNC refers to Arizona's rejection of improperly cast ballots as Arizona's OOP policy.)

Recently, Arizona has permitted counties to choose between the traditional precinct model and "voting centers," wherein voters from multiple precincts can vote at a single location. *Id.* § 16-411(B)(4). Each voting center must be equipped to print a specific ballot, correlated to each voter's particular district, that

includes all races in which the voter is eligible to vote. *Reagan*, 2018 WL 2191664, at *9. Six rural and sparsely populated counties—Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma—have adopted the voting center model. *Id.*

As noted above, most Arizona voters (roughly 80 percent in the 2016 general election) do not vote in person. Arizona law permits "[a]ny qualified elector" to "vote by early ballot." Ariz. Rev. Stat. § 16-541(A).[3] Early voting can occur by mail or in person at an on-site early voting location in the 27 days before an election. *See id.* § 16-542(D). All Arizona counties operate at least one on-site early voting location. *Reagan*, 2018 WL 2191664, at *7. Voters may also return their ballots in person at any polling place without waiting in line, and several counties additionally provide special drop boxes for early ballot submission. *Id.* Moreover, voters can vote early by mail, either for an individual election or by having their names added to a permanent early voting list. *Id.* An early ballot is mailed to every person on that list as a matter of course no later than the first day of the early voting period. Ariz. Rev. Stat. § 16-544(F). Voters may return their early ballot by mail at no cost, *id.* § 16-542(C), but it must be received by 7:00 p.m. on Election Day, *id.* § 16-548(A).

Since 1992, Arizona has prohibited any person other than the voter from having "possession of that elector's

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[3] A "qualified elector" is any person at least eighteen years of age on or before the date of the election "who is properly registered to vote." Ariz. Rev. Stat. § 16-121(A).

unvoted absentee ballot." *See* 1991 Ariz. Legis. Serv. Ch. 310, § 22 (S.B. 1390) (West). In 1997, the Arizona legislature expanded that prohibition to prevent any person other than the voter from having possession of any type of unvoted early ballot. *See* 1997 Ariz. Legis. Serv. Ch. 5, § 18 (S.B. 1003) (West) (codified at Ariz. Rev. Stat. § 16-542(D)). As explained by the Supreme Court of Arizona, regulations on the distribution of absentee and early ballots advance Arizona's constitutional interest in secret voting, *see* Ariz. Const. art. VII, § 1, "by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation," *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994) (en banc).

Arizona has long supplemented its protection of the early voting process through the use of penal provisions, as set forth in section 16-1005 of Arizona's statutes. For example, since 1999, "[a]ny person who knowingly marks a voted or unvoted ballot or ballot envelope with the intent to fix an election for that person's own benefit . . . is guilty of a class 5 felony." 1999 Ariz. Legis. Serv. Ch. 32, § 12 (S.B. 1227) (codified as amended at Ariz. Rev. Stat. § 16-1005(A)). And in 2011, Arizona made offering or providing any consideration to acquire a voted or unvoted early ballot a class 5 felony. *See* 2011 Ariz. Legis. Serv. Ch. 105, § 3 (S.B. 1412) (codified at Ariz. Rev. Stat. § 16-1005(B)).

Since at least 2002, individuals and groups in Arizona have collected early ballots from voters. While distribution of early ballots had been strictly regulated for decades, *see* 1997 Ariz. Legis. Serv. Ch. 5, § 18 (S.B. 1003) (West) (codified at Ariz. Rev. Stat. § 16-542(D)),

ballot collection by third parties was not. This changed in 2016, when Arizona revised its early voting process, as defined in section 16-1005, by enacting H.B. 2023 to regulate the collection of early ballots. This law added the following provisions to the existing penalties for persons abusing the early voting process:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:
>
> > 1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.
> >
> > 2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:
> >
> > > (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution,

> adult day health care facility or adult foster care home.
>
> (b) "Collects" means to gain possession or control of an early ballot.
>
> (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.
>
> (d) "Household member" means a person who resides at the same residence as the voter.

Ariz. Rev. Stat. § 16-1005(H)–(I).

This amendment to section 16-1005 makes it a felony for third parties to collect early ballots from voters unless the collector falls into one of several exceptions. *See id.* The prohibition does not apply to election officials acting as such, mail carriers acting as such, any family members, any persons who reside at the same residence as the voter, or caregivers, defined as any person who provides medical or health care assistance to voters in a range of adult residences and facilities. *Id.* § 16-1005(I)(2). H.B. 2023 does not provide that ballots collected in violation of this statute are disqualified or disregarded in the final election tally.

B

We next turn to the history of this case. In April 2016, DNC and other appellants sued the state of Arizona, challenging H.B. 2023 and Arizona's OOP policy.

In separate motions, DNC sought preliminary injunctions against H.B. 2023 and the OOP policy, respectively. On September 23, 2016, the district court denied the motion to preliminarily enjoin enforcement of H.B. 2023. The district court subsequently denied DNC's motion for a preliminary injunction pending appeal. On October 11, 2016, the district court likewise declined to issue a preliminary injunction with respect to the OOP policy.

DNC appealed both denials. A motions panel denied DNC's request to issue an injunction pending appeal of the district court's ruling on the challenge to H.B. 2023, but the two appeals were expedited and calendared for arguments before a three-judge panel on October 19 and 26, 2016, respectively. The expedited appeals proceeded at a rapid pace. On October 28, 2016, a divided panel affirmed the district court's denial of a preliminary injunction as to H.B. 2023. *See Feldman v. Ariz. Sec'y of State's Office* (*Feldman I*), 840 F.3d 1057 (9th Cir. 2016). The case was called en banc the same day, and on November 2, 2016—after a highly compressed five-day memo exchange and voting period—a majority of the active judges on this court voted to hear the appeal of the district court's denial of a preliminary injunction against H.B. 2023 en banc. Two days later, the en banc panel reconsidered the motions panel's earlier denial of an injunction pending appeal and granted DNC's motion for an injunction pending a resolution of the preliminary injunction appeal. *See Feldman v. Ariz. Sec'y of State's Office* (*Feldman III*), 843 F.3d 366 (9th Cir. 2016) (en banc). In so doing, the six-judge majority stated that "we grant the motion for a preliminary injunction pending

appeal essentially for the reasons provided in the dissent in [*Feldman I*]." *Id.* at 367 (citing *Feldman I*, 840 F.3d at 1085–98). The Supreme Court summarily stayed this injunction pending appeal the next day. *See Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446, 446 (2016) (mem.) ("The injunction issued by the United States Court of Appeals for the Ninth Circuit on November 4, 2016, in case No. 16-16698, is stayed pending final disposition of the appeal by that court.").[4]

The appeal of the district court's denial of a preliminary injunction as to the OOP policy also proceeded apace. On November 2, 2016, a divided panel affirmed the district court. *See Feldman v. Ariz. Sec'y of State's Office* (*Feldman II*), 842 F.3d 613 (9th Cir. 2016). Two days later a majority of active judges voted to hear the OOP policy appeal en banc, and the en banc panel denied DNC's motion for an injunction pending

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[4] Although *Feldman III* referenced the dissent in *Feldman I*, it did not incorporate it nor adopt any specific reasoning from the dissenting opinion, Because *Feldman III* did not provide a "fully considered appellate ruling on an issue of law," we are guided by our general rule that "decisions at the preliminary injunction phase do not constitute the law of the case." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) (first quoting 18 Charles Alan Wright & Arthur R. Miller Federal Practice and Procedure § 4478.5 (2002); then citing *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004)). Moreover, the Supreme Court's immediate stay of *Feldman III*'s injunction pending appeal "undercut[s] [*Feldman III*'s] theory or reasoning" to a significant extent. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Therefore, we conclude that *Feldman III*'s reference to the dissent in *Feldman I* does not make that dissent law of the case or of the circuit.

resolution of the appeal. *See Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1165 (9th Cir. 2016) (mem.) (per curiam) (en banc). As a result of these proceedings, both H.B. 2023 and the OOP policy remained in effect for the November 2016 election. The en banc panel did not reach the merits of DNC's appeal of the district court's denial of the preliminary injunctions against H.B. 2023 and the OOP policy.[5]

DNC's challenge proceeded in district court. DNC argued that H.B. 2023 imposed undue burdens on the right to vote, in violation of the First and Fourteenth Amendments. DNC also claimed that H.B. 2023 violated § 2 of the VRA because it resulted in a discriminatory burden on voting rights prohibited by that section. Finally, DNC claimed that H.B. 2023 was enacted with discriminatory intent, in violation of the Fifteenth Amendment. DNC raised similar claims that the OOP policy imposed an unconstitutional burden on the right to vote and violated § 2 of the VRA, but did not claim that the OOP policy had a discriminatory purpose.

The district court developed an extensive factual record on all five claims. Over the course of a ten-day bench trial in October 2017, the parties presented live testimony from 7 expert witnesses and 33 lay witnesses, in addition to the testimony of 11 witnesses by deposition. *Reagan*, 2018 WL 2191664, at *2–7. The

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[5] After the district court rendered its decision on the merits and final judgment, the en banc panel dismissed the interlocutory appeals of the denied preliminary injunctions as moot.

district court also considered over 230 exhibits admitted into evidence.

Seven months later, on May 10, 2018, the district court issued its amended 83-page findings of fact and conclusions of law, holding that DNC had failed to prove its constitutional and VRA claims. *Reagan*, 2018 WL 2191664.

DNC timely appealed that same day. Fed. R. App. P. 4(a)(1)(B). It also moved for an injunction pending resolution of its appeal. The en banc panel voted not to exercise jurisdiction over the appeal, and the case was assigned to the original three-judge panel. We granted DNC's motion to expedite the appeal in light of the upcoming 2018 election.[6]

II

The district court exercised jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction pursuant to 28 U.S.C. § 1291.

Following a bench trial, we review de novo the district court's conclusions of law and review its findings of fact for clear error. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (en banc). "The clear error standard is significantly deferential." *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir. 2009). "[T]o be clearly erroneous, a decision must . . . strike [a court] as wrong with the force of a five-week old, unrefrigerated dead fish."

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[6] We deferred consideration of DNC's motion for an injunction pending appeal. Because we affirm the district court, we now **DENY** that motion as moot.

Ocean Garden, Inc. v. Marktrade Co., Inc., 953 F.2d 500, 502 (9th Cir. 1991) (quoting *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Bessemer City*, 470 U.S. at 573. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573–74. That is, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574.

III

We first address DNC's challenges to H.B. 2023. DNC argues that (1) H.B. 2023 unduly burdens the right to vote, in violation of the First and Fourteenth Amendments; (2) H.B. 2023 disproportionately impacts minority voters in a manner that violates § 2 of the VRA; and (3) H.B. 2023 was enacted with discriminatory intent, in violation of the Fifteenth Amendment.[7] We address each claim in turn.

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[7] DNC does not "specifically and distinctly" argue that H.B. 2023 was enacted with a discriminatory purpose in violation of § 2 of the VRA, and therefore we do not consider this issue. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

A

We begin with DNC's claim that H.B. 2023 violates Arizona voters' First and Fourteenth Amendment rights.

1

The Constitution vests the States with a "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting U.S. Const., art. 1, § 4, cl. 1). This power under the Elections Clause to regulate elections for federal offices "is matched by state control over the election process for state offices." *Id.* "Governments necessarily 'must play an active role in structuring elections,'" *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (en banc) (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)), and "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974). However, when a state exercises its power and discharges its obligation "[t]o achieve these necessary objectives," the resulting laws "inevitably affect[]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Because a state has the authority and obligation to manage the election process, "not all election laws impose constitutionally suspect burdens on that right."

Short v. Brown, 893 F.3d 671, 676 (9th Cir. 2018). There is no "'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789 (quoting *Storer*, 415 U.S. at 730). Rather, "a more flexible standard applies." *Burdick*, 504 U.S. at 434. "A court considering a challenge to a state election law must weigh [1] 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against [2] 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration [3] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Anderson*, 460 U.S. at 789). This framework is generally referred to as the *Anderson*/*Burdick* balancing test.

The first prong of this test, the magnitude of the burden imposed on voters by the election law, "is a factual question on which the plaintiff bears the burden of proof." *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122–24 (9th Cir. 2016) (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)); *Gonzalez*, 485 F.3d at 1050 (noting that whether an election law imposes a severe burden is an "intense[ly] factual inquiry"). In addition to considering the burden on the electorate as a whole, courts may also consider whether the law has a heavier impact on subgroups, *Pub. Integrity All.*, 836 F.3d at 1025 n.2, but only if the plaintiff adduces evidence sufficient to show the size of the subgroup and quantify how the subgroup's special characteristics makes the election law more burdensome. Thus, *Crawford v. Marion County Election Board* acknowledged the argument that a

voter photo identification (ID) requirement might impose a heavier burden on "homeless persons[,] persons with a religious objection to being photographed," and those "who may have difficulty obtaining a birth certificate," but declined to undertake a subgroup analysis because the evidence was insufficient to show the size of such subgroups or to quantify the additional burden on those voters. 553 U.S. 181, 199, 200–03 (2008). Accordingly, it is an error to consider "the burden that the challenged provisions uniquely place" on a subgroup of voters in the absence of "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [those provisions]." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016).

After determining the severity of the burden, the court must then identify the state's justifications for the law, and consider whether those interests make it "necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789. As we have emphasized, this inquiry does not necessarily mean that the state is "required to show that its system is narrowly tailored—that is, is the one best tailored to achieve its purposes." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011). Rather, this step involves a "balancing and means-end fit framework." *Ariz. Green Party v. Reagan*, 838 F.3d 983, 988 (9th Cir. 2016) (quoting *Pub. Integrity All.*, 836 F.3d at 1024). The severity of the burden dictates the closeness of the fit required, and the more severe the burden, the "more compelling the state's interest must be." *Id.*

By contrast, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788); *see also Ariz. Green Party*, 838 F.3d at 988. In conducting this analysis, we are particularly deferential when "the challenge is to an electoral *system*, as opposed to a discrete election *rule*." *Dudum*, 640 F.3d at 1114.

2

Applying the *Anderson/Burdick* framework, the district court found that H.B. 2023 did not unconstitutionally burden the right to vote. First, the court found that H.B. 2023 posed only a minimal burden on Arizona voters as a whole. Twenty percent of Arizonans voted in person in the prior 2016 general election, and so were wholly unaffected. *Reagan*, 2018 WL 2191664, at *12. As to the 80 percent of Arizonans who voted by mail, the district court noted that there were no records of the number of voters who returned their ballots with the assistance of third parties. *Id.* After presenting various witnesses on this issue, DNC's counsel's "best estimate of the number of voters affected by H.B. 2023 based on the evidence at trial" was "thousands . . . but I don't have a precise number of that." *Id.* The court found that the evidence suggested that "possibly fewer than 10,000 voters are impacted" out of over 2.3 million voters. *Id.* Therefore, the vast majority of Arizona voters were unaffected by the law. *Id.*

Second, the district court found that H.B. 2023 imposed a minimal burden on even the small number of voters who had previously returned ballots with the assistance of third parties. Because "[e]arly voters may return their own ballots, either in person or by mail, or they may entrust a family member, household member, or caregiver to do the same," the burden imposed by H.B. 2023 "is the burden of traveling to a mail box, post office, early ballot drop box, any polling place or vote center (without waiting in line), or an authorized election official's office, either personally or with the assistance of a statutorily authorized proxy, during a 27-day early voting period." *Id*. Therefore, the court found that H.B. 2023 "does not increase the ordinary burdens traditionally associated with voting." *Id*.

The district court then considered whether DNC had shown that H.B. 2023 had a more severe impact on particular subgroups of Arizona voters who have some common circumstance that would cause them to face special difficulties in voting without ballot collection services, such as "communities that lack easy access to outgoing mail services; the elderly, homebound, and disabled voters; socioeconomically disadvantaged voters who lack reliable transportation; [and] voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services."[8] *Id*.

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[8] DNC also identified as a potential subgroup "voters who are unfamiliar with the voting process and therefore do not vote without assistance or tend to miss critical deadlines." *Reagan*, 2018 WL 2191664, at *14. The district court found that remembering relevant deadlines was not a burden on the right to vote, and therefore not a basis for finding a special burden. *Id*.

at *14. The court determined that the plaintiffs had not made such a showing, because there was "insufficient evidence from which to measure the burdens on discrete subsets of voters" or to "quantify with any degree of certainty" how many voters had previously used ballot collection services. *Id.* Moreover, the district court could not determine the number of those voters who used those services merely "out of convenience or personal preference, as opposed to meaningful hardship," and therefore could not evaluate whether any of them would face a substantial burden in relying on other means of voting offered by Arizona. *Id.*

Having identified these major gaps in DNC's evidence, the district court evaluated the evidence presented. According to the district court, "the evidence available largely shows that voters who have used ballot collection services in the past have done so out of convenience or personal preference." *Id.* The court discussed five voters who testified, Nellie Ruiz, Carolyn Glover, Daniel Magos, Carmen Arias, and Marva Gilbreath, explained their individual circumstances and noted that each had successfully returned their ballot except for Gilbreath, who simply forgot to timely mail her ballot.[9] *Id.* at *15. The district court also found that Arizona provides accommodations to subgroups of voters whose special characteristics might lead them to

[9] The district court expressed "concerns about the credibility" of the deposition testimony of a deceased witness, Victor Vasquez. *Reagan*, 2018 WL 2191664, at *16. "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Bessemer City*, 470 U.S. at 575.

place a greater reliance on ballot collection. *Id*. at *14. Specifically, for voters with mobility issues, Arizona requires counties to provide special election boards, which, upon timely request, will deliver a ballot to an ill or disabled voter. *Id*. While finding that "relatively few voters are aware of this service," the district court pointed out that DNC could educate voters as to its availability. *Id*. Further, Arizona permits polling places to offer curbside voting, allowing voters to pull up to the curb by a polling place and have an election official assist them at their car. *Id*. Arizona law also requires employers to give their employees time off to vote in person if an employee is scheduled for an Election Day shift without at least a three-hour window to vote. *Id*. at *15. Finally, the district court noted the many exceptions in H.B. 2023, allowing voters to give their early ballots to family members, household members, caregivers, or election officials. *Id*.

Because the court found that H.B. 2023 imposed only a minimal burden on Arizonans' First and Fourteenth Amendment rights, it held that defendants had to show only that H.B. 2023 served important regulatory interests. As summarized by the district court, Arizona advanced two regulatory interests: (1) "that H.B. 2023 is a prophylactic measure intended to prevent absentee voter fraud by creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction"; and (2) "that H.B. 2023 improves and maintains public confidence in election integrity." *Id*. at *18. The court found that these interests were important. *Id*. at *19.

Turning to a means-end fit, the court found that given the de minimis nature of the burden imposed by H.B. 2023, it did not need to be "the most narrowly tailored provision," so long as it reasonably advanced the state's interests. *Id.* at *20. Finding that it did so, the court held that H.B. 2023 did not violate the First and Fourteenth Amendments. *Id.* at *18–20.

3

We conclude that the district court did not err in its *Anderson/Burdick* analysis. First, the district court's determination that H.B. 2023 imposes only a de minimis burden on Arizona voters was not clearly erroneous. *See Crawford*, 553 U.S. at 198 (holding that "the inconvenience" of the process of going to the state Bureau of Motor Vehicles to obtain an ID "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting"). DNC does not directly dispute this conclusion.

Rather, DNC argues that H.B. 2023 imposes severe burdens on subgroups of voters unable to vote without the third-party ballot collection services prohibited by H.B. 2023. This argument fails. The district court did not clearly err in finding that there was "insufficient evidence from which to measure the burdens on discrete subsets of voters," *Reagan*, 2018 WL 2191664, at *14, which is a threshold requirement to conducting a subgroup analysis. *See Crawford*, 553 U.S. at 200–03. The record shows that DNC's witnesses could not specify how many voters would have been unable to vote without ballot collection services. For instance, a Maricopa County Democratic Party organizer, Leah

Gillespie, testified that some voters who used ballot collection services told her that they had no other means of voting, but her only example was of a friend whose husband was supposed to deliver her ballot but forgot it at home.[10] Similarly, Arizona State Senator Martin Quezada stated that his campaign received ballot collection requests after H.B. 2023 took effect and had been unable to provide rides to the polling place or other assistance to all such voters. But he did not know "how many of those people had family members who could have turned in their ballot," and could only give his sense "that several of them lacked anybody" who could do so. Moreover, DNC failed "to produce a single voter to testify that H.B. 2023's limitations on who may collect an early mail ballot would make voting significantly more difficult for her." Only one voter (Marva Gilbreath) testified that she did not vote in the 2016 general election, because she "was in the process of moving," had no mailbox key due to "misunderstandings with the realtor and things like that," and "didn't know where the voting place was." This witness's highly idiosyncratic circumstances do not indicate that H.B. 2023 imposes a severe burden on an identifiable subgroup of voters. Rather, burdens "arising from life's vagaries are neither so serious nor so frequent as to raise any question about the constitutionality of [the challenged law]." *Id.* at 197.

In sum, DNC's evidence falls far short of the necessary "quantifiable evidence from which an arbiter

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[10] Of course, had the husband not forgot, but had delivered the vote, there would have been no violation of H.B. 2023, which exempts family members. Ariz. Rev. Stat. § 16-1005(H)–(I).

could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of [H.B. 2023]." *Ne. Ohio Coal.*, 837 F.3d at 631; *cf. Crawford*, 553 U.S. at 201–02 (declining to conduct a subgroup analysis despite evidence of one indigent voter who could not (or would not) pay for a birth certificate and one homeless woman who was denied a photo ID card because she lacked an address.).

The dissent disagrees, but its disagreement here—as with the district court's opinion generally—is based on throwing out the district court's factual findings, reweighing the evidence, and reaching its own factual conclusions. This approach is not only contrary to the most basic principles of appellate review, but is an approach that the Supreme Court has frequently warned us to avoid. *See Bessemer City*, 470 U.S. at 574–75 (holding that the rationale for deference to the trial court's finding of fact is based not only on "the superiority of the trial judge's position to make determinations of credibility," but also on the judge's expertise in determination of fact, and ensuring that "the trial on the merits should be 'the main event . . . rather than a tryout on the road'") (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

Here, for instance, the dissent seeks to revisit the district court's conclusion that DNC failed to carry its burden of showing that H.B. 2023 imposed a heavy burden on Native Americans. Dissent at 121–22. Conducting its own factual evaluation, the dissent claims that H.B. 2023 imposes a heavy burden on Native Americans because a majority of them lack home mail service. Dissent at 121. The dissent then

speculates that many Native Americans may have trouble getting to post offices, and may have different family relationships than are indicated in H.B. 2023. Dissent at 121–22. Of course, the dissent's determination that "it would have decided the case differently" does not make the district court's findings clearly erroneous. *Bessemer City*, 470 U.S. at 573. Indeed, even evidence that third-party ballot collection is more useful to Native Americans than to other voters does not compel the conclusion that H.B. 2023 imposes a heavy burden on Native Americans' ability to vote. Most tellingly, the dissent does not meaningfully address the district court's most notable factual finding: that not a single voter testified at trial that H.B. 2023's limitations would make voting significantly more difficult. Although the dissent insists that there was evidence to this effect, Dissent at 122, it cites only to the testimony of a third-party ballot collector who conceded that his organization had not attempted to determine whether the voters they served could have returned their ballots some other way. There is thus no basis for holding that the district court's findings were clearly erroneous, and the dissent errs in arguing otherwise.

The dissent also faults the district court's decision not to conduct a subgroup analysis because it "could not determine a precise number of voters that had relied on ballot collection in the past or predict a likely number in the future." Dissent at 122. According to the dissent, this decision was based on a misunderstanding of *Crawford*, and therefore constitutes legal error. We disagree. The district court correctly relied on *Crawford* in concluding that "on the basis of the

evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that [was] fully justified." *Reagan*, 2018 WL 2191664, at *14 (quoting *Crawford*, 553 U.S. at 200). Accordingly, the court properly held that DNC did not carry its burden of showing the existence of a relevant subgroup.

Nor did the district court clearly err in finding that any burden imposed by H.B. 2023 was further minimized by Arizona's many accommodations available for those subgroups of voters that DNC claims are burdened by H.B. 2023.[11] *Reagan*, 2018 WL 2191664, at *14. For instance, the district court reasonably found that the subgroup of voters who are "confined as the result of a continuing illness or physical disability," Ariz. Rev. Stat. § 16-549(C), could request ballots from special election boards, and the burden of doing so was minimal, *see Short*, 893 F.3d at 677 ("To the extent that having to register to receive a mailed ballot could be viewed as a burden, it is an extremely small one, and certainly not one that demands serious constitutional scrutiny."). The district court did not clearly err in finding that it was irrelevant whether voters were widely aware of this alternative, as nothing prevented DNC from informing

[11] Given that DNC did not meet its burden of showing how large the subgroup of specially burdened voters might be, *see Democratic Party of Haw.*, 833 F.3d at 1122–24, its unsupported claims that Arizona's many accommodations cannot adequately serve an unquantified number of voters are unpersuasive.

voters of and facilitating this procedure. *Reagan*, 2018 WL 2191664, at *14.

We conclude that the district court did not clearly err in finding that DNC had failed both to quantify the subgroups purportedly burdened by H.B. 2023 and to show that Arizona's alternatives did not ameliorate any burden on them. Accordingly, there was no clear error in the district court's finding that H.B. 2023 imposed only a minimal burden.

4

Next, DNC and the dissent contend that the district court clearly erred in finding that H.B. 2023 serves Arizona's important regulatory interests because Arizona did not adduce any direct evidence of voter fraud. We reject this argument.

DNC does not dispute—nor could it—that Arizona's interest in "a prophylactic measure intended to prevent absentee voter fraud" and to maintain public confidence are facially important. *Id*. at *18; *see Crawford*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (explaining that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy" and noting "the State's compelling interest in preventing voter fraud").

Further, a state "need not show specific local evidence of fraud in order to justify preventive measures," *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013), nor is such evidence required to

uphold a law that imposes minimal burdens under the *Anderson/Burdick* framework, *see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (explaining that legislatures are "permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). For example, in *Crawford*, the challenged law addressed only in-person voter fraud, and "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194. Yet the controlling opinion concluded that the law served Indiana's interests in preventing fraud, citing evidence of in-person and absentee voter fraud in other jurisdictions and in historical examples. *Id.* at 195–96 & nn.11–13. Accordingly, H.B. 2023 serves Arizona's important interest in preventing voter fraud even without direct evidence of ballot collection voter fraud in Arizona.[12]

The dissent proposes several meritless distinctions between H.B. 2023 and the voter I.D. law in *Crawford*. First, the dissent argues that unlike H.B. 2023, *Crawford*'s voter I.D. law was "tied to 'the state's interest in counting only the votes of eligible voters.'"

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[12] DNC's reliance on a vacated Sixth Circuit opinion is unpersuasive. *See Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The Sixth Circuit has explained that any persuasive value in *Ohio State Conference*'s analysis of this point is limited to cases involving "significant although not severe" burdens, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016) (quoting *Ohio State Conference*, 768 F.3d at 539), and not those involving "minimal" burdens, *id.* (explaining that the district court's reliance on *Ohio State Conference* was "not sound").

Dissent at 124 (quoting *Crawford*, 553 U.S. at 196). But H.B. 2023's regulation of third-party ballot collectors is likewise tied to the state's interest in ensuring the integrity of the vote. As explained by the district court, Arizona could reasonably conclude that H.B. 2023 reduced "opportunities for early ballots to be lost or destroyed" by limiting the possession of early ballots to "presumptively trustworthy proxies," and also lessened the potential for pressure or intimidation of voters, and other forms of fraud and abuse. *Reagan*, 2018 WL 2191664, at *20; *see infra* at 32–33. Second the dissent argues that *Crawford* is distinguishable because the legislature in that case was motivated in-part by "legitimate concerns," while here the Arizona legislature was "motivated by discriminatory intent," or by solely partisan interests. Dissent at 124. Again, we reject the dissent's factual findings because the district court found that the legislature was *not* motivated by discriminatory intent and only partially motivated by partisan considerations, and these findings are not clearly erroneous. Moreover, a legislature may act on partisan considerations without violating the constitution. *See infra* at 53–54.

Similarly, a court can reasonably conclude that a challenged law serves the state's interest in maintaining "public confidence in the integrity of the electoral process," even in the absence of any evidence that the public's confidence had been undermined. *Crawford*, 553 U.S. at 197. As several other circuits have recognized, it is "practically self-evidently true" that implementing a measure designed to prevent voter fraud would instill public confidence. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 633 (6th Cir. 2016)

(citing *Crawford*, 553 U.S. at 197); *see Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (noting that *Crawford* took "as almost self-evidently true" the relationship between a measure taken to prevent voter fraud and promoting voter confidence). The district court did not clearly err in finding that H.B. 2023 also serves this important state interest.

5

DNC next argues that Arizona could have used less burdensome means to pursue its regulatory interests and H.B. 2023 could have been designed more effectively. This argument also fails. *Burdick* expressly declined to require that restrictions imposing minimal burdens on voters' rights be narrowly tailored. *See* 504 U.S. at 433. Consistent with *Burdick*, we upheld an election restriction that furthered the interest of "ensuring local representation by and geographic diversity among elected officials" even though less-restrictive means could have achieved the same purposes. *Pub. Integrity All.*, 836 F.3d at 1028. Similarly, in *Arizona Green Party*, we rejected the argument that the state must adopt a system of voting deadlines "that is the most efficient possible," in light of the "de minimis burden" imposed by the existing deadlines. 838 F.3d at 992 (citation omitted).

Here, the district court found that H.B. 2023 imposed a minimal burden, and that it was a reasonable means for advancing the state's interests. It concluded that "[b]y limiting who may possess another's early ballot, H.B. 2023 reasonably reduces opportunities for early ballots to be lost or destroyed." *Reagan*, 2018 WL 2191664, at *20. The district court

also observed that H.B. 2023 "closely follows," *id.*, the recommendation of a bipartisan national commission on election reform to "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots," *id.* (quoting *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005)).[13] These

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[13] The district court took judicial notice of the report of the Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James A. Baker III. *Reagan*, 2018 WL 2191664, at *20 n.12. The district court noted that the report was cited favorably in *Crawford*, which remarked that "[t]he historical perceptions of the Carter-Baker Report can largely be confirmed." 553 U.S. at 194 n.10. The relevant portion of the report provides:

> Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud. . . . Absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots.

Building Confidence in U.S. Elections § 5.2 (Sept. 2005), https://www.eac.gov/assets/1/6/Exhibit%20M.PDF. The district court did not abuse its discretion in taking judicial notice of the report publicly available on the website of the U.S. Election Assistance Commission. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("We may take judicial notice of records and reports of administrative bodies.") (internal quotation marks and citation omitted). There is no dispute as to the report's authenticity or that it contained the cited recommendation, and

findings were sufficient to justify the minimal burden imposed by H.B. 2023. DNC's reliance on *Common Cause Indiana v. Individual Members of the Indiana Election*, 800 F.3d 913, 928 (7th Cir. 2015) as requiring a closer means-ends fit is misplaced. As the Seventh Circuit concluded, the election law in that case imposed a severe burden on the right to vote, and therefore it was appropriate to apply strict scrutiny. *Id.* at 927.

We therefore affirm the district court's conclusion that DNC did not succeed on its *Anderson/Burdick* claim as to H.B. 2023.

B

We next consider DNC's claim that H.B. 2023 violates § 2 of the VRA. We begin by providing some necessary legal background.

1

"Inspired to action by the civil rights movement," Congress enacted the Voting Rights Act of 1965 to improve enforcement of the Fifteenth Amendment.[14] *Shelby County v. Holder*, 570 U.S. 529, 536 (2013). Section 2 of the Act forbade all states from enacting any "standard, practice, or procedure . . . imposed or

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DNC was not unfairly surprised, given that counsel indicated at trial that he was well acquainted with it and its contents.

[14] The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and authorizes Congress to enforce the provision "by appropriate legislation." U.S. Const. amend. XV.

applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* (quoting Voting Rights Act of 1965, § 2, 79 Stat. 437). Section 5 of the Act prevented states from making certain changes in voting procedures unless the states obtained "preclearance" for those changes, meaning they were approved by either the Attorney General or a court of three judges. *Id.* at 537.

"At the time of the passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment." *Chisom*, 501 U.S. at 392. In 1980, black residents of Mobile, Alabama challenged the city's at-large method of electing its commissioners on the ground that it unfairly diluted their voting strength. *City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980). A plurality of the Supreme Court held that the electoral system did not violate § 2 of the VRA because there was no showing of "purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color or previous conditions of servitude.'" *Id.* at 65.

In response to *Bolden*, "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone." *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). In order to show actionable discriminatory effect, Congress enacted the "results test," applied by the Supreme Court in *White v. Regester*, 412 U.S. 755 (1973), *see Gingles*, 478 U.S. at 35, namely "whether the political processes are equally open to minority voters." S. Rep.

No. 97-417, at 2 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205.

As amended, § 2 of the VRA provides:

> § 10301. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

52 U.S.C. § 10301.

Thus, § 2(a) prohibits a state or political subdivision from adopting a practice that "results in a denial or abridgement" of any U.S. citizen's right to vote on account of race, color, or membership in a language minority group, "as provided in subsection (b)." *Id.* § 10301(a). Subsection (b), in turn, provides that a plaintiff can establish a violation of § 2(a) if "based on the totality of circumstances," the members of a protected class identified in § 2(a) "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

Thornburg v. Gingles further clarified that in analyzing whether a state practice violates § 2, a court must engage in a two-step process. First, the court must ask the key question set forth in § 2(b), whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 28). Second, a court must assess the impact of the practice on such electoral opportunities in light of the factors set forth in the Senate Report, which accompanied the 1982 amendments and "elaborates on the nature of § 2 violations and on the proof required to establish these violations." *Id.* at 43–44.[15]

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[15] As explained in *Gingles*, the Senate Factors include the extent of any history of official discrimination, the use of election practices or structures that could enhance the opportunity for discrimination, the extent to which voting is racially polarized, and the extent to which minorities bear the effects of discrimination in

In the wake of *Gingles*, some lower courts interpreted the key question set forth in § 2(b) (whether as a result of the challenged practice plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice) as "provid[ing] two distinct types of protection for minority voters." *Chisom*, 501 U.S. at 396 (citing *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 625 (5th Cir. 1990) (en banc)). These courts held that a "vote denial" claim, meaning a claim that a particular state election practice denied or abridged a minority group's right to vote, turned on whether members of that protected class had "less opportunity . . . to participate in the political process." By contrast, a "vote dilution" claim, meaning a claim that a state election practice diluted the effectiveness of a minority group's votes, turned on whether those members had "less

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education, employment and health. 478 U.S. at 36–37. The factors are not exclusive, and "the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Id.* at 45 (quoting S. Rep. No. 97-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 208). Because the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," 478 U.S. at 47, if a court determines that a challenged practice does not cause unequal opportunities, it need not consider the practice's interaction with the Senate Factors. Because we affirm the district court's finding that DNC failed to carry its burden of satisfying step one of the § 2 analysis for either H.B. 2023 or the OOP policy, we do not review in detail its factual findings that DNC also failed to carry its burdens at step two.

opportunity . . . to elect representatives of their choice." *Id.* at 388, 395–96 (citing *Clements*, 914 F.2d at 625).

The Supreme Court flatly rejected this interpretation. In *Chisom*, the Supreme Court explained that § 2(b) "does not create two separate and distinct rights." *Id.* at 397. The Court reasoned that if members of a protected class established that a challenged practice abridged their opportunity to participate in the political process, it would be relatively easy to show they were also unable to elect representatives of their choice, because "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Id.* By contrast, evidence that members of a protected class are unable to elect representatives of their choice does not necessarily prove they had less opportunity to participate in the political process. *Id.* Accordingly, the Court concluded that the two-pronged results test required by the 1982 amendment "is applicable to all claims arising under § 2," and "all such claims must allege an abridgment of the opportunity to participate in the political process *and* to elect representatives of one's choice." *Id.* at 398; *see also Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994) ("Section 2 plaintiffs must demonstrate that they had less opportunity *both* (1) to participate in the political process, and (2) to elect representatives of their choice." (emphasis added) (citing *Chisom*, 501 U.S. at 397)).

In reaching this conclusion, the *Chisom* majority rejected Justice Scalia's argument in dissent that

requiring a plaintiff to prove both less opportunity to participate *and* less opportunity to elect representatives would prevent small numbers of voters from bringing a § 2 claim. According to Justice Scalia, the Court should have read "and" in § 2(b) to mean "or," so that if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity 'to *participate* in the political process' than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). The majority rejected this argument, however, stating that it had "no authority to divide a unitary claim created by Congress." *Id.* at 398.[16]

In light of *Chisom*, plaintiffs cannot establish a § 2 violation without showing that an electoral practice actually gives minorities less opportunity to elect representatives of their choice. This requires plaintiffs to show that the state election practice has some material effect on elections and their outcomes. As *Gingles* explained, "[i]t is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot

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[16] The majority also rejected Justice Scalia's "erroneous assumption that a small group of voters can never influence the outcome of an election," *Chisom*, 501 U.S. at 397 n.24, although it did not explain what evidence would be necessary to establish that an election practice that affected only a small group of voters deprived minorities of an equal opportunity to elect candidates of their choice.

prove that a challenged electoral mechanism impairs their ability 'to elect.'" 478 U.S. at 48 n.15 (quoting 52 U.S.C. § 10301(b)). It is "the usual predictability of the majority's success" which distinguishes a structural problem "from the mere loss of an occasional election." *Id.* at 51. If an election practice would generally "not impede the ability of minority voters to elect representatives of their choice" there is no § 2 violation; rather a "bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 48–49.

In a § 2 challenge, a court's focus must be on the question whether minorities have less opportunity to elect representatives of their choice; therefore, evidence that a particular election practice falls more heavily on minority than non-minority voters, or that electoral outcomes are not proportionate to the numbers of minorities in the population,[17] is not sufficient by itself to establish a § 2 violation. As we have previously explained, "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Salt River*, 109 F.3d at 595. Rather, "plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result," i.e., less opportunity to participate in the political process and elect representatives. *Id.* (*quoting Ortiz*, 28 F.3d at 312). Because "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of

[17] The VRA itself states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

its voting system," *Frank*, 768 F.3d at 754, were it enough to merely point to "some relevant statistical disparity" implicated by the challenged law, *Salt River*, 109 F.3d at 595, then § 2 would "dismantle every state's voting apparatus," *Frank*, 768 F.3d at 754.[18]

If a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting, a court can reasonably conclude that the law does not impair any particular group's opportunity to "influence the outcome of an election," *Chisom*, 501 U.S. at 397 n.24, even if the practice has a

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[18] Directly contrary to this longstanding precedent, the dissent insists that if a challenged practice disproportionately impacts members of a protected class, then it per se constitutes a violation under the first step of the § 2 test. *See* Dissent at 83 (arguing that because DNC showed that minorities are over-represented among those who cast out-of precinct ballots, "[t]he analysis at step one of the § 2 results test ought to end at this point"); *id*. at 83–84 (asserting that the district court's finding that "OOP ballot rejection has no meaningfully disparate impact on the opportunities of minority voters to elect their preferred representatives" is "irrelevant to step one of § 2's results test, which focuses solely on the differences in opportunity and effect enjoyed by groups of voters"); *id*. at 86 (arguing that under § 2, a state must correct any disparities that can be attributed to socioeconomic factors); *id*. at 118 (arguing that because H.B. 2023 imposes a disparate burden on members of protected classes, it meets step one). The dissent's argument is not only contrary to our precedent, but is inconsistent with the plain language of § 2, and to the Supreme Court's interpretation of the VRA. *Gingles*, 478 U.S. at 51 (§ 2 plaintiffs must show more than "the mere loss of an occasional election"); *Chisom*, 501 U.S. at 398 ("For all such [§ 2] claims must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice.").

disproportionate impact on minority voters. For instance, in *Lee v. Virginia State Board of Elections*, plaintiffs argued that Virginia's photo ID law violated § 2 because more minorities than non-minorities lacked the necessary IDs, and "the process of obtaining photo IDs requires those voters to spend time traveling to and from a registrar's office." 843 F.3d 592, 600 (4th Cir. 2016). The Fourth Circuit rejected this argument. Observing that the state provided the option for voters without ID to cast a provisional ballot and obtain a free ID to verify their identity, the Fourth Circuit reasoned that "every registered voter in Virginia has the full ability to vote when election day arrives," and therefore the election practice "does not diminish the right of any member of the protected class to have an equal opportunity to participate in the political process." *Id*.

In sum, in considering a § 2 claim, a court must consider whether the challenged standard, practice, or procedure gives members of a protected class less opportunity than others both "to participate in the political process *and* to elect representatives of their choice." *Chisom*, 501 U.S. at 397 (quoting 52 U.S.C. § 10301(b)). The plaintiff must show a causal connection between the challenged voting practice and the lessened opportunity of the protected class to participate and elect representatives; it is not enough that the burden of the challenged practice falls more heavily on minority voters. *See Salt River*, 109 F.3d at 595. Rather, the challenged practice must "influence the outcome of an election," *Chisom*, 501 U.S. at 397 n.24, and create some "substantial difficulty" for a protected class to elect representatives of its choice, not just the "mere loss of an occasional election." *Gingles*,

478 U.S. at 48 n.15, 51. If this sort of discriminatory result is found, then the practice must be considered in light of the Senate Factors, which are "particularly" pertinent to vote dilution claims, but "will often be pertinent" to other § 2 claims as well. *Id.* at 44–45.[19]

2

We now turn to the district court's determination here. We review the district court's legal determinations de novo, *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012), but defer to "the district court's superior fact-finding capabilities," and review

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[19] Our two-step analysis, derived from the language of § 2, and Supreme Court precedent, is consistent with the two-step framework adopted by the Fourth, Fifth, and Sixth Circuits (and, in part, the Seventh Circuit):

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and]
>
> [2] [T]hat 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.

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (citations and internal quotation marks omitted); *Veasey v. Abbott* (*Veasey I*), 830 F.3d 216, 244 (5th Cir. 2016); *Ohio Democratic Party*, 834 F.3d at 637; *Frank*, 768 F.3d at 754–55 (adopting the test "for the sake of argument"). The first prong tracks the language of § 2, as interpreted by the Supreme Court, and the second prong implicates the Senate Factors.

its factual findings for clear error, *Salt River*, 109 F.3d at 591.

In analyzing the first step of a § 2 claim, the district court first found that DNC had provided no quantitative or statistical evidence showing how many people would be affected by H.B. 2023 and their minority status, noting that it was "aware of no vote denial case in which a § 2 violation has been found without quantitative evidence measuring the alleged disparate impact of a challenged law on minority voters." *Reagan*, 2018 WL 2191664, at *30. Despite the lack of any statistical evidence establishing a disproportionate impact of H.B. 2023 on minorities, the court stated that it would not rule against DNC on this ground. *Id*. at *31. Instead, it considered DNC's circumstantial and anecdotal evidence, and tentatively concluded that "prior to H.B. 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties," emphasizing the caveat that it could not "speak in more specific or precise terms than 'more' or 'less.'" *Id*. at *33.

Having inferred, based on DNC's circumstantial and anecdotal evidence, that H.B. 2023 likely impacted more minority voters than non-minority voters, the district court nevertheless concluded that DNC's evidence did not establish that H.B. 2023 gave members of a protected class less opportunity than other members of the electorate both to participate in the political process and to elect representatives of their choice. *Id*. at *32–34. The district court provided two reasons. First, the court reasoned that the evidence

presented indicated that only "a relatively small number of voters" used ballot collection services at all. *Id*. at *33. By logical extension, that meant that only a small number of minorities used ballot collection services to vote, and the vast majority of minority voters "vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions." *Id*. Because only a small number of minority voters were affected to any degree by H.B. 2023, the court found "it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." *Id*.

Second, the court reasoned that even for the small number of minority voters who were affected by H.B. 2023 (i.e., who would use third-party ballot collectors no longer permitted by H.B. 2023 if they could), the evidence did not show that H.B. 2023 gave minorities less opportunity than other members of the electorate to participate in the political process and elect representatives. *Id*. at *34. While H.B. 2023 might make it "slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots," the court found that there was no evidence that H.B. 2023 "would make it significantly more difficult to vote," particularly given that no individual voter had testified that H.B. 2023 had this impact. *Id*. Therefore, the district court found that DNC had not carried its burden at the first step of the § 2 analysis. *Id*.

Although the district court did not need to reach the second step, it nonetheless reviewed the relevant

Senate Factors in order to develop the record and concluded that DNC had likewise failed to carry its burden at step two. *Id*. at *36–40.[20]

3

The district court's conclusion that the burden on a protected class of voters is so minimal that it would not give them less opportunity to elect representatives of their choice is not clearly erroneous. DNC produced anecdotal testimony that various sources collected between fifty and a few thousand ballots but DNC's counsel could not articulate an estimate more precise than that "thousands" of people used this opportunity. *Id*. at *12. Accordingly, the district court did not clearly err in estimating that fewer than 10,000 voters used ballot collection services in each election. Moreover, the district court even considered a more generous, although "unjustified," number of 100,000 voters, but nonetheless found that this was "relatively small" in relation to the 1.4 million early mail ballots and 2.3 million total voters. *Id*. The district court's view was, at minimum, a permissible view of the evidence. *See Bessemer City*, 470 U.S. at 573. Given these small numbers, the district court did not clearly err in concluding that the unavailability of third party ballot collection would have minimal effect on the opportunity

[20] As noted above, *supra* at 37 n.15, because the district court correctly determined that H.B. 2023 does not satisfy step one of the § 2 analysis, we need not evaluate the district court's analysis of these factors in detail. Nevertheless, the district court's factual conclusions were not clearly erroneous, and as explained below, *see infra* at 72 n.32, we reject the dissent's factual reevaluations.

of minority voters to elect representatives of their choice.

Further, as explained in the *Anderson/Burdick* analysis, the evidence available indicated that the burden on even those few minority voters who used third-party ballot collection was minimal, because those voters had "done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways," rather than from necessity. *Reagan*, 2018 WL 2191664, at *14. As the district court pointed out, not a single voter testified at trial that H.B. 2023 made it significantly more difficult to vote, despite the fact that H.B. 2023 was in place for two 2016 elections. *Id.* at *34.[21]

In challenging the district court's conclusion, DNC and the dissent argue that under § 2, the total number of votes affected is not the relevant inquiry; the proper test is whether any minority votes are burdened. This argument is meritless. As we have explained, a "bare statistical showing" that an election practice "has a disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry." *Salt River*, 109 F.3d at 595. Rather, the test under § 2 is whether the "members [of a class of protected citizens] have less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 52 U.S.C. § 10301(b)

[21] In arguing that H.B. 2023 had a disparate impact on the ability of minorities to participate in the political process, the dissent fails to address this key fact.

(emphasis added).[22] To determine whether a challenged law will result in members of a class having less opportunity to elect representatives of their choice, a court must necessarily consider the severity and breadth of the law's impacts on the protected class.

Accordingly, we affirm the district court's ruling that DNC failed to establish that H.B. 2023 results in less opportunity for minority voters to participate in the political process and to elect representatives of their choice, and therefore H.B. 2023 did not violate § 2 of the VRA.

C

Finally, we consider DNC's claim that H.B. 2023 violated the Fifteenth Amendment.

1

Plaintiffs can challenge a state's election practice as violating their Fifteenth Amendment rights by showing that "a state law was enacted with discriminatory intent." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Discriminatory intent "implies more than intent as volition or intent as awareness of consequences." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Rather, plaintiffs must show that a state legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its

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[22] While DNC cites extensively to the dissent in *Chisom* in arguing that they need not prove members of a protected class have less opportunity to elect representatives of their choice, we are bound by the majority, which rejected this argument. 501 U.S. at 397 & n.24.

adverse effects upon an identifiable group." *Id.* Thus, although racial discrimination need not be the "dominant" or "primary" factor underlying a legislative enactment, it must be a "motivating factor." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

A law is not infected by discriminatory intent merely "because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). Rather, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. This inquiry is guided by factors set forth in *Arlington Heights*. *Id.* at 266–68; *see Bolden*, 446 U.S. at 62, 72–74 (holding that a facially neutral law "violates the Fifteenth Amendment only if motivated by a discriminatory purpose" and applying *Arlington Heights* in an analysis of discriminatory intent).

Under the *Arlington Heights* framework, "the following, non-exhaustive factors" are relevant "in assessing whether a defendant acted with discriminatory purpose: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history." *Arce v. Douglas*, 793 F.3d 968, 977 (9th Cir. 2015). Because of "the presumption of good faith that

must be accorded legislative enactments" and the "evidentiary difficulty" in determining whether race was a motivating factor, courts must "exercise extraordinary caution" when engaging in this inquiry. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Discriminatory intent "is a pure question of fact" subject to review for clear error. *Pullman-Standard*, 456 U.S. at 287–88; *Abbott*, 138 S. Ct. at 2326. "It is not a question of law and not a mixed question of law and fact." *Pullman-Standard*, 456 U.S. at 288.

Given this standard, we must determine whether the district court's finding that the Arizona legislature did not have discriminatory intent is clearly erroneous. We consider the district court's findings on each *Arlington Heights* factor.

2

We start with two of the *Arlington Heights* factors, the historical background and legislative history of the enactment. *Arce*, 793 F.3d at 977. According to the district court, Arizona's history was "a mixed bag of advancements and discriminatory actions." *Reagan*, 2018 WL 2191664, at *38. Although there was evidence of discrimination and racially polarized voting, there was also evidence of improvement. While Arizona was subject to § 5 preclearance, "the DOJ did not issue any objections to any of [Arizona's] statewide procedures for registration or voting." *Id.* at *37. Moreover, Arizona enacted an Independent Redistricting Commission to combat problems with discrimination in drawing statewide redistricting plans. *Id.* at *38.

The district court also noted the relevant legislative history of H.B. 2023, including "farfetched allegations of ballot collection fraud" made by one legislator, Arizona State Senator Don Shooter, *id*. at *41, and a video (referred to as the "LaFaro Video") which "showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots," *id*. at *38.[23] However, the court concluded that the legislature was not motivated by discriminatory intent. Rather, the court found that "Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting, and these proponents appear to have been sincere in their beliefs that this was a potential problem that needed to be addressed." *Id*. at *41.

The district court's conclusion is well supported by the legislative record, which shows that legislative discussion focused on the danger of fraud. For example, the bill's sponsor, Senator Michelle Ugenti-Rita, stated that H.B. 2023 was designed to "limit fraud" in ballot collection, which "is important to maintaining integrity in our electoral process" because the ballot collection practice "is ripe to be taken advantage of." Senator Steve Smith testified that ballot fraud is "certainly happening," and Michael Johnson, an African

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[23] The district court found that the narration by Maricopa County Republican Chair A.J. LaFaro "contained a narration of 'Innuendos of illegality . . . [and] racially tinged and inaccurate commentary by . . . LaFaro.'" *Reagan*, 2018 WL 2191664, at *38. The video was first introduced in 2014, but became "prominent in the debates over H.B. 2023." *Id*. at *39.

American who had served on the Phoenix City Council, testified that he had constituents call to complain about ballot collectors in minority communities. Senator Smith cited this testimony in a speech supporting the law. Senator Sylvia Allen expressed concern that "we do not know what happens between the time the ballots are collected and when they're finally delivered." This concern was confirmed by State Election Director Eric Spencer, who testified that "there is a huge imbalance in the amount of security measures that are in place for polling place voting compared to early voting." Even though "77 percent of all the votes cast in Arizona" are early votes, there are "almost no prophylactic security procedures in place to govern that practice, whereas, at the polling place, where only 23 percent of the votes are taking place, we have every security measure in the world."

The legislature also heard testimony that other states had implemented similar security measures related to ballot collection. According to the legislative record, at the time H.B. 2023 was considered by the Arizona legislature, "California, New Mexico, Colorado, [and] Nevada all ha[d] laws that restrict or prohibit ballot collection," and therefore Arizona was "a little bit out of the norm especially among our neighbors." The legislature also heard that the California law was more draconian than H.B. 2023: it prohibited all ballot collection except by members of the household, family members, and spouses, and did not count votes in ballots that had been improperly collected.

DNC and the dissent claim that the district court erred in giving weight to this evidence because there

was no evidence of actual fraud. According to DNC, this evidentiary gap established that the legislators' expressed concerns regarding fraud in ballot collection were merely a facade for racial discrimination. This argument fails. The Arizona legislature was free to enact prophylactic measures even when the legislative record "contains no evidence of any such fraud actually occurring." *Crawford*, 553 U.S. at 194. Moreover, as the district court noted, "H.B. 2023 found support among some minority officials and organizations," including Michael Johnson, the African American councilman, and the Arizona Latino Republican Association for the Tucson Chapter, which undermines DNC's claim that concerns about fraud were a mere front for discriminatory motives. *Reagan*, 2018 WL 2191664, at *41.

DNC argues that the district court erred in not giving sufficient weight to the evidence that the LaFaro video had racial overtones. The district court's decision to give this evidence less weight was not a legal error, however, because the district court was not obliged to impute the motives of a few legislators to the entire Arizona legislature that passed H.B. 2023. *See Arlington Heights*, 429 U.S. at 265–66. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).[24] The Sixth Circuit recently recognized

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[24] DNC relies on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), for the principle that courts should put more weight on discriminatory statements of individual decisionmakers, but that case is not on point. In holding

this point, holding that the clearly discriminatory statements and motive of one legislator did not show that the enacting legislature "acted with racial animus." *Ne. Ohio Coal.*, 837 F.3d at 637.

The district court also did not err in giving little weight to evidence that "some individual legislators and proponents were motivated in part by partisan interests." *Reagan*, 2018 WL 2191664, at *43. The record shows that State Senator Shooter's concerns about ballot collection arose after he won a close election, that Michael Johnson complained that ballot collection put candidates without an effective get-out-the-vote effort at a disadvantage, and a 2014 Republican candidate for the Arizona House of Representatives claimed that he lost his election because of ballot collection activities. *Id*. Although DNC and the dissent seem to argue that, as a matter of law, legislators should be deemed to have a discriminatory intent for Fifteenth Amendment purposes when they are motivated by partisan interests to enact laws that disproportionately burden minorities, this is incorrect.

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that statements of individual commissioners were relevant to determine whether a law intentionally discriminated on the basis of religion, the Court distinguished the adjudicatory context from the legislative context. *See id.* at 1730. *Masterpiece Cakeshop* explained that while "[m]embers of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion," the remarks in this case were made "in a very different context—by an adjudicatory body deciding a particular case." *Id*. Because our case involves a legislature enacting a general statute, rather than adjudicating a specific case, *Masterpiece Cakeshop* is not applicable.

Fifteenth Amendment plaintiffs must show that the legislature acted with racial motives, not merely partisan motives. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1473 (2017) ("[A] trial court has a formidable task: It must . . . assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines."); *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (evaluating the district court's critical finding "that race *rather than* politics" motivated the districting map). The "intent to preserve incumbencies" is not equivalent to racially-discriminatory intent, and only the latter supports a finding of intentional discrimination. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 & n.1 (9th Cir. 1990). Even when "racial identification is highly correlated with political affiliation," *Cooper*, 137 S. Ct. at 1473 (quoting *Easley*, 532 U.S. at 243), plaintiffs must still carry their burden of showing that the former was a motivating factor. *Id.* Accordingly, the determination whether racial or political interests motivated a legislature is one of fact subject to review for clear error. *See Cooper*, 137 S. Ct. at 1473–74. Here the district court disentangled racial motives from partisan motives, and its factual finding that even those few legislators harboring partisan interests did not act with a discriminatory purpose is not clearly erroneous.[25]

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[25] Contrary to the dissent, the district court did not find that "partisan self-interest [] absolve[d] discriminatory intent." Dissent at 110. Rather, the district court determined that the Arizona legislature did not act with discriminatory intent, and passed H.B. 2023 in spite of any potential disparate-impact on minority voters, not because of it. *Reagan*, 2018 WL 2191664, at *41.

Therefore, the historical and legislative history factors support the district court's conclusion.

3

We next turn to the *Arlington Heights* factors of the "sequence of events" leading to the challenged action and "departures from normal procedures." *Arce*, 793 F.3d at 977. First, the district court found that the Arizona legislature followed its normal course in enacting H.B. 2023, and therefore the legislative process itself did not raise an inference of discriminatory intent. *Reagan*, 2018 WL 2191664, at *42–43. This conclusion is supported by the record; there is no evidence that the legislature used unusual procedures or unprecedented speed to pass a law, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214, 228 (4th Cir. 2016), which other courts have deemed raise such an inference, *see, e.g.*, *Veasey I*, 830 F.3d at 238 (holding that the Texas legislature's unwonted procedure of designating the bill "as emergency legislation," cutting debates short, passing it without the ordinary committee process, and suspending a two-thirds voting rule to get the bill passed, weighed in favor of a finding of discriminatory intent).

Second, in considering the historical sequence of events, the district court held that neither of the two prior efforts to limit ballot collection, S.B. 1412 (enacted in 2011) and H.B. 2305 (enacted in 2013), weighed in favor of finding that the legislature had a discriminatory intent in enacting H.B. 2023. *Reagan*, 2018 WL 2191664, at *42–43. The record showed that S.B. 1412 was subject to § 5 preclearance, and that

after the DOJ requested additional information regarding the ballot collection provision, the Arizona Attorney General voluntarily withdrew the provision. *Id*. at *42. Two years later, the legislature enacted H.B. 2305, which also regulated ballot collection. *Id*. After citizen groups organized referendum efforts against the law, the legislature repealed it. *Id*. The court held that while these circumstances were somewhat suspicious, they "have less probative value because they involve different bills passed during different legislative sessions by a substantially different composition of legislators." *Id*.

The district court did not clearly err in giving little weight to these prior enactments. Even if the bills had been informed by a discriminatory intent, the Supreme Court has made clear that "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324 (quoting *Bolden*, 446 U.S. at 74). The intent of a prior legislature cannot be imputed to a new legislature enacting a different bill "notwithstanding the previous drafter's intent." *Veasey v. Abbott (Veasey II)*, 888 F.3d 792, 802 (5th Cir. 2016). Indeed, it is a clear error to presume that any invidious intent behind a prior bill "necessarily carried over to and fatally infected" the law at issue. *Id*. Further, "meaningful alterations" in an amended statute may render even a previously discriminatory statute valid. *Id*. (citation omitted). Because Arizona's previous laws on ballot collection were different rules, passed by different legislatures, and H.B. 2023 is "more lenient than its predecessors given its broad exceptions for family members, household members, and caregivers," these

prior enactments do not materially bear on the legislature's intent in enacting H.B. 2023. *Reagan*, 2018 WL 2191664, at *43.

Moreover, the district court did not err in finding that neither S.B. 1412 or H.B. 2305 was enacted with racially discriminatory intent. Regarding S.B. 1412, the record shows only that the DOJ requested more information, but its primary concern was the law's "*impact* on minority voters," *Feldman III*, 843 F.3d at 369 (emphasis added), not the intent of the legislature in enacting it.[26] And as to H.B. 2305, the record does not disclose why citizens opposed the law or whether the referendum sought to combat a discriminatory purpose. The lack of evidence of past discrimination further undermines DNC's argument that the legislature had discriminatory intent in passing H.B. 2023.

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[26] To support its claim, DNC points to Representative Ruben Gallego's statements to the DOJ that S.B. 1412 was motivated by discriminatory intent. But Gallego opposed S.B. 1412, and "[t]he Supreme Court has . . . repeatedly cautioned—in the analogous context of statutory construction—against placing too much emphasis on the contemporaneous views of a bill's opponents" in determining a legislature's intent. *Veasey I*, 830 F.3d at 234 (quoting *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985)). DNC also points to statements by Amy Chan (formerly Amy Bjelland) to the DOJ, but the district court reasonably interpreted her statements as merely explaining that the impetus for S.B. 1412 was an accusation of voter fraud in San Luis, a predominately Hispanic area in the southern portion of Arizona. *Feldman III*, 843 F.3d at 384.

In reviewing the final *Arlington Heights* factor (whether the law would have a disparate impact on a particular racial group), *Arce*, 793 F.3d at 977, the district court found that "the legislature enacted H.B. 2023 in spite of its impact on minority [get out the vote] efforts, not because of that impact," and concluded that "proponents of the bill seemed to view these concerns as less significant because of the minimal burdens associated with returning a mail ballot," *Reagan*, 2018 WL 2191664, at *43.

The district court did not clearly err in reaching this conclusion. Multiple senators expressed their view that H.B. 2023 imposes only a slight burden on voters. For instance, Senator Michelle Ugenti-Rita stated that voters have "[l]ots of opportunities" to vote in the 27 day early-voting window, and expressed her view that there is no reason to presume a voter who previously used ballot collection would have trouble voting. Given that these voters have already asked "that their ballot be mailed to them," Senator Ugenti-Rita stated "logic would tell you they are perfectly capable and understand that, in order to then get their ballot in, they need to put it back in to the mailbox or drop it off." Another proponent of the bill, John Kavanaugh, expressed a similar view: "The only way you get an early ballot is to have it delivered to you by mail, and the way you're supposed to return an early ballot is to reverse that process. And it's hard to imagine how, when you have an early ballot, somewhere in the area of 30 days, you somehow can't do that." Again, the record does not contain the sort of evidence that has led

other courts to infer the legislature was acting with discriminatory intent, such as evidence that the legislators studied minority data and targeted the voting methods most used by minority voters. *Cf. McCrory*, 831 F.3d at 220. In fact, no voters, minority or non-minority, testified that they faced a substantial obstacle to voting because of H.B. 2023. Accordingly, we find no clear error in the court's holding that "[b]ased on the totality of the circumstances," DNC had "not shown that the legislature enacted H.B. 2023 with the intent to suppress minority votes." *Reagan*, 2018 WL 2191664, at *43.

In sum, the district court carefully weighed the evidence of discriminatory purpose and found the Arizona legislature was not motivated by an intent to discriminate. The findings supporting this conclusion are not clearly erroneous, and neither was the ultimate balancing of the *Arlington Heights* factors.

5

Because discriminatory intent is a "pure question of fact," a court must defer to the district court's fact-finding unless it is clearly erroneous. *Pullman-Standard*, 456 U.S. at 288. But the dissent once again reviews the record de novo, reweighs the evidence, and reaches its own conclusion. For instance, the district court referenced Senator Shooter's allegations and the LaFaro video, but concluded, based on its review of the record, that the legislature was not motivated by discriminatory intent. *Reagan*, 2018 WL 2191664, at *41. The dissent simply reaches the opposite conclusion, based on the same evidence. Dissent at 111–13. Similarly, the dissent claims "the district court

was wrong to determine that a law is not racially motivated if any people of color support it." Dissent at 113. But that mischaracterizes the district court's holding. Rather, after reviewing the evidence in the record, the district court found that H.B. 2023 was supported by minority officials and organizations. *Reagan*, 2018 WL 2191664, at *41. The district court did not err in considering that fact, among others, in determining whether the supporters of H.B. 2023 were motivated by racial discrimination, and the district court need not have concluded, as does the dissent, that such evidence "simply demonstrates that people of color have diverse interests." Dissent at 113. The Supreme Court has long held that an appellate court may not reject a district court's findings as clear error even when the court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Bessemer City*, 470 U.S. at 574. The dissent's approach contradicts this rule.

Further, the dissent supports its conclusion that "H.B. 2023 was enacted for the purpose of suppressing minority votes" by creating its own per se rules that a legislature's anti-fraud motive is pretextual when there is no direct evidence of voter fraud, and that a legislature's partisan motives are evidence of racial discrimination. Dissent at 107, 110–12. The dissent cites no support for these new rules, likely because Supreme Court precedents contradict them: *Crawford* rejected the idea that actual evidence of voter fraud was needed to justify restrictions preventing voter fraud, 553 U.S. at 195–96 & nn.11–13; and *Cooper* made clear plaintiffs must "disentangle race from politics and prove that the former drove" the

legislature, 137 S. Ct. at 1473. The dissent's attempt to reframe the evidence does not make the district court's resolution of this purely factual question clearly erroneous. *Pullman-Standard*, 456 U.S. at 287–88.

IV

We now turn to DNC's challenges to the OOP policy. DNC argues that (1) the OOP policy violates the First and Fourteenth Amendment; and (2) the OOP policy violates § 2 of the VRA.

A

We begin with DNC's claims that the OOP policy violates the First and Fourteenth Amendment by imposing an unconstitutional burden under the *Anderson/Burdick* test.

1

As an initial matter, we agree with the district court's characterization of these claims as constituting a challenge to the precinct voter system. As discussed, most Arizona counties use a precinct-based system for the 20 percent of voters who vote in person on Election Day. In-person voters must cast their ballots in their assigned precinct, or their votes will not be counted. *See* Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584 (codified in 1979); 1970 Ariz. Sess. Laws, ch. 151, § 64 (amending Ariz. Rev. Stat. § 16-895); Ariz. Rev. Stat. § 16-102 (1974). This rule does not apply to voters who cast their ballots in a county that use a vote center system, or who use other methods to vote.

On appeal, DNC argues that it is not challenging the rule requiring voting within a precinct, but rather Arizona's enforcement of the rule by not counting ballots cast in the wrong precinct (which it calls disenfranchisement).[27] This argument is sophistical; it conflates the burden of *complying* with an election rule with the *consequence* of noncompliance. As the Supreme Court has recognized, a state has an obligation to structure and organize the voting process within the state through a system of election rules. *Storer*, 415 U.S. at 730. For instance, states typically have election rules that require voters to register to vote and to cast their votes in person during the hours when polls are open. These rules impose certain minimal burdens on voters—the ordinary burdens of registering to vote and showing up on time. If voters fail to comply, they may be unable to vote or their ballots may not be counted. But it is the election rules that impose a burden on the voter—not the enforcement of those rules. Under DNC's theory, a state could not enforce even a rule requiring registration, because the state's failure to count the vote of a non-registered voter would "disenfranchise" the noncompliant voter.

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[27] This is a misnomer. A state disenfranchises voters (for example, pursuant to a felon disenfranchisement law) by depriving certain individuals of their right to vote, not by requiring voters to comply with an election rule in order to have their votes counted. As the Supreme Court has explained, an election rule, such as the requirement to have a valid photo ID in order to vote, may be valid, even if a voter's noncompliance with such a rule means that the voter's ballot will not be counted. *Crawford*, 553 U.S. at 187, 189.

Rather than adopt DNC's fallacious approach, we are guided by the Supreme Court's approach in *Crawford*. *Crawford* considered a state's election rule which provided that in-person voters who did not have valid photo ID, and did not thereafter verify their identities, were unable to have their votes counted. 553 U.S. at 186. In conducting its *Anderson/Burdick* analysis, *Crawford* held that this photo ID rule imposed the burden of obtaining the requisite identification by "making a trip to the [issuing agency], gathering the required documents, and posing for a photograph," *id.* at 198, and potentially could impose a heavier burden on subgroups, such as the homeless or those lacking birth certificates, *id.* at 199. The Court's analysis would make little sense if the relevant burden were the state's enforcement of the photo ID rule; under that view, all voters would be subject to the same burden—that of having their non-compliant votes discounted. Accordingly, like the district court, we conclude that the appropriate analysis is whether compliance with the voter requirement in question—here, the requirement to vote in an assigned precinct—imposes an undue burden. *See also Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (explaining that courts cannot "absolve[] 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").

2

Applying the *Anderson/Burdick* framework to the proper characterization of DNC's challenge, the district

court found that the precinct voting rule did not unconstitutionally burden the right to vote. As with H.B. 2023, the district court first observed that Arizona's OOP policy has no impact on the vast majority of Arizona voters because 80 percent of them cast their ballots through early mail voting. *Reagan*, 2018 WL 2191664, at *21. The court also noted that the policy has no impact on voters in Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties, rural counties that adopted the vote center model. *Id*.

As to those few Arizonans who vote in person outside of the vote center counties, the district court found that the burden of voting in the correct precinct was minimal. The district court acknowledged that people who move frequently may fail to update their voter registration in a timely manner and, as a result, may not have their early ballot forwarded to their new address, and that "changes in polling locations from election to election, inconsistent election regimes used by and within counties, and placement of polling locations all tend to increase OOP voting rates," as well as incorrect information provided by poll workers. *Id*. at *22. The district court nevertheless concluded that "the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens traditionally associated with voting." *Id*. at *24. Moreover, the district court found, "Arizona does not make it needlessly difficult for voters to find their assigned precincts," citing the myriad ways Arizona provides that information to voters: direct mailings, multiple state and county websites, town halls, live events, and social media and other advertising. *Id*. at

*23–24 This information is generally provided in both English and Spanish. *Id.* at *24. Further, the court found that "for those who find it too difficult to locate their assigned precinct, Arizona offers generous early mail voting alternatives." *Id.* In light of these measures, the district court did not clearly err in finding that the burden of voting in the correct precinct was minimal.

Considering the electorate as a whole, the court found that the number of out-of-precinct votes was "small and ever-dwindling." *Id.* Only 14,885 of the 2,320,851 Arizonan votes cast in the 2008 general election were cast outside of the correct precinct—just 0.64 percent of total votes. *Id.* at *21. That number dropped to 10,979 ballots in the 2012 general election—0.47 percent of total votes. *Id.* By the 2016 general election, only 3,970 votes were cast in the wrong precinct in Arizona—just 0.15 percent of the 2,661,497 total votes. *Id.* The small and decreasing number of out-of-precinct votes confirms the district court's conclusion that the burden of identifying the correct precinct is minimal.

We conclude that the district court's finding that the requirement to vote in the correct precinct is a minimal burden is not clearly erroneous. As the district court noted, precinct-based voting is an established method of conducting elections and is used in a majority of states. *Id.* at *8; *see also Serv. Emps.*, 698 F.3d at 344 (precinct-voting system); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004) (per curiam) ("One aspect common to elections in almost every state is that voters are required to vote in

a particular precinct. Indeed, in 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."). And a majority of the states that use precinct voting do not count out-of-precinct ballots. *Reagan*, 2018 WL 2191664, at *8. The requirement to use mail voting or locate the correct precinct and then travel to the correct precinct to vote does not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

DNC's arguments to the contrary are meritless. First, DNC argues that the burden imposed by Arizona's policy of not counting ballots cast outside of the proper precinct is not minimal because the ratio of Arizona voters who cast ballots outside of the correct precinct compared to total votes cast *in-person* on Election Day is higher than in any other state. This statistic is misleading, because the vast majority of Arizonans vote early by mail—not in-person on Election Day. *Reagan*, 2018 WL 2191664, at *21. More important, the relative difference between Arizona and other states does not shed any light on the only relevant issue: the size of the burden imposed by Arizona's precinct voter system.[28]

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[28] The dissent offers similarly misleading statistics to support its assertion that "Arizona voters are far likelier to vote [out of precinct] than voters of other states." Dissent at 77. The dissent's graph, Dissent at 78, shows only that the small subset of Arizona voters who cast their ballots in-person on Election Day are more likely to vote outside their precinct than voters in other states. Dissent at 78. The vast majority of Arizona voters, however, vote early by mail. *Reagan*, 2018 WL 2191664, at *21. Further, the dissent mentions the total number of votes cast out of precinct in

Second, DNC points to the evidence in the record regarding the external factors that contribute to out-of precinct voting in Arizona, such as residential mobility, polling place locations, and pollworker training, and argues that such external factors impose a heavier burden on minorities.[29] But even if DNC presented evidence showing that the burden of finding the correct precinct fell more heavily on minorities than nonminorities, such evidence would not establish that the burden is any more than de minimis. DNC does not cite evidence that would allow a court "to quantify either the magnitude of the burden on [any such] class of voters or the portion of the burden imposed on them that is fully justified," *id*. at 200; nor does DNC directly contest the evidence on which the district court relied in determining the burden was minimal. For instance, the district court cited substantial evidence in the record showing that in "Arizona counties with precinct-based systems, voters generally are assigned to precincts near where they live, and county officials consider access to public transportation when assigning polling places," and that "Arizona voters also can learn of their assigned precincts in a variety of ways," by

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the 2012 election, but not the more recent data from the 2016 election, which supports the district court's conclusion that the number of votes cast out of precinct is an "ever-decreasing fraction of the overall votes cast in any given election." *Reagan*, 2018 WL 2191664, at *35.

[29] As the district court noted, DNC did not challenge the manner in which individual counties locate polling places, or the manner in which Arizona trains its poll workers or informs voters of their assigned precincts, thus undercutting any argument that such practices violated § 2. *Reagan*, 2018 WL 2191664, at *23.

accessing multiple websites operated by Arizona or various counties, by being mailed notice of any changes in polling places, or by calling the county recorder, among numerous other methods. *Reagan*, 2018 WL 2191664, at *23. Further, the district court relied on a 2016 Survey of Performance of American Elections in which no Arizona respondents stated that it was "very difficult" to find their polling place, and 94 percent of Arizona respondents reported that it was "very easy" or "somewhat easy" to find their polling place. *Id.* Accordingly, we decline the invitation by DNC and the dissent to reweigh the same evidence considered by the district court and reach the opposite conclusion. *See Bessemer City*, 470 U.S. at 573. Instead, we affirm the district court's determination that the Arizona precinct voter rule imposed only minimal burdens.

3

We next consider the district court's conclusion that Arizona had important regulatory interests for requiring precinct-based voting. The court found that this precinct system serves an important planning function by allowing counties to estimate the number of voters who may be expected at any particular precinct, allowing for better allocation of resources and personnel. *Reagan*, 2018 WL 2191664, at *24. A well-run election increases voter confidence and reduces wait times. *Id.* Second, the precinct voting system ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote, which "promotes voting for local candidates and issues and helps make ballots less confusing by not providing

voters with ballots that include races for which they are not eligible to vote." *Id.*

The court concluded that the OOP policy was sufficiently justified by Arizona's important interests in light of the minimal burdens it imposes, and held that Arizona's practice did not need to be the narrowest means of enforcement. *Id.* at *24–26. The court therefore rejected DNC's arguments that Arizona should be required to adopt a more narrowly tailored rule and partially count ballots that were cast out-of-precinct, i.e., "counting only the offices for which the OOP voter is eligible to vote." *Id.* at *25. Moreover, the court concluded that such a requirement would have significant impacts. If Arizona no longer enforced in-precinct voting, the court reasoned, people would "have far less incentive to vote in their assigned precincts and might decide to vote elsewhere." *Id.* at *25. Voters could also "be nefariously directed to vote elsewhere," *id.*, as detailed in *N.C. State Conference of NAACP v. McCrory*, 182 F. Supp. 3d 320, 461 (M.D.N.C. 2016), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016). Further, partially counting ballots would burden candidates for local office, who would have to persuade voters to vote in-precinct. *Reagan*, 2018 WL 2191664, at *25. Finally, it would "impose a significant financial and administrative burden on Maricopa and Pima Counties because of their high populations." *Id.* Accordingly, the court concluded that Arizona's rejection of ballots cast out-of-precinct does not violate the First and Fourteenth Amendments.

We agree with the district court's analysis. The interests served by precinct-based voting are well recognized. As the Sixth Circuit has explained:

> 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 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 Cty. Democratic Party, 387 F.3d at 569.

DNC does not dispute these legitimate interests, but argues that the OOP policy is not justified because it is administratively feasible to count ballots cast out-of-precinct, pointing to 20 other states which partially count out-of-precinct ballots. But restrictions such as the OOP policy that impose minimal burdens on voters' rights need not be narrowly tailored, *see Burdick*, 504 U.S. at 433, and thus Arizona is not required to show that its electoral system "is the one best tailored to achieve its purposes." *Dudum*, 640 F.3d at 1114. Moreover, as the district court pointed out, DNC's "requested relief essentially would transform Arizona's precinct-based counties, including its two most populous, into quasi-vote-center counties." *Reagan*, 2018 WL 2191664, at *26. The mere fact that a

minority of jurisdictions adopt a different system does not mean that Arizona's choice is unjustified. Where, as here, the plaintiff "effectively ask[s] the court to choose between electoral systems," we ordinarily reject such challenges. *See Dudum*, 640 F.3d at 1115. "[A]bsent a truly serious burden on voting rights," we have held that we must have "respect for governmental choices in running elections," particularly where "the challenge is to an electoral system, as opposed to a discrete election rule (e.g., voter ID laws, candidacy filing deadlines, or restrictions on what information can be included on ballots)." *Id.* at 1114–15 (emphasis omitted). As we have recognized, such variations are "the product of our democratic federalism, a system that permits states to serve 'as laboratories for experimentation to devise various solutions where the best solution is far from clear.'" *Pub. Integrity All.*, 836 F.3d at 1028 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015)).

DNC also contends that there is insufficient evidence that more voters will vote out-of-precinct if Arizona began partially counting out-of-precinct ballots. But just as with fraud prevention, Arizona does not need to produce "elaborate, empirical verification of the weightiness of [its] asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *see also Munro*, 479 U.S. at 195 ("To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate."). Courts

wisely do not require "that a State's political system sustain some level of damage" before it can impose "reasonable restrictions" on the electoral process.[30] *Munro*, 479 U.S. at 195. Therefore, we affirm the district court's holding that the OOP policy is valid under the *Anderson/Burdick* framework.

B

Finally, we address DNC's claim that the OOP policy violates § 2 of the VRA.

As noted above, at the first step, DNC must carry its burden of showing that the challenged practice (here Arizona's requirement that in-person voters vote in the correct precinct) gives members of a protected class less opportunity than other members of the electorate both "to participate in the political process *and* to elect representatives of their choice." *Chisom*, 501 U.S. at 397 (quoting 52 U.S.C. § 10301(b)).

The district court held that DNC did not carry its burden at the first step of its § 2 claim. Although finding that "minorities are over-represented among

[30] The dissent also challenges the wisdom of Arizona's OOP policy, labeling as "illogical" Arizona's concern that without the policy voters may not have an incentive to identify and vote in their correct precinct. Dissent at 104. In reaching this conclusion, the dissent relies only on its own view of proper policy, a view that contradicts a majority of states, which each adopt the same approach as Arizona. *Reagan*, 2018 WL 2191664, at *8. We therefore reject this argument.

the small number of voters casting OOP ballots,"[31] the court also found that out-of-precinct "ballots represent . . . a small and ever-decreasing fraction of the overall votes cast in any given election." *Reagan*, 2018 WL 2191664, at *34–35. As noted above, only 3,970 out of 2,661,497 total votes, or 0.15 percent, were cast in the wrong precinct during the 2016 general election. *Id*. at *35. Further, as in its *Anderson/Burdick* analysis, the court found that the burden of identifying the correct precinct was minimal. The court noted that DNC had not challenged "the manner in which Arizona counties allocate and assign polling places or Arizona's requirement that voters re-register to vote when they move." *Id*. Nor had DNC claimed that there was "evidence of a systemic or pervasive history" of disproportionately giving minority voters misinformation as to precinct locations, or evidence "that precincts tended to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters." *Id*. Because the number of votes cast out of precinct by any voters was small and decreasing, and because the burden of

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[31] For example, among all counties that reported out-of-precinct ballots in the 2016 general election, roughly 99 percent of Hispanic, African American, and Native American voters cast ballots in the correct precinct, while the other 1 percent voted in the wrong precinct. *Reagan*, 2018 WL 2191664, at *34. By comparison, 99.5 percent of non-minority voters voted in the correct precinct, with 0.5 percent casting out-of-precinct ballots. *Id*. While this data shows, as Arizona notes, that minority voters were "twice as likely" to cast OOP ballots as non-minority voters, the relative percentages of voters in each group who vote in the correct and incorrect precincts are far more meaningful. *See Frank*, 768 F.3d at 752 n.3.

finding the correct precinct was minimal (and the state had not made the burden more difficult for minorities), the district court concluded that the OOP policy did not give minority voters less opportunity than the rest of the electorate to participate in the political process and elect their preferred representatives. *Id.* at *36. Therefore, the court concluded that DNC had failed to carry its burden at the first step of § 2.[32]

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[32] Having reached this conclusion, the district court did not need to reach step two, but nonetheless analyzed both challenged election practices together and found that, although some of the Senate Factors were present, DNC's causation theory was too tenuous to meet its burden. *Reagan*, 2018 WL 2191664, at *36–40. These findings are not clearly erroneous. In arguing to the contrary, the dissent again engages in appellate fact-finding, emphasizing some parts of the extensive record and ignoring others. For example, the district court found that DNC did not carry its burden of proving that "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority groups." *Id.* at *27. This conclusion is supported by substantial evidence in the record, including evidence of outreach efforts by the Arizona Citizens Clean Elections Commission to increase minority voter education and participation, and evidence that Arizona had the sixteenth-highest minority representation ratio in the country. Although the dissent points to other evidence in the record, e.g., evidence that Arizona has the fourth-poorest health insurance coverage for children, and is ranked second-lowest overall per-pupil spending for Fiscal Year 2014, Dissent at 94–95, our proper role is to determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety," *Bessemer City*, 470 U.S. at 574, not to substitute our own evaluation of the record. Here, the district court's view of the evidence was clearly permissible, and we therefore disregard the dissent's impermissible reweighing of the evidence.

The district court did not clearly err in reaching this conclusion. Although DNC argues that minorities are more likely to cast out-of-precinct ballots, and that there have been close elections where out-of-precinct ballots could have made a difference, the fact that a practice falls more heavily on minorities is not sufficient to make out a § 2 violation. *Salt River*, 109 F.3d at 595. Rather, there must be a showing that the challenged practice causes a material impact on the opportunity provided to minorities to participate in the political process and to elect representatives of their choice. "[U]nless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Gingles*, at 48 n.15 (quoting 52 U.S.C. § 10301(b)). A precinct voting system, by itself, does not have such a causal effect. Such a common electoral practice is a minimum requirement, like the practice of registration, that does not impose anything beyond "the usual burdens of voting." *Crawford*, 553 U.S. at 198. As with other laws that impose such minimal burdens, a court can reasonably conclude that this background requirement, on its own, does not cause any particular group to have less opportunity to "influence the outcome of an election." *Chisom*, 501 U.S. at 397. Indeed, DNC has not adduced any evidence to the contrary.

In arguing that the district court erred, the dissent relies primarily on its erroneous view that any disparate impact on minorities constitutes a violation of step one of § 2. *See supra* at 41 n.18. Based on this misunderstanding, the dissent argues that "the district court legally erred in determining that a critical mass

of minority voters must be disenfranchised before § 2 is triggered."[33] Dissent at 84. But it is the dissent that errs in arguing that evidence that an election rule has any disparate impact on minorities is sufficient to succeed on a § 2 claim. Dissent at 88. As the Supreme Court pointed out, to meet the language of § 2, "all such claims must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives of one's choice," *Chisom*, 501 U.S. at 398, and must prove more than "the mere loss of an occasional election." *Gingles*, 478 U.S. at 51. Here, the district court was faithful to the language of § 2. 52 U.S.C. § 10301 (b).[34]

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[33] Of course, as explained above, *supra* at 61 n.27, an election rule requiring voters to identify their correct precinct in order to have their ballots counted does not constitute a "disenfranchisement" of voters.

[34] In the alternative, the dissent argues that "in this instance, a critical mass has been shown." Dissent at 84 n.2. The record provides no support for this statement. Rather, the evidence shows that approximately 99 percent of Hispanic, African American, and Native American voters cast ballots in their correct precinct. *Reagan*, 2018 WL 2191664, at *34. In 2016 only 3,970 votes were cast out of precinct—0.15 percent of the total votes cast—and the record is silent on what number of those ballots were cast by minority voters. *Reagan*, 2018 WL 2191664, at *34–35. The dissent's only support for its claim is its brief reference to the dissent in *Feldman II*, 842 F.3d at 634, which in turn references two close primary elections in Arizona (one Republican, one Democrat) in 2012 and 2014, and five other close races over the course of the past 100 years (from 1916 to 2012). Dissent at 84 n.2. This certainly does not compel a conclusion that the district court's view of the relevant evidence was clearly erroneous.

This is not to say that plaintiffs could never carry their burden of showing a precinct-based voting system gave minority voters less opportunity. For instance, it is possible that a state could implement such a system in a manner that makes it more difficult for a significant number of members of a protected group to discover the correct precinct in order to cast a ballot. This could occur, for instance, if the state did not provide necessary information in the language best understood by a language minority. But here, the district court found that DNC did not present any evidence of this sort of practice. *Reagan*, 2018 WL 2191664, at *23–24. DNC does not contest this finding on appeal, nor does it challenge any other elements of Arizona's precinct voting system, such as individual counties' location of polling places, as unlawful.

Therefore, the district court correctly determined that the precinct voter system did not lessen the opportunities of minorities to participate in the political process and to elect representatives of their choice, and did not clearly err in rejecting DNC's argument that it need not provide evidence of this factor so long as there is evidence of some disparity in out-of-precinct voting.

V

After an exhaustive ten-day bench trial involving the testimony of 51 witnesses and over 230 exhibits, the district court made two key factual findings. First, it found that neither Arizona's precinct voter system nor H.B. 2023 imposed more than a minimal burden on voters or increased the ordinary burdens traditionally associated with voting. Second, it found that the

Arizona state legislature was not motivated by a discriminatory purpose in enacting H.B. 2023. These findings, which were not clearly erroneous, effectively preclude DNC's claims. The finding that Arizona's two election practices place only the most minimal burden on voters necessarily leads to the conclusion that the practices did not result in less opportunity for minority voters to participate in the political process and elect representatives of their choice for purposes of § 2 of the VRA. Further, in light of the court's finding that the burden imposed on voters by the two election practices was minimal, Arizona easily carried its burden under the *Anderson/Burdick* test to show that its election practices were reasonably tailored to achieve the State's important regulatory interests. Finally, the court's finding that the legislature had no discriminatory purpose in enacting H.B. 2023 effectively eviscerates DNC's Fifteenth Amendment claim. Accordingly, we affirm the district court's determination that Arizona's election practices did not violate the First and Fourteenth Amendments or § 2 of the VRA, and H.B. 2023 did not violate the Fifteenth Amendment.

AFFIRMED.

THOMAS, Chief Judge, dissenting:

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Our right to vote benefits government as much as it benefits us: a representative democracy requires participation, and the people require representatives accountable to them. Arizona's electoral scheme impedes this ideal and has the effect of disenfranchising Arizonans of African American, Hispanic, and Native American descent.

Arizona's policy of wholly discarding—rather than partially counting—votes cast out-of-precinct has a disproportionate effect on racial and ethnic minority groups. It violates § 2 of the Voting Rights Act ("VRA"), and it unconstitutionally burdens the right to vote guaranteed by the First Amendment and incorporated against the states under the Fourteenth Amendment.

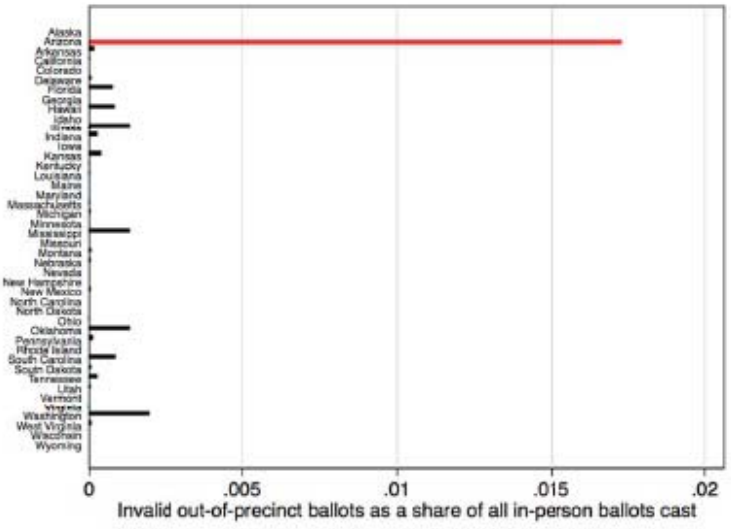
H.B. 2023, which criminalizes most ballot collection, serves no purpose aside from making voting more difficult, and keeping more African American, Hispanic, and Native American voters from the polls than white voters.

I respectfully dissent.

I

No state rejects more out-of-precinct ("OOP") votes than Arizona. As the district court recognized, Arizona voters are far likelier to vote OOP than voters of other states. *Democratic Nat'l Comm. v. Reagan*, No. CV-16-01065-PHX-DLR, 2018 WL 2191664, at *21 (D. Ariz.

May 10, 2018) (hereinafter *Reagan*). Indeed, "[i]n 2012 alone more than one in every five Arizona in-person voters was asked to cast a provisional ballot, and over 33,000 of these—more than 5 percent of all in-person ballots cast—were rejected." *Id.* (internal quotation marks and alterations omitted). The following graph compares the rate at which Arizona rejects OOP ballots to that of other states, showing just how much of an outlier Arizona is:



Arizona voters are likely to vote OOP for a constellation of reasons, the most striking of which is the frequency with which polling locations change, particularly in the highly populated urban areas. *Id.* at *22. Between 2006 and 2008, at least 43 percent of all polling places in Maricopa County—where approximately two-thirds of Arizona's registered voters live—changed locations, and 40 percent moved again between 2010 and 2012. *Id.* In 2016, Maricopa County

went from 60 vote centers for the presidential preference election to 122 polling locations for the May special election to over 700 assigned polling locations in the August primary and November general elections. *Id.* In other words, the paths to polling places in the Phoenix area is much like the changing stairways at Hogwarts, constantly moving and sending everyone to the wrong place. The effect? Voters whose polling location changed were *forty percent* likelier to vote OOP. *Id.*

Additionally, polling locations are often counterintuitive, further driving up OOP rates. Polls are likely to be placed on the edge of the precinct, and they are frequently clustered together—sometimes even in the same building. Unsurprisingly, voters who live further from their assigned polling location than from a location nearest to them or who are close to more than one location are likelier to end up casting a discarded ballot. Indeed, one-quarter of OOP voters cast their ballots in locations closer than their assigned polling place to their homes.

Worse, voters left confused by Arizona's labyrinthian system often miss out on the opportunity to cast a ballot in their assigned location, where it will be counted. At trial, all but one of the affected witnesses testified that they were never informed that they were voting OOP and that their ballot would not be counted. And the one witness who was given this crucial information was nonetheless unable to vote; he could not make it to his assigned location before the polls closed.

There is no question that Arizona's practice of discarding OOP ballots is also a practice of disproportionately discarding ballots cast by minority voters. The district court recognized as much. *Id.* at *4, *34. Indeed, although rates of OOP voting decreased in the last election, the disparity between white and minority voters remains constant. In the 2016 general election, Hispanic, African American, and Native American voters were twice as likely as white voters to vote OOP. *Id.* at *34.

Race and ethnicity intersect with the socioeconomic conditions that drive up OOP voting. It is frequently more difficult for minority voters to locate and vote in their assigned polling locations. As the district court noted, "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities." *Id.* at *35.

Moreover, minority voters are far likelier to face significant barriers in traveling to the polls, barriers that compound the difficulty faced by the voter who is informed that she is in the wrong location and therefore needs to travel to a different precinct. The evidence showed that African American, Hispanic, and Native American voters in Arizona are more likely to work multiple jobs and to lack reliable transportation and childcare resources. *Id.* at *31. Given that voters may wait as long as five hours in line just to cast a ballot, it is not difficult to see how socioeconomic conditions may increase the significance of barriers to ballot access.

Native American voters, many of whom live on sovereign lands, face unique challenges. Navajo voters in Northern Apache County, for example, are not assigned standard addresses; their polling locations are assigned according to "guesswork." *Id.* at *35. And they often have different polling locations for tribal elections and state and federal elections. *Id.*

Despite these startling indicators, the district court concluded that Arizona's policy of discarding OOP ballots violates neither § 2 of the VRA nor the First Amendment, applicable to the states pursuant to the Fourteenth Amendment. I respectfully disagree on both counts.

II

Arizona's practice of discarding OOP ballots violates § 2 of the VRA. The practice "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), and, "based on the totality of circumstances," members of protected classes "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," *id.* § 10301(b).

The VRA "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). There are two routes to vindication of a § 2 claim—a plaintiff may satisfy either the "intent test" or the "results test." *Thornburg v. Gingles*, 478 U.S. 30, 35, 44 (1986). DNC has not

alleged that the challenged practice was initiated for a discriminatory purpose, as required to satisfy the intent test. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (requiring a showing of "invidious discriminatory purpose").

Thus, the operative question is whether, under "the totality of circumstances," members of a racial or ethnic minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," 52 U.S.C. § 10301(b).[1] Under the results test, a challenged law or practice violates § 2 of the VRA if: (1) it "impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect

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[1] The use of the conjunction "and" in the quoted language did not create a new and more rigorous two-part test, as the majority's reading of *Chisom v. Roemer*, 501 U.S. 380 (1991) suggests. *See* Op. 38–42. Rather, in *Chisom*, the Court explained why it rejected the notion that voters could not bring a vote dilution claim for judicial elections. *Chisom*, 501 U.S. at 396–97. The Court clearly understood that the VRA does not demand a showing that the challenged provision may be outcome-determinative: "Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Id.* at 397. Indeed, the Court wrote that it was a relatively "mere[ ]" thing to show that voters are denied the ability to influence an election's outcome; the greater hurdle is to show that voters are not allowed to fully participate. *Id.* at 396–97 (rejecting the position that "a . . . practice . . . which has a disparate impact on black voters' opportunity to cast their ballots under § 2, may be challenged even if a different practice that merely affects their opportunity to elect representatives of their choice to a judicial office may not.").

representatives of their choice"; and (2) that burden is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (internal quotation marks omitted) (quoting *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 553 (6th Cir. 2014)); *accord Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016).

Our responsibility is to interpret the law in accordance with Congress's "broad remedial purpose of 'ridding the country of racial discrimination in voting,'" *Chisom*, 501 U.S. at 403 (alteration omitted) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966)). Here, we know that African American, Hispanic, and Native American Arizonan voters are twice as likely as white voters to be disenfranchised by Arizona's OOP policy, and we know that the problem could be easily remedied. I would hold the challenged practice in violation of § 2 and enjoin Arizona from wholly discarding OOP ballots.

A

As the district court recognized, DNC "provided quantitative and statistical evidence of disparities in OOP voting." *Reagan*, 2018 WL 2191664, at *34. That evidence was "credible and shows that minorities are over-represented among the small number of voters casting OOP ballots." *Id.* Indeed, in 2016, whites were half as likely to vote OOP as African Americans, Hispanics, or Native Americans, a pattern displayed in

all counties save one, which is predominately white. *Id.* The analysis at step one of the § 2 results test ought to end at this point, as DNC clearly met its burden of demonstrating that Arizona's practice of discarding OOP ballots places a "discriminatory burden" on African Americans, Hispanics, and Native Americans. *League of Women Voters*, 769 F.3d at 240.

The district court discredited this disparity, writing: "Considering OOP ballots represent such a small and ever-decreasing fraction of the overall votes cast in any given election, OOP ballot rejection has no meaningfully disparate impact on the opportunities of minority voters to elect their preferred representatives." *Reagan*, 2018 WL 2191664, at *35. However, this consideration is irrelevant to step one of § 2's results test, which focuses solely on the differences in opportunity and effect enjoyed by groups of voters. 52 U.S.C. § 10301. Thus, the district court legally erred in determining that a critical mass of minority voters must be disenfranchised before § 2 is triggered.[2] *See Chisom*, 501 U.S. at 397 ("Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.").

The district court also determined that, "as a practical matter, the disparity between the proportion

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[2] What is more, in this instance, a critical mass has been shown. As I wrote when this case was last before us, regarding DNC's request for a preliminary injunction, the record demonstrates vote margins as thin as 27 votes in a 2016 partisan primary and about 10,000 votes in the 2002 gubernatorial general election. *Feldman v. Ariz. Sec'y of State's Office*, 842 F.3d 613, 634 (9th Cir. 2016).

of minorities who vote at the wrong precinct and the proportion of non-minorities who vote at the wrong precinct does not result in minorities having unequal access to the political process." *Reagan*, 2018 WL 2191664, at *35. But when, as a result, proportionately fewer of the ballots cast by minorities are counted than those cast by whites, that is precisely what it means.

Under the standard applied by the district court, a poll tax or literacy test—facially neutral, evenly applied across racial and ethnic lines—could withstand scrutiny. After all, regardless of race, individuals who pay the tax or pass the test get to vote. However, the § 2 results test rejects this line of thinking. *Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 97-417, at 28 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206) ("The 'right' question, . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'").

Similarly, it is inappropriate to require, as the district court did, that DNC demonstrate a causal connection between Arizona's policy of not counting OOP ballots and the disparate rates of OOP voting. *Reagan*, 2018 WL 2191664, at *35–36. The district court misstated the burden by concluding that DNC is challenging the voters' own behavior rather than the state's policy of not counting OOP ballots. Because the challenged practice is Arizona's wholesale rejection of

OOP ballots, it does not matter whether such rejection increases the rates of OOP voting.[3]

Moreover, the VRA does not demand the causal connection required by the district court. Rather, it is violated by a law that "impose[s] a discriminatory burden on members of a protected class" when that burden is "in part . . . caused by or linked to" discriminatory conditions. *League of Women Voters*, 769 F.3d at 240. The district court flipped the requisite connection between the burden alleged and the conditions of discrimination by demanding DNC to show that the burden of having votes go uncounted leads to the socioeconomic disparities that in turn lead to OOP voting.

Applying the appropriate causation requirement leads to a different conclusion. The evidence showed the existence of a "causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (quoting *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 312 (3d Cir. 1994)); *see also id.* at 595 ("Only a voting practice that *results* in discrimination gives rise to § 2 liability.") (emphasis added). Here, the challenged practice—not counting OOP ballots—results in "a prohibited discriminatory result"; a substantially higher

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[3] For the same reason, I disagree that we must be more deferential to the State on the grounds that "the challenge is to an electoral *system*, as opposed to a discrete election *rule*." Op. 20 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011)).

percentage of minority votes than white votes are discarded. *Id.* at 586.

The district court recognized that socioeconomic disparities between whites and minorities increase the likelihood of OOP voting. In the district court's words, "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities." *Reagan*, 2018 WL 2191664, at *35. It also recognized that "Hispanics, Native Americans, and African Americans . . . are significantly less likely than non-minorities to own a vehicle, more likely to rely upon public transportation, [and] more likely to have inflexible work schedules." *Id.* at *32.

I cannot accept the proposition that, under § 2, the State is absolved of any responsibility to correct disparities if they can be attributed to socioeconomic factors. *See Gingles*, 478 U.S. at 63 ("[T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2."). When we look at the evidence through this lens, the district court's findings give rise to certain logical inferences. For one, when a polling location is situated on one end of a precinct—as often occurs—it is disproportionately difficult for minorities to get to that location. And, in the event that a poll worker informs the voter that she is in the wrong precinct and her ballot will be uncounted, she is likelier to have the opportunity to successfully travel to and vote at her assigned polling location if she is white. The district court erred by requiring DNC to show that "Arizona's policy to not

count OOP ballots is . . . the cause of the disparities in OOP voting." *Reagan*, 2018 WL 2191664, at *35. The VRA imposes no such requirement.

The district court also erred by discounting the significance of its determination that "[p]olling place locations present additional challenges for Native American voters." *Id.* As the trial court itself noted:

> Navajo voters in Northern Apache County lack standard addresses, and their precinct assignments for state and county elections are based upon guesswork, leading to confusion about the voter's correct polling place. Additionally, boundaries for purposes of tribal elections and Apache County precincts are not the same. As a result, a voter's polling place for tribal elections often differs from the voter's polling place for state and county elections. Inadequate transportation access also can make travelling to an assigned polling place difficult.

Id. Remedying the legal error committed by the trial court in imposing an overly onerous burden on the plaintiffs, the court's own findings demonstrate that African American, Hispanic, and Native American voters are far likelier than white voters to vote OOP and see their votes go uncounted.

In sum, I take no issue with the district court's findings of fact. Rather, I disagree with the application of law to the facts, and the conclusions drawn from them. In particularly, I respectfully disagree with the conclusion that the findings—which conclusively demonstrate the existence of disparate burdens on

African American, Hispanic, and Native American voters—can be discounted on the grounds that there are not enough disenfranchised voters to matter. *See Salt River Project*, 109 F.3d at 591 (citation and internal quotation marks omitted) (noting "the [court's] power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law").

B

As required at step two of the results test, DNC has shown that, under the "totality of circumstances," 52 U.S.C. § 10301(b), the disparate burden of disenfranchisement is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class," *League of Women Voters*, 769 F.3d at 240 (citation and internal quotation marks omitted). This step "provides the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." *Veasey*, 830 F.3d at 244. "[T]he second step asks not just whether social and historical conditions 'result in' a disparate impact, but whether the challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions." *Husted*, 834 F.3d at 638 (emphasis removed).

In 1982, Congress amended the VRA in response to *Mobile v. Bolden*, 446 U.S. 55 (1980), in which the

Supreme Court held that the VRA—like the Civil Rights Amendments—was indifferent to laws with a disparate impact on minority voters. *Gingles*, 478 U.S. at 35. Consistent with Congress's intent, courts consider a non-exhaustive list of factors outlined in the Senate Report accompanying the 1982 amendments. *Id.* As relevant here, courts consider: (1) the history of official discrimination connected to voting; (2) racially polarized voting patterns; (3) whether systemic discrimination disproportionately affects minority group's access to the polls; (4) racial appeals in political campaigns; (5) the number of minorities in public office; (6) officials' responsiveness to the needs of minority groups; and (7) the importance of the policy underlying the challenged restriction. *Id.* at 36–37 (citing S. Rep. No. 97-417, at 28–29).

Here, each of the listed factors weigh in DNC's favor.

1

Courts are to consider "the extent of any history of official discrimination in the state . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles*, 478 U.S. at 36–37 (1986) (quoting S. Rep. No. 97-417, at 28–29). The district court classified this factor as a "mixed bag," but the evidence—even as it was described by the court—points overwhelmingly in the DNC's favor.

The district court recognized Arizona's "history of discrimination against Native Americans, Hispanics, and African Americans" throughout the entirety of its

statehood. *Reagan*, 2018 WL 2191664, at *36–38. For example, Native Americans could not legally vote until 1948, when the Arizona Supreme Court held the disenfranchisement of Native Americans unconstitutional. *Id.* at *36. From the state's inception until Congress passed the VRA, literacy tests enacted specifically to limit "the ignorant Mexican vote" prevented Hispanics, Native Americans, and African Americans from full participation in the electoral franchise. *Id.* The state discriminates against minorities in other ways which ultimately limit voting participation, too, particularly by undereducating nonwhite residents and refusing to offer appropriate Spanish translations, practices that continue into the present day and likely serve to widen the racial and ethnic gaps in OOP voting. *Id.* at *37.

The district court noted that "discrimination against minorities in Arizona has not been linear." *Id.* However, the fact that "[d]iscriminatory action has been more pronounced in some periods of state history than others . . . [and] each party (not just one party) has led the charge in discriminating against minorities over the years" does not support the district court's conclusion that this factor is inconclusive. *Id.* at *38. Rather, despite some advancements, most of which were mandated by courts or Congress, Arizona's history is marred by discrimination. What is more, while evidence of sustained improvement must be considered, "sporadic[] and serendipitous[]" indicators of improvement are not grounds for discounting a long history of discrimination. *Gingles*, 478 U.S. at 76.

Additionally, the district court discounted some evidence on the grounds that "[m]uch of the discrimination that has been evidenced may well have in fact been the unintended consequence of a political culture that simply ignores the needs of minorities." *Reagan*, 2018 WL 2191664, at *38. The results test avoids such a chicken-or-the-egg inquiry. *Gingles*, 478 U.S. at 63. When Congress amended the VRA in 1982, it did so in recognition that discrimination need not be intentional to disenfranchise minority groups.

2

Courts are also tasked with considering "the extent to which voting in the elections of the state . . . is racially polarized." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28–29). The district court correctly concluded that "Arizona has a history of racially polarized voting, which continues today." *Reagan*, 2018 WL 2191664, at *38. This factor was never in dispute.

However, it bears mentioning the degree to which Arizona politics are racially polarized. In reasonably contested elections, 59% of white Arizonans vote Republican, in contrast to 35% of Hispanic Arizonans and an undetermined minority of African American and Native American voters. Arizona politics are even more polarized along the lines of the candidate's ethnicity; in non-landslide district-level contests between a Hispanic Democratic candidate and a white Republican candidate, 84% of Hispanic voters, 77% of Native American voters, 52% of African American voters, and only 30% of white voters select the Hispanic candidate.

3

Similarly, there is no dispute that "members of the minority groups[s] in the state . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process[.]" *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28–29). As the district court noted, "[r]acial disparities between minorities and non-minorities in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona." *Reagan*, 2018 WL 2191664, at *38. Although the district court's order only briefly mentions this factor, the evidence is overwhelming. Indeed, compared to white Arizonans, black Arizonans are over twice as likely to live in poverty, Hispanic Arizonans are nearly three times as likely, and Native Americans are almost four times as likely. *Id.* at *31.

4

Arizona politicians have a long history of making "overt or subtle racial appeals," and that history extends to the present day. *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28–29). As the district court noted, candidates have relied on racial appeals since the 1970s. *Reagan*, 2018 WL 2191664, at *38. For example, during Raul Castro's successful gubernatorial run in the 1970s, his opponent's supporters called on the electorate to choose the candidate who "looked like a governor," and a newspaper printed Fidel Castro's face below a headline reading, "Running for governor of Arizona." *Id.*

More recently, too, during his winning campaign for State Superintendent of Public Office, John Huppenthal, a white candidate running against a Hispanic competitor, ran an ad touting that he was "one of us," that he was opposed to bilingual education, and that he "will stop La Raza," an influential Hispanic civil rights organization. *Id.* And when former Maricopa County Attorney Andrew Thomas ran for governor, one of his ads included an image of the Mexican flag with a red line striking through it. *Id.* Moreover, as I discuss at length below, racial appeals were made specifically in regard to H.B. 2023. These racial appeals "lessen to some degree the opportunity of [minorities] to participate effectively in the political processes and to elect candidates of their choice." *Gingles*, 478 U.S. at 40.

5

Also relevant is "the extent to which members of the minority group[s] have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28–29). The district court noted that "the disparity in the number of minority elected officials in Arizona has declined." *Reagan*, 2018 WL 2191664, at *39. However, a "decline" does not translate to equity. *Gingles*, 478 U.S. at 76. While nonwhites compose 44% of Arizona's total population, only two minority statespersons—one Hispanic governor in 1974 and one African American Corporation Commissioner in 2008—have been elected to statewide positions in the last 50 years. *Id.* There are currently no minorities in statewide office.

Minorities hold only 22% of state congressional seats and 9% of judgeships.

Minorities are seriously underrepresented in public office in Arizona, and the problem is most severe at the statewide level. Significantly, because Arizona could not be required to count votes for which an OOP voter is not qualified to vote, Arizona's practice of wholly discarding OOP ballots only has an effect on top-of-the-ticket races, where representation is at its lowest.

6

A § 2 claim is likelier to succeed where "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[s]." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28–29). The district court found that DNC's evidence was "insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups." *Reagan*, 2018 WL 2191664, at *39. It bolstered its conclusion with evidence that the Arizona Citizens Clean Elections Commission engages in outreach with minority populations, but engagement by one entity is not conclusive, especially in the face of overwhelming evidence of government nonresponsiveness.

The district court ignored evidence that Arizona underserves minority populations. For example, it failed to recognize that Arizona was the last state in the nation to join the Children's Health Insurance Program, which may explain, in part, why forty-six states have better health insurance coverage for children. Similarly, it ignored evidence that Arizona's

public schools are drastically underfunded; in fact, in 2016 Arizona ranked 50th among the states and the District of Columbia in per pupil spending on public elementary and secondary education. Given the well-documented evidence that minorities are likelier to depend on public services—evidence generally credited by the district court—Arizona's refusal to provide adequate state services demonstrates its nonresponsiveness to minority needs.[4]

Indeed, the district court's finding is directly contradicted by its recognition, later in its order, that Arizona has a "history of advancing partisan objectives with the unintended consequence of ignoring minority interests." *Reagan*, 2018 WL 2191664, at *43. And, as I discuss below, there is significant specific evidence of the legislature's disregard for minority needs in the legislative history leading to the passage of H.B. 2023. The district court failed to consider important facts and overstated the significance of one minor item of evidence. It clearly erred in finding that this factor does not support DNC. *See, e.g.*, *Myers v. United States*, 652 F.3d 1021, 1036 (9th Cir. 2011) (holding that the

[4] Rather than discuss the evidence supporting DNC, the district court simply discredited the testimony of one of DNC's experts, Dr. Allan Lichtman, on the grounds that he "ignored various topics that are relevant to whether elected officials have shown responsiveness, and he did not conduct research on the issues in Arizona." *Reagan*, 2018 WL 2191664, at *39. However, the court also found "Dr. Lichtman's underlying sources, research, and statistical information [to be] useful." *Id.* at *2. Thus, my analysis incorporates only Dr. Lichtman's "underlying sources, research, and statistical information."

district court clearly erred when it ignored evidence contradicting its findings).

7

Courts may also consider "whether the policy underlying the state . . . practice . . . is tenuous." *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28). In its analysis of this factor, the district court erroneously misstated the inquiry as whether the precinct-based system—rather than the practice of wholly discarding OOP votes—is justified. Finding the precinct-based system well-supported, the district court determined only that "Arizona's policy to not count OOP ballots is one mechanism by which it strictly enforces this system to ensure that precinct-based counties maximize the system's benefits." *Reagan*, 2018 WL 2191664, at *39. However, the district court attempted no further explanation, fully adopting the state's explanation for its practice of discarding votes without considering its logic.

Arizona's OOP policy does not serve any purpose beyond administrative ease. Simply put, it takes fewer resources to count fewer ballots. There is no indication that there is any correlation between the precinct-based model and the OOP policy. Because the analysis of this factor is essentially no different than the analysis under step two of the *Anderson/Burdick* test, I will not discuss it at length here. Because it misstated DNC's challenge, the district court clearly erred in its finding regarding the justifications for the OOP policy. There is no indication that the precinct-based electoral scheme runs more effectively because Arizona refuses to count OOP votes.

Summing up its analysis, the district court found that "[some] of the germane Senate Factors . . . are present in Arizona and others are not." *Reagan*, 2018 WL 2191664, at *40. Because DNC showed that each of the relevant factors was satisfied, the district court's characterization of the evidence was clearly erroneous.

Further, the district court took issue with the Senate Factors themselves, writing that DNC's "causation theory is too tenuous to support [its] VRA claim because, taken to its logical conclusion, virtually any aspect of a state's election regime would be suspect as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters." *Id.* However, the results test was not on trial here; Congress specifically amended the VRA in response to such concerns. *Gingles*, 478 U.S. at 43–44 ("The Senate Report which accompanied the 1982 amendments . . . dispositively rejects the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.").

DNC demonstrated that Arizona's practice of not counting OOP ballots "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), and that, "based on the totality of circumstances," members of protected classes "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," *id.* § 10301(b).

III

Arizona's practice of wholly discarding OOP votes also violates the First Amendment, which applies to the states pursuant to the Fourteenth Amendment. In deciding otherwise, the district court made several legal errors, discussed below. Upon correcting the district court's errors and applying the *Anderson/Burdick* test to the uncontested facts, the record compels a contrary conclusion. *See United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1998) (citation omitted) (clear error standard met when appellate court is left with the "definite and firm conviction" that a mistake was made). Arizona unconstitutionally infringes upon the right to vote by disenfranchising voters unable to find or travel to the correct precinct, even as to those contests for which the voter is qualified to vote.

The First and Fourteenth Amendments protect individual voting rights by limiting state interference with those rights. *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). While "the right[s] to vote in any manner and . . . to associate for political purposes" are not "absolute," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), neither is the state's constitutionally designated authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1; *Williams v. Rhodes*, 393 U.S. 23, 29 (1968) (a state's power to regulate elections is "subject to the limitation that [it] may not be exercised in a way that violates other . . . provisions of the Constitution."). Thus, "[t]he power to

regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote." *Tashjian*, 479 U.S. at 217.

Courts apply the *Anderson/Burdick* test, a "flexible" balancing test, to determine whether a voting regulation runs afoul of the First Amendment right to associate. *Burdick*, 504 U.S. at 434. The Court must "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.'" *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). There is no substitute for the "balancing and means-end fit framework" required under *Anderson/Burdick*; even if a burden is minimal, it must be justified. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (en banc).

A

The burden imposed by Arizona's refusal to count OOP votes is severe. The district court and the majority mischaracterize that burden as the burden of complying with the State's general requirement that individuals vote in their assigned precinct. However, the burden here is the burden of disenfranchisement suffered by those voters whose votes are discarded even as to those elections in which the voter is qualified to vote. DNC brought suit alleging that Arizona's practice of discarding OOP ballots unconstitutionally infringes upon individual voting rights. They sought an

injunction barring Arizona from continuing that practice. They did not challenge Arizona's precinct-based system in its entirety.

1

The defendants and intervenors rely on semantics, casting the discarding of OOP ballots as the "consequence" of Arizona's precinct system. However, wholly discarding OOP ballots is not a fundamental requirement of—or even a logical corollary to—a precinct-based model. Instead, Arizona's practice of discarding such ballots is exactly that—a practice. And it can change.[5]

The district court legally erred when it restated the burden along the lines urged by the defendants and intervenors.[6] Concluding that the burden was that of voting in the correct precinct, the district court determined that Arizona's voters are themselves

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[5] Indeed, the district court determined in its analysis of standing, which has not been contested on appeal, that the alleged injury—not counting OOP ballots—is redressable. *Reagan*, 2018 WL 2191664, at *10.

[6] I respectfully disagree with the majority that the district court rightly restated DNC's challenge because "under DNC's theory, a state could not enforce even a rule requiring registration, because the state's failure to count the vote of a non-registered voter would 'disenfranchise' the noncompliant voter." Op. 61–62. The *Anderson/Burdick* test is a balancing test. If a basic registration requirement imposes a burden on voters—and it does—it will still be upheld if that burden is justified—and it is. DNC has merely asked us to apply the *Anderson/Burdick* framework to its challenge; it has not asked for a per se rule striking any policy or law under which votes go uncounted.

partially responsible for any burden because they are so likely to change residences and to rent rather than own their homes. *Reagan*, 2018 WL 2191664, at *22. However, if such a consideration were permissible, a poll tax could be upheld on the grounds that poor voters could simply earn more money or spend the money that they do earn differently—propositions that have, thankfully, been rejected. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

The court also rejected DNC's challenge because "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." *Reagan*, 2018 WL 2191664, at *23. But the problem is not with the voters, who are dealing with a system insensitive to their needs; the problem is with an electoral system that refuses to acknowledge and respond to the needs of the State's voting population. A democracy functions only to the degree that it fosters participation.

The district court also legally erred when it equated Arizona's policy of discarding OOP votes with similar policies in other states, policies which were not on trial in this lawsuit. Voting rights claims demand an "intensely local appraisal." *Gingles*, 478 U.S. at 78 (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)). What is more, the constitutionality of these other states' policies has not been affirmatively decided. Thus, the fact that those other states also have policies of not counting votes cast OOP is not indicative of the constitutionality of Arizona's policy.

Thus, the district court erred as a matter of law in determining that "[t]hough the consequence of voting

OOP might make it more imperative for voters to correctly identify their precincts, it does not increase the burdens associated with doing so." *Reagan*, 2018 WL 2191664, at *22. The burden identified by DNC and faced by the voter is disenfranchisement.

2

The burden is severe. Because the district court misstated the burden, it also miscalculated its severity. For example, the district court determined that the burden is slight based on its finding that "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." *Id.* at *23. But that reasoning turns the appropriate legal framework on its head.

Under the first prong of the *Anderson/Burdick* test, the issue is the severity of the burden faced by voters whose ballots are discarded because they voted OOP. *Pub. Integrity Alliance*, 836 F.3d at 1024 n.2 ("[C]ourts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe."). Perhaps Arizona's electoral scheme justifies that burden, no matter its severity. If so, however, that determination comes in under step two of the *Anderson/Burdick* analysis.

For those whose votes go uncounted, "there can be no do-over and no redress." *League of Women Voters*, 769 F.3d at 247. To determine the burden, the Court looks not to the voters unaffected by the practice, as the district court did, *Reagan*, 2018 WL 2191664, at

*21 ("Arizona's rejection of OOP ballots . . . has no impact on the vast majority of Arizona voters."), but to those who suffer the burden, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 186 (2008) (plurality opinion); *Pub. Integrity All.*, 836 F.3d at 1024 n.2. And those voters are effectively rendered unable to vote in elections for which they are qualified and in which they cast otherwise legitimate ballots. There is no burden more severe in the voting rights context.

However, even if the district court had properly stated the burden alleged, its ultimate finding would be clearly erroneous. The district court found that Arizona makes it easy for voters to find their precincts. *Reagan*, 2018 WL 2191664, at *23. The district court's finding is inconsistent with the evidence presented and generally credited by the court.

The government bears responsibility for the high rate of OOP voting. First, precincts appear to change polling locations and practices even more often than residents change homes. *Id.* at *22 ("[I]n Maricopa County, between 2006 and 2008 at least 43 percent of polling locations changed from year to the next[.]"). Second, polling places are often in counterintuitive locations, far from some residents' homes. *Id.* And third, the district court noted (and did not discredit) evidence that election workers fail to inform voters that they are in the wrong precinct and that a provisional ballot will not be counted. *Id.* Thus, the district court clearly erred in determining that Arizona does all it should to prevent OOP voting.

B

The severe burden faced by OOP voters is not outweighed by a sufficiently important government interest. *Pub. Integrity All.*, 836 F.3d at 1024. Because the district court misstated the burden, it also overstated the government interest by focusing on the "numerous and significant advantages" of a precinct-based voting model. *Reagan*, 2018 WL 2191664, at *24. The inquiry should instead be whether the state can justify the interests served by the challenged practice of not counting OOP ballots. It cannot.

As the district court itself found, "[c]ounting OOP ballots is administratively feasible." *Id.* at *25. This is demonstrated by: (1) the methods used by the 20 states that use a precinct-based system and nonetheless count OOP ballots; and (2) Arizona's readily transferable method "to process certain types of ballots that cannot be read by an optical scan voting machine" and "some provisional ballots cast by voters who are eligible to vote in federal elections, but whom Arizona does not permit to vote in state elections." *Id.* Certainly, Arizona can count the votes cast by all qualified voters.

The district court determined that, although OOP votes could be counted, Arizona nonetheless could justify its policy on the basis of assumptions regarding what could happen if the state counted all of the ballots that it received. Voters may "decide to vote" out of precinct or "incorrectly believe that they can vote at any location and receive the correct ballot." *Id.* Worse, they could "be nefariously directed to vote elsewhere." *Id.* This reasoning is illogical and unsupported by the facts. There is no demonstrated increase in OOP voting

in states where those votes are counted than in Arizona (where, of course, OOP voting is at its highest level). And "nefarious" interests would be far better served by misdirecting voters if their out-of-precinct vote would not be counted at all than if it were partially tallied.[7]

Arizona's interest in administrative ease does not justify the severe burden of disenfranchisement. I would hold Arizona's practice of discarding OOP ballots unconstitutional.

IV

Next, DNC challenges a recently enacted law, H.B. 2023, which criminalizes most ballot collection. Under the law, a person who collects another's ballot commits a felony unless the collector is an official engaged in official duties or the voter's family member household member, or caregiver. Ariz. Rev. Stat. § 16-1005(H)–(I).

H.B. 2023 was not Arizona's first attempt to limit ballot collection. Prior to *Shelby County v. Holder*, 570 U.S. 529 (2013), Arizona was subject to the VRA's § 5 preclearance requirements. In 2011, Arizona passed S.B. 1412, which criminalized the collection of more than ten ballots by any one individual. *Reagan*, 2018 WL 2191664, at *42. Arizona submitted the bill to the DOJ for preclearance, and the DOJ "precleared all provisions except for the provision regulating ballot

[7] Under the current system, for example, a Democrat could conceivably misdirect likely Republican voters to the wrong precinct in order to render their ballots null. However, if OOP ballots counted, the Democrat would have less incentive, as the Republicans' choices for statewide and federal office would still register.

collection," about which the DOJ requested further information in order to ensure that the provision had neither the purpose nor the effect of limiting minority participation in voting. *Id.* Arizona did not proffer the requested information, instead withdrawing the provision before formally repealing the law. *Id.* With good reason: the State Elections Director, who helped draft the bill, told the DOJ that the law was "targeted at voting practices . . . in predominantly Hispanic areas" and that state officials were expecting § 5 review. Withdrawing a provision was not standard procedure for Arizona, which fully or partially withdrew only 6 of its 773 preclearance provisions. *Id.*

In 2013, the legislature tried a new approach. It passed H.B. 2305 "along nearly straight party lines in the waning hours of the legislative session." *Id.* The law "banned partisan ballot collection and required other ballot collectors to complete an affidavit stating that they had returned the ballot." *Id.* The public outcry was immediate, with "citizen groups organiz[ing] a referendum effort and collect[ing] more than 140,000 signatures to place H.B. 2305 on the ballot for a straight up-or-down vote" in the next election. *Id.* "Rather than face a referendum," which would have barred further related legislation without a supermajority vote, "Republican legislators again repealed their own legislation along party lines." *Id.* At the time, then-State Senator Michele Reagan (now Secretary of State and defendant to this action), who sponsored the bill, stated that the legislature would reintroduce the bill, but in smaller fragments. *Id.*

As the district court noted, H.B. 2023 was passed not only "on the heels of" these earlier bills, but also "in the context of racially polarized voting" and "increased use of ballot collection as a Democratic [get-out-the-vote] strategy in . . . minority communities." *Id.* at *41. Legislators supporting the bill were particularly motivated by two items of evidence: the wildly irrational testimony of then-State Senator Don Shooter, and a racist video prepared by former Maricopa Republican Party Chair A.J. LaFaro, in which LaFaro claims that a Hispanic man engaged in a lawful get-out-the-vote ballot collection effort is a "thug" breaking the law. *Id.* at *38–39, *41.

DNC brings three challenges to H.B. 2023. It argues that the provision was motivated by racial animus, in violation of the Fourteenth and Fifteenth Amendments and § 2 of the VRA. It claims that it has a discriminatory effect, also in violation of § 2. And, finally, it contends that the law unreasonably burdens voters' First Amendment rights. I agree on all counts and would hold the provision invalid under the VRA and the United States Constitution.

V

H.B. 2023 was enacted for the purpose of suppressing minority votes, in violation of § 2 of the VRA and the Fourteenth and Fifteenth Amendments. Although lawmakers were also motivated by partisanship, their intent to reduce the total number of Democratic votes does not render the law constitutional.

Under the Fourteenth and Fifteenth Amendments and § 2 of the VRA, a law passed with the intent to discriminate against racial or ethnic minorities cannot stand. The law imposes a high burden on plaintiffs, who must show "[p]roof of racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Voting regulations are unconstitutional when they are "'conceived or operated as purposeful devices to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)). A plaintiff need not show that officials acted *solely* to further a racially motivated agenda, *Arlington Heights*, 429 U.S. at 265, but the ultimate issue is whether "the legislature enact[ed] a law 'because of,' and not 'in spite of,' its discriminatory effect," *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (2016) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." *Rogers*, 458 U.S. at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). "Thus determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Id.* (quoting *Arlington Heights*, 429 U.S. at 266). Courts consider the *Arlington Heights* factors, a non-exhaustive list of considerations, to determine whether a law was enacted to satisfy a motive to discriminate: (1) the historical background and sequence of events leading

to enactment; (2) substantive or procedural departures from the normal legislative process; (3) relevant legislative history; and (4) the impact of the law on a particular racial group. *Arlington Heights*, 429 U.S. at 266–68.

Here, all four factors weigh in favor of DNC.

A

The historical background of a challenged provision is an important evidentiary source, "particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. As the district court recognized, "H.B. 2023 emerged in the context of racially polarized voting, increased use of ballot collection as a Democratic [get-out-the-vote] strategy in low-efficacy minority communities, and on the heels of several prior efforts to restrict ballot collection." *Reagan*, 2018 WL 2191664, at *41. And as discussed below, in my analysis of § 2's results test, a longer view of history similarly weighs in favor of DNC. Quite simply, the historical background suggests that the restriction was enacted in order to prevent minority ballots from being counted.

The fact that the minority votes would help Democratic candidates does not alter the analysis. *See id.* (suggesting that because "some individual legislators and proponents were motivated in part by partisan interests"[8] they were not motivated by racially

[8] The majority concludes that the district court "did not err in giving little weight to evidence that 'some individual legislators and proponents were motivated in part by partisan interests.'" Op.

discriminatory interests). Indeed, if that were the case, consideration for racially polarized voting patterns—a constant in VRA and constitutional voting regulation challenges—would be impermissible or weigh in favor of upholding a regulation. By nature of the political process, an unconstitutionally discriminatory voting regulation is a law enacted by the political party in power in order to maintain power by preventing minorities from voting, assuredly because they belong to the other political party.

The first *Arlington Heights* factor suggests discriminatory motive.

B

Under *Arlington Heights* courts consider "the defendant's departures from its normal procedures or substantive conclusions." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (citing *Arlington Heights*, 429 U.S. at 266–68). The district court recognized that "the circumstances surrounding" H.B. 2023 were "somewhat suspicious." *Reagan*, 2018 WL 2191664, at *42. This is an understatement. H.B. 2023 flowed directly out of the Arizona legislature's two prior attempts to limit ballot collection.[9] The law enacted does not cure the intent to

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53 (quoting *Reagan*, 2018 WL 2191664, at *43). But the court did not discredit this evidence. Rather it *relied* on it to show proof of nondiscrimination.

[9] While it is true that discriminatory intent as to an earlier law does not necessarily carry through to any other provision on the subject, Op. 56, we do not have to suspend common sense. The recency of the earlier provisions, coupled with relevant public

discriminate demonstrated by its precursors; rather, H.B. 2023 was part of the same general strategy of limiting the minority vote by limiting ballot collection.

This *Arlington Heights* factor suggests discriminatory motive.

C

"The legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body . . . ." *Arlington Heights*, 429 U.S. at 267. The district court found evidence of racial animus in the legislative history but discounted its significance, suggesting that any initial discriminatory motive was cured because some legislators acted either out of self-interest or an unfounded but sincere belief that voter fraud was likely.

The district court's reasoning is clearly erroneous. First, partisan self-interest cannot absolve discriminatory intent. If we were to allow racially motivated voting schemes whenever those schemes serve partisan interests, the exception would swallow the rule, and there would be no prohibition on enacting laws in order to discriminate. Second, the sincerity of the legislators' belief in a wholly theoretical risk of voter fraud is—as the district court itself suggested—indicative of discriminatory intent. *Reagan*, 2018 WL 2191664, at *41 (describing legislators'

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statements and the weak legislative record supporting H.B. 2023, places H.B. 2023 on one end of an unbroken line beginning just a few years earlier with S.B. 1412.

motives as "perhaps implicitly informed by racial biases").

Moreover, the district court's own specific factual findings belie its ultimate conclusion on the third *Arlington Heights* factor. The district court determined that the proponents of H.B. 2023 voted for the bill in response to two pieces of evidence: (1) the "demonstrably false," "unfounded and often farfetched allegations of ballot collection fraud" made by former Arizona State Senator Don Shooter; and (2) a "racially-tinged" video created by Maricopa County Republican Chair A.J. LaFaro (the "LaFaro Video"). *Id.* Because there was "no direct evidence of ballot collection fraud . . . presented to the legislature or at trial," the district court understood that Shooter's allegations and the LaFaro Video were *the* reasons the bill passed. *Id.* ("Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting . . . .").

Both of these evidentiary items demonstrate racial animus. As the district court made clear, Senator Shooter's testimony regarding the existence and prevalence of voter fraud was not only incorrect but in fact "unfounded and often farfetched." *Id.* If Senator Shooter was sincere, his distorted view of reality is explainable only by what the district court downplayed as being "implicitly informed by racial biases,"—or, in starker terms, by racism. *Id.* An unfounded and exploited fear that members of minority groups are "engage[d] in nefarious activities," *id.*, supports a finding of racial animus. And if Senator Shooter was

insincere, he purposefully distorted facts in order to prevent Hispanics—who generally preferred his opponent—from voting. *Id.* ("Due to the high degree of racial polarization in his district, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic [get-out-the-vote] strategy. . . . Indeed, Shooter's 2010 election was close: he won with 53 percent of the total vote, receiving 83 percent of the non-minority vote but only 20 percent of the Hispanic vote.").

The LaFaro Video is even more damning. The video shows a Hispanic man, a volunteer with a get-out-the-vote organization, delivering early ballots to the polls. The video is itself wholly mundane; it is eight soundless minutes of a man moving completed ballots from a cardboard box to the ballot box. It markedly "did not show any obviously illegal activity." *Id.* at *39. However, LaFaro provided a voice-over narration, "includ[ing] statements that the man was acting to stuff the ballot box; that LaFaro did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug; and that LaFaro did not follow him out to the parking lot to take down his tag number because he feared for his life." *Id.* at *38. It is LaFaro's narration—not the dull raw material showing a Hispanic man dropping off ballots—that "became quite prominent in the debates over H.B. 2023." *Id.* at *39. As the district court recognized, the LaFaro Video evidences racial animus.

After recognizing the existence of discriminatory intent, the district court seems to have determined that intent was later cured because the bill "found support

among some minority officials and organizations" and because some lawmakers opposed H.B. 2023 for reasons other than that it being grounded in racial discrimination. *Id.* at *41. The district court's reasoning is incorrect. As the Supreme Court has stated, there is no room for judicial deference "[w]hen there is . . . proof that a discriminatory purpose has been a motivating factor in the decision." *Arlington Heights*, 429 U.S. at 265–66.

Moreover, the district court was wrong to determine that a law is not racially motivated if any people of color support it. Rather, the evidence that particular Hispanic and African American Arizonans supported H.B. 2023 simply demonstrates that people of color have diverse interests, some of which may outweigh potential concerns that a law was enacted with the intent to discriminate. And although one lawmaker "testified that she has no reason to believe H.B. 2023 was enacted with the intent to suppress Hispanic voting," the district court also recognized that "some Democratic lawmakers accused their Republican counterparts of harboring partisan or racially discriminatory motives." *Reagan*, 2018 WL 2191664, at *41. Again, a diversity of perspectives is neither surprising nor particularly telling, especially when the operative legal test recognizes that a law may be unconstitutionally discriminatory even if it is not driven *solely* by racial animus: "legislators . . . are properly concerned with balancing numerous competing considerations." *Arlington Heights*, 429 U.S. at 265.

The district court's concerns were also assuaged because Shooter's "demonstrably false" allegations and "the racially-tinged LaFaro Video . . . spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting." *Reagan*, 2018 WL 2191664, at *41. The court's finding is neither here nor there. The legislature did not act to limit all early voting, but it targeted a specific practice known to be popular among minority voters, despite the absence of any evidence that ballot collection was less secure than other early voting methods.

This *Arlington Heights* factor weighs in favor of DNC.

D

"The impact of the official action whether it 'bears more heavily on one race than another'" is "important" to the analysis of whether a law was enacted to serve a discriminatory motive. *Arlington Heights*, 429 U.S. at 266 (quoting *Davis*, 426 U.S. at 242.) The district court wholly failed to measure H.B. 2023's impact on minority voters in its discussion of *Arlington Heights*. Rather, it counterintuitively concluded that concerns about the law's effect on minority groups "show[] only that the legislature enacted H.B. 2023 in spite of its impact on minority [get-out-the-vote] efforts, not because of that impact." *Reagan*, 2018 WL 2191664, at *43. The district court's determination is not only illogical but also out of place in its discussion of the fourth *Arlington Heights* factor. As I will discuss in my analysis of the § 2 results test, H.B. 2023 disproportionately affects minority voters.

Like the first three factors considered, the fourth and final factor supports a conclusion that the law is motivated by racial animus. Thus, under the purpose test of § 2 of the VRA and the Fourteenth and Fifteenth Amendments, H.B. 2023 cannot survive.

VI

Like Arizona's practice of discarding OOP votes, H.B. 2023 imposes an unlawful discriminatory burden on minority voters. As discussed above, § 2 of the VRA provides that "[n]o voting . . . standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

Under the results test, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The test is one of the "totality of circumstances." 52 U.S.C. § 10301(b); *Gingles*, 478 U.S. at 43. In this instance, the totality of the circumstances conclusively demonstrates that H.B. 2023 disproportionately burdens minority voters, and that burden can be traced directly to historical and social conditions of discrimination. *League of Women Voters*, 769 F.3d at 240.

A

The first prong of the results test "inquires about the nature of the burden imposed and whether it creates a disparate effect." *Veasey*, 830 F.3d at 244.

The district court suggested that DNC's challenge ought to fail at step one because of a lack of quantitative evidence, but it ultimately based its disposition on its determination that "Plaintiffs' circumstantial and anecdotal evidence is insufficient to establish a cognizable disparity under § 2." *Reagan*, 2018 WL 2191664, at *31. The district court erred as a matter of law when it determined that although, "prior to H.B. 2023's enactment minorities generally were more likely than non-minorities to give their early ballots to third parties," *id.*, it could not find for DNC because it could not "speak in more specific or precise terms than 'more' or 'less.'" *Id.* at *33.

While it is true that a plaintiff bears the burden of demonstrating the existence and extent of a disparity, *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc), it is not true that the plaintiff is required to do so with statistical evidence, 52 U.S.C. § 10301(b) (providing that relevant inquiry is into "the totality of circumstances"). The question is simply whether members of the affected ethnic and racial minority groups "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

The evidence presented at trial weighed overwhelmingly in DNC's favor. For political and socioeconomic reasons, H.B. 2023 is far likelier to affect

African American, Hispanic, and Native American Arizonan voters than white voters. As the district court recognized, minority voters used ballot collection services more than white voters. *Reagan*, 2018 WL 2191664, at *31. The disparity is not caused solely by geography, as the socioeconomic conditions leading minority voters to depend on ballot collection "exist in both urban and rural areas." *Id.* at *32.

The witnesses with direct experience in collecting ballots, without exception, testified at trial that racial and ethnic minority voters were far likelier to vote with the help of ballot collection services. For example, one individual who worked in several ballot collection groups testified that "the overwhelming majority" of voters with whom he worked were Hispanic or African American. Another stated that the "vast majority of the ballot pickups" done by the Maricopa County Democratic Party are in "[m]ajority-minority districts." Democratic State Senator Martin Quezada described requests for ballot collection, testifying that "[t]he large majority of those requests came from the lower income and the neighborhoods that were a larger percentage Latino than others."

No one had a clear statistical analysis of the disparity. Nor could anyone, as the state would be the only entity in a position to collect such evidence, and it has not done so. However, one ballot collector testified as to what she termed a "case study" showing the extent of the disparity. In 2010, she and her fellow organizers collected "somewhere south of 50 ballots" in one particular district. The area was redistricted before the next election to add a heavily Hispanic

neighborhood, Sunnyslope, and in 2012, the organization "pulled in hundreds of ballots, vast majority from that Sunnyslope area."

Not only is there no evidence in the record of any significant reliance on ballot collection by white voters, but the evidence is also replete with evidence explaining why a disparity is natural. For example, in rural Somerton and San Luis, both of which are over 95% Hispanic, voters lack home mail service and are unlikely to have access to reliable transportation. *Id.* at *32. In urban areas, too, Hispanic voters are less likely to have access to mail services and, due to mail theft, less likely to trust mail-in voting. *Id.*

As the district court rightfully noted, the "problems are particularly acute in Arizona's Native American communities." *Id.* Indeed, uncontroverted expert testimony showed that "the majority of Native Americans in non-metropolitan Arizona do not have home mail delivery" and that non-Hispanic white voters are 350% more likely to have home mail service than Native American voters. *Id.* In fact, only 18% of Native Americans outside of Pima and Maricopa Counties have home mail service—in contrast to 86% of non-Hispanic whites. And residents of sovereign nations often must travel 45 minutes to 2 hours just to get to a mailbox. In the district court's words, "for many Native Americans living in rural locations, especially on reservations, voting is an activity that requires the active assistance of friends and neighbors." *Id.*

In contrast, none of the evidence discussed by the district court suggested that there was no disparate

burden or that any such disparity was minor. In short, the district court summarized the overwhelming evidence showing a disparate burden and then concluded that because it couldn't pin down the difference with exactitude, it could not find for DNC.

The district court also suggested that it could not find for DNC because too few voters rely on ballot collection for a restriction on ballot collection to matter. *Id.* at *33–34. To the degree that this finding matters, it is a consideration under the *Anderson/Burdick* analysis, not under step one of the VRA analysis. Moreover, the district court's analysis ignores that the VRA exists to protect minority groups—those groups least likely to have their voices heard. Thus, the precise number of affected voters is not particularly helpful.

Because it misstated the legal requirements for establishing a disparity, the district court clearly erred in concluding that DNC failed to meet their burden. I would hold that H.B. 2023 imposes a disparate burden on members of protected classes.

B

As detailed earlier, within my application of the § 2 results test to the OOP policy, the Senate Factors demonstrate the existence of social and historical conditions of discrimination in Arizona. Those determinations have equal force here, and I will not belabor the point by repeating my analysis here. Instead, I will focus on the ways in which H.B. 2023 is directly connected to those conditions of discrimination.

For example, one of the Senate Factors considers the state's history of racial discrimination. *Gingles*, 478

U.S. at 36–37. Not only does Arizona have a history of official discrimination, as I have discussed, but the history of H.B. 2023—passed after one provision was rejected under § 5 of the VRA and after the people of Arizona demonstrated concern with another—powerfully links the statute to that history. Similarly, as to racially polarized voting patterns, as the district court noted, one of the most vocal proponents for criminalizing ballot collection, Senator Shooter, did so in part because he was facing a close election in which Hispanic voters were highly unlikely to vote for him.

Perhaps most significantly, there is direct evidence of racial appeals being made in the context of this very issue. *Gingles*, 478 U.S. at 36–37. In the LaFaro video, a Hispanic get-out-the-vote volunteer gives no indication that he is violating election law but is nonetheless described as a "thug" likely to physically harm a white political figure. *Reagan*, 2018 WL 2191664, at *38–39. That video figured "prominently" in public debates about voter fraud and ballot collection, even though it showed no illegal activity. *Id.* at *39. The Senate Factors clarify that even "subtle" racial appeals are significant under the § 2 analysis, but the subtext of the LaFaro video does not demand decoding. *Gingles*, 478 U.S. at 37 (1986) (quoting S. Rep. No. 97-417, at 28–29).

Additionally, the legislative record demonstrates a "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[s]." *Gingles*, 478 U.S. at 37 (1986) (quoting S. Rep. No. 97-417, at 28–29). Legislators were apprised of concerns that H.B. 2023

would place an especial burden on minority voters. Their response? In the words of the bill's sponsor: "not my problem." And in those of another state senator supporting the measure, "I don't know why we have to spoon-fe[e]d and baby them over their vote."

H.B. 2023 "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. DNC has conclusively met its burden of showing that H.B. 2023 limits African American, Hispanic, and Native American Arizonan voters' ability to fully participate in the political process and to elect representatives of their choice.

VII

Finally, H.B. 2023 cannot be reconciled with the First Amendment, which applies to the states under the Fourteenth Amendment and which guarantees that the right to vote will not be unreasonably burdened. *Burdick*, 504 U.S. at 434.

A

The burden is identified by looking to those affected by the challenged provision. *Crawford*, 553 U.S. at 198 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements."). Here, then, the relevant burden is that faced by individuals who vote with the assistance of others who are not family members, household members, or caregivers.

"[C]ourts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All.*, 836 F.3d at 1024 n.2. And, indeed, the Court recognized this principle in *Crawford* by noting that "a somewhat heavier burden may be placed on a limited number of persons." 553 U.S. at 199. A determination of the severity of that burden takes into account socioeconomic situations. *Id.* (considering "persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification").

Here, there is a heavy burden on, at minimum, Native Americans living in rural Arizona, 82% of whom lack home mail service. *Reagan*, 2018 WL 2191664, at *32. Many of these individuals without home mail access may have serious difficulties getting to the post office due to distance, socioeconomic conditions, and lack of reliable transportation. *Id.* Additionally, as the district court recognized, the State's definition of a family relationship, codified in H.B. 2023, does not track with family relationships in Indian Country. *Id.* at *33.

The district court erred by failing to consider a significant body of evidence demonstrating the burdens faced by voters. The district court wrote that it "ha[d] insufficient evidence from which to measure the burdens on discrete subsets of voters" because it could not determine a precise number of voters that had relied on ballot collection in the past or predict a likely

number in the future. *Id.* at *14. Its reliance on *Crawford* for this assertion is legally erroneous. In *Crawford*, the Court did not set forth a rigorous evidentiary standard requiring the production of quantifiable evidence; instead, the Court simply said that DNC did not produce *anything* sufficiently reliable to demonstrate who would be burdened or to what degree. 553 U.S. at 200–02.

DNC presented a much better case than the plaintiffs in *Crawford*. First, here, unlike in *Crawford*, the district court did not reject the plaintiff's evidence as "utterly incredible and unreliable." *Crawford*, 553 U.S. at 200. Second, also distinguishable from *Crawford*, here, there is evidence that some will be unable to vote under H.B. 2023. For example, an individual who collected ballots for the Maricopa County Democratic Party testified that even though the organization only collected ballots for voters with "no other option," she nonetheless witnessed its collection of 1,200 to 1,500 ballots. Here, there was no evidentiary failure.

That said, even if the district court properly classified the burden as minimal at step one of the *Anderson/Burdick* analysis, H.B. 2023 nonetheless fails at step two.

B

H.B. 2023 was and is not supported by the "adequate justification" of "reduc[ing] opportunities for early ballot loss or destruction," *Reagan*, 2018 WL 2191664, at *40, or of "maintain[ing] public confidence in election integrity," *id.* at *18. Rather, the legislative

history uncontrovertedly indicates that the best justification offered by the legislators voting for the measure was a generic concern regarding voter fraud—a solution in search of a problem. Even after the bill was passed and a trial was held, the trial court could find "no direct evidence that the type of ballot collection fraud the law is intended to prevent or deter has occurred." *Id.*[10] H.B. 2023's foundation is not only shaky, it's illusory.

Even if the district court had been correct to classify the burden imposed by H.B. 2023 as minimal, the law does not withstand scrutiny under the First Amendment. "However slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). "'[E]venhanded restrictions that protect the integrity and reliability of the electoral process itself are not invidious and satisfy the standard." *Crawford*, 553 U.S. 181, 189–90 (quoting *Anderson*, 460 U.S. at 788). Here, no legitimate interest justifies H.B. 2023.

Crawford is not a blank check for legislators seeking to restrict voting rights with baseless cries of "voter fraud." In *Crawford*, the Court held that the state's interest in deterring voter fraud was legitimate despite the record's absence of "evidence of any [in-person] fraud actually occurring . . . at any time in its history,"

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[10] Nor was there any suggestion that legislators had reason to believe that public faith in the system had been shaken, as the district court notes. *Reagan*, 2018 WL 2191664, at *18.

but the case is distinguishable for at least two reasons. *Id.* at 194. First, the voter I.D. restriction considered in *Crawford* was tied to "the State's interest in counting only the votes of eligible voters," particularly given the extreme disorganization of Indiana's voter rolls. *Id.* at 196. On the other hand, the nature of the relationship between the voter and the person submitting a ballot has no similar logical connection to that interest. The same safeguards—e.g., "tamper evident envelopes and a rigorous voter signature verification procedure"—are in place for voters who give their ballots to their sister as for those who participate in a get-out-the-vote effort. *Reagan*, 2018 WL 2191664, at *19.

Second, the Court in *Crawford* was untroubled by its determination that the legislature was motivated by partisanship because it determined that the legislature was also motivated by legitimate concerns. *Crawford*, 553 U.S. at 204 ("[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators."). Here, however, the legislature was motivated by discriminatory intent, as I have discussed.

Moreover, even in the absence of discriminatory intent, given the precision of H.B. 2023 toward Democratic get-out-the-vote operations, "partisan considerations" did not simply "play[] a significant role in the decision to enact [the law]" but rather "provided the *only* justification for [the restriction on ballot collection]." *Id.* at 203. In *Crawford*, the plurality "assume[d]" that such a law would be held

unconstitutional. *Id.* The Court's assumption was based in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, in which the Court struck a poll tax requirement. *Harper* is instructive. There, the Court wrote that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications." *Id.* at 668. Just as "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process[,]" neither is political affiliation. *Id.* at 668.

VIII

As I said in the previous appeal in this case, voting should be easy in America. It is not in Arizona, and the burden falls most heavily on minority voters. In my view, the district court should have granted an injunction as to both of DNC's challenges. Arizona's practice of discarding OOP votes violates § 2 of the VRA and the First and Fourteenth Amendments. And H.B. 2023 cannot withstand scrutiny under § 2 and the First, Fourteenth, and Fifteenth Amendments.

I respectfully dissent.

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-16-01065-PHX-DLR

[Filed May 10, 2018]

Democratic National Committee, DSCC, and Arizona Democratic Party,	)
Plaintiffs,	)
v.	)
Michele Reagan and Mark Brnovich,	)
Defendants.	)

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

Plaintiffs challenge two aspects of Arizona's election system: (1) Arizona's policy to not count provisional ballots cast in the wrong precinct, which derives from the collective effect of A.R.S. §§ 16-122, -135, -584, and related rules in the Arizona Election Procedures Manual; and (2) Arizona House Bill 2023 ("H.B. 2023"), codified at A.R.S. § 16-1005(H)-(I), which makes it a felony for anyone other than the voter to possess that voter's early mail ballot, unless the possessor falls within a statutorily enumerated exception. Plaintiffs allege that the challenged laws violate § 2 of the Voting Rights Act of 1965 ("VRA") by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American Arizonans, who Plaintiffs claim are among their core constituencies. Plaintiffs also contend that these provisions violate the First and Fourteenth Amendments to the United States Constitution by severely and unjustifiably burdening voting and associational rights. Lastly, Plaintiffs claim that H.B. 2023 violates § 2 of the VRA and the Fifteenth Amendment to the United States Constitution because it was enacted with the intent to suppress voting by Hispanic and Native American voters. (Doc. 360 at 4-

[1] This order amends the Court's May 8, 2018 order (Doc. 412) to: (1) correct five non-substantive typographical errors on pages 50 at line 5, 61 at lines 18 and 23, 64 at line 6, and 69 at line 10 of the original order; and (2) replace the words "qualitative" and "qualitatively" on pages 56, 58, and 62 of the original order with more accurate and precise modifiers. The substance of the order remains the same.

7.)[2] Plaintiffs seek (1) a declaration that the challenged election practices are unlawful and (2) a permanent injunction requiring Defendants to partially count out-of-precinct ("OOP") provisional ballots for races for which the voter otherwise was eligible to cast a vote and enjoining Defendants from implementing, enforcing, or giving any effect to H.B. 2023. (Doc. 233 at 41-42.)

The Court presided over a ten-day bench trial beginning October 3, 2017 and ending October 18, 2017. Pursuant to Federal Rule of Civil Procedure 52, and for the following reasons, the Court finds against Plaintiffs and in favor of Defendants on all claims.[3]

I. PARTIES

Plaintiffs are the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), and the Arizona Democratic Party ("ADP"). The DNC is a national committee dedicated to electing local, state, and national candidates of the Democratic Party to public office. The DSCC is a Democratic political committee dedicated to encouraging the election of Democratic Senate candidates to office and is comprised of sitting

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[2] For purposes of this order, "Doc." refers to documents on the Court's electronic docket, "Ex." to trial exhibits, "Tr." to the official trial transcript, and "Dep." to designated deposition transcripts. Record citations offer examples of supporting evidence, but are not intended to be exhaustive of all evidence supporting a proposition.

[3] Defendants' oral motion, made during trial, for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c) is denied as moot. (Doc. 384.)

Democratic members of the United States Senate. The ADP is a state committee dedicated to electing candidates of the Democratic Party to public office throughout Arizona.

Defendants are Arizona Secretary of State Michele Reagan and Arizona Attorney General Mark Brnovich. Secretary Reagan is Arizona's chief elections officer. Attorney General Brnovich is Arizona's chief legal officer, charged with enforcing state criminal statutes, including H.B. 2023 and other election-related offenses. Secretary Reagan drafts, and Attorney General Brnovich (in conjunction with the Governor of Arizona) approves, the Election Procedures Manual. A.R.S. §§ 41-191 et seq, 16-1021, -452.

The Court also permitted the following parties to intervene as defendants: (1) the Arizona Republican Party ("ARP"), a state committee dedicated to electing candidates of the Republican Party to public office; (2) Debbie Lesko, who at the time of intervention was an Arizona State Senator representing Arizona's 21st legislative district and Precinct Committeewoman for Arizona's 21st legislative district, and who recently was elected to represent Arizona's 8th congressional district in the United States House of Representatives; (3) Tony Rivero, a member of the Arizona House of Representatives representing Arizona's 21st legislative district; (3) Bill Gates, who at the time of intervention served as a City of Phoenix Councilman and Precinct Committeeman for Arizona's 28th legislative district, and who now serves as a member of the Maricopa County Board of Supervisors representing district 3; and (4) Suzanne Klapp, a City of Scottsdale

Councilwoman and Precinct Committeewoman for Arizona's 23rd legislative district. (Docs. 39, 44, 56, 126.)

II. OVERVIEW OF TRIAL TESTIMONY

A. Plaintiffs' Expert Witnesses

1. Dr. Allan Lichtman

Dr. Allan Lichtman is a Distinguished Professor of History at American University in Washington, D.C., where he has been employed for 42 years. Dr. Lichtman formerly served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. He received his B.A. in History from Brandeis University in 1967 and his Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. Dr. Lichtman's areas of expertise include political history, electoral analysis, and historical and quantitative methodology. (Ex. 91 at 3-4.)

Dr. Lichtman has worked as a consultant or expert witness for plaintiffs and defendants in more than 80 voting and civil rights cases, including *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), in which Justice Kennedy's majority opinion authoritatively cited Dr. Lichtman's statistical work. Dr. Lichtman also has testified several times for plaintiffs and defendants on issues of intentional discrimination and application of Section 2 in VRA cases. (Ex. 91 at 4.)

Dr. Lichtman opined, generally, that under the totality of the circumstances H.B. 2023 causes minority voters to have less opportunity to participate in the political process than non-minority voters, and that the law was passed with the intent to suppress minority voters.[4] He supported his opinions with the standard sources used in political and historical analysis, including scholarly books, articles, reports, newspapers, voter registration and turnout data, and scientific surveys.

Dr. Lichtman's underlying sources, research, and statistical information are useful. The surveys and data he supplied reveal significant socioeconomic disparities between non-minorities and minorities, including in areas of poverty, unemployment, education, transportation, and health. (Ex. 91 at 3-4.) His report also contains evidence that Arizona exhibits racially polarized voting and has a history of racial appeals in political campaigns that continue to this day. (Ex. 91 at 30, 44-45.) Dr. Lichtman opined that the strong ties between race and partisanship in Arizona make targeting minorities the most effective and efficient way for Republicans to advance their political prospects. (Ex. 93 at 4-5.)

Although the Court finds Dr. Lichtman's curation of material facts surrounding the legislative history and his underlying research to be helpful and reliable, the Court did not find Dr. Lichtman's ultimate opinions

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[4] For ease, the Court uses the terms "minority" to refer to the racial minorities alleged to be adversely impacted by the challenge laws, and "non-minority" to refer to non-Hispanic white voters.

useful. Dr. Lichtman applied the law as he interpreted it to the data he assembled. In this respect, his opinions presented more like an attorney's closing argument than an objective analysis of data, and the credibility of his trial testimony was undermined by his seeming effort to advocate a position rather than answer a question. Moreover, applying law to facts is this Court's duty, and it is one the Court can do without the assistance of an expert opining on how he interprets the law and thinks it should be applied. The Court also has not considered Dr. Lichtman's opinions on the ultimate issue of legislative intent, both because this issue is not the proper subject of expert testimony and because it invades the province of the Court.

2. Dr. David Berman

Dr. David Berman is a Professor Emeritus of Political Science and a Senior Research Fellow at the Morrison Institute for Public Policy at Arizona State University. As a political science professor, he has taught undergraduate survey courses in American government and politics, state and local politics, and Arizona government and politics, as well as more specialized courses, including undergraduate seminars on Arizona politics during which students interacted with state and local office holders and political participants. He has also taught advanced graduate courses focusing on research methods in these areas. (Ex. 89 at 3.)

As a Senior Research fellow with the Morrison Institute, Dr. Berman specializes in research and writing on governance and election issues in Arizona, including redistricting, direct democracy, and

campaign finance. He has been a professor at Arizona State University since 1966, and his previous work experience was as a Research Associate at the National League of Cities in Washington, D.C. from 1964 to 1966. (Ex. 89 at 3-4.)

Dr. Berman opined that Arizona has a long history of discrimination against the voting rights of Native Americans, Hispanics, and African Americans, and that this discrimination is part of a more general pattern of political, social, and economic discrimination against minority groups in areas such as school segregation, educational funding and programming, equal pay and the right to work, and immigration.

The Court finds Dr. Berman credible. His opinions were well-researched and rendered using standard sources and methodologies in his field of expertise, and his sources were well-identified. Dr. Berman has authored ten books and over 70 published papers, book chapters, or refereed articles dealing with state and local government, politics, and public policy, and his opinions were based substantially on these prior works. In particular, Dr. Berman drew heavily upon his book *Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development* (University of Nebraska Press, 1998) and his review of archival papers and collections. (Ex. 89 at 3-4.) The Court affords great weight to Dr. Berman's opinions.

3. Dr. Jonathan Rodden

Dr. Jonathan Rodden is a tenured Professor of Political Science at Stanford University and the founder and director of the Stanford Spatial Social

Science Lab, a center for research and teaching with a focus on the analysis of geo-spatial data in the social sciences. Students and faculty members affiliated with the lab are engaged in a variety of research projects involving large, fine-grained, geo-spatial data sets, including individual records of registered voters, Census data, survey responses, and election results at the level of polling. Prior to joining the Stanford faculty, Dr. Rodden was the Ford Professor of Political Science at the Massachusetts Institute of Technology. He received his Ph.D. from Yale University and his B.A. from the University of Michigan, Ann Arbor, both in political science. (Ex. 95 at 5-6.)

Dr. Rodden has expertise in the use of large data sets and geographic information systems to analyze aspects of political representation. He has developed a national data set of geo-coded precinct-level election results that has been used extensively in policy-oriented research related to redistricting and representation. He also has worked extensively with Census data from the United States and other countries.

Dr. Rodden has published papers on political geography and representation in a variety of academic journals and has been featured in popular publications like the Wall Street Journal, the New York Times, and Boston Review. Dr. Rodden has testified as an expert witness in three recent election law cases. (Ex. 95 at 6.)

Here, Dr. Rodden analyzed the rates and causes of OOP voting in Arizona during the 2012, 2014, and 2016 general elections. The Court finds his use of a combination of individual-level and aggregate data

analyses, both of which have been accepted in previous cases analyzing questions under the VRA, to be valid and generally trustworthy, and affords them great weight. (Ex. 97 at 7-9.)

Dr. Rodden found that Hispanic, Native American, and African American voters cast OOP ballots at statistically higher rates than their non-minority counterparts. (Ex. 95 at 3-4; Ex. 97 at 2-4.) Focusing on Maricopa County in the 2012 election, Dr. Rodden found that the rate of OOP voting was "131 percent higher for Hispanics, 74 percent higher for African Americans, and 39 percent higher for Native Americans than whites." (Ex. 95 at 3-4.)

Further, Dr. Rodden found that OOP voters are substantially more likely to be young and to live in neighborhoods characterized by large numbers of renters and with high rates of transience, and that the rate of OOP voting was 65 percent higher for Democratic voters than for Republican voters in Maricopa County, and 56 percent higher in Pima County. Dr. Rodden found that "changes in polling place locations are associated with higher rates of out-of-precinct voting," and that "African Americans and Hispanics are substantially more affected by this than whites. In particular, the impact of precinct consolidation, while statistically significant for all groups, is more than twice as large for Hispanics and African Americans as for non-Hispanic whites." (Ex. 95 at 3-4.) When analyzing Arizona's non-metropolitan counties, Dr. Rodden found that OOP voting is "negligible in majority-white precincts, but increases

dramatically in precincts where Hispanics and Native Americans make up majorities." (Ex. 96 at 58.)

In addition to his analysis of OOP voting, Dr. Rodden employed standard and accepted methods in his field to analyze the "mailability" of Arizona's non-metropolitan counties in order to estimate the populations that likely would be most affected by H.B. 2023's ballot collection restrictions. Though somewhat imprecise, the Court finds his method of analysis to be creative given the lack of direct data available on the subject, generally reliable, and based on sufficient data given the circumstances. Dr. Rodden found that "[o]utside of Maricopa and Pima counties" "around 86 percent of non-Hispanic whites have home mail service," but "only 80 percent of Hispanics do, and only 18 percent of Native Americans have such access." (Ex. 97 at 4.)

Dr. Rodden's error rate is unknown, however, due to the lack of direct data. Also, his analysis did not include Arizona's metropolitan counties and therefore does not reveal whether, on a statewide basis, minorities have disparate access to home mail service as compared to non-minorities. Further, mail access is an imprecise proxy for determining the number and demographics of voters who use or rely on ballot collection services. Simply because a voter lacks home mail access does not necessarily mean that she uses or relies on a ballot collector to vote, let alone a ballot collector who does not fall into one of H.B. 2023's exceptions. Accordingly, although Dr. Rodden's analysis provided useful insight into home mail access in non-metropolitan counties, the Court is mindful of

its limitations and affords these opinions moderate weight.

B. Plaintiffs' Lay Witnesses

Plaintiffs called the following lay witnesses to testify at trial: Carmen Arias, Michael Blair, Delilah Correa, Charlene Fernandez, LeNora Fulton, Steve Gallardo, Kate Gallego, Kathleen Giebelhausen, Marva Gilbreath, Leah Gillespie, Carolyn Glover, Leonard Gorman, Shari Kelso, Scott Konopasek, Joeseph Larios, Daniel Magos, Lori Noonan, Patrick O'Connor, Martin Quezada, Nellie Ruiz, Spencer Scharff, Sam Shaprio, Ken Clark, and John Powers. These witnesses include individual voters, representatives from state, county, and municipal governments, community advocates who have collected ballots as part of get-out-the-vote ("GOTV") efforts, community advocates focusing of Native American issues, Democratic Party operatives, a California state elections official, and a former United States Department of Justice ("DOJ") official.

C. Defendants' Expert Witnesses

1. Dr. Donald Critchlow

Dr. Donald Critchlow works at Arizona State University as the Director of the Center for Political Thought and Leadership, an organization funded by a grant from the Charles Koch Foundation. (Tr. 1533-37.) He opined on the relationship between racial discrimination and voting in Arizona. Dr. Critchlow made credible observations that discrimination in Arizona has not been linear and that Arizona has taken effective action to combat discrimination and encourage participation in voting.

With that said, Dr. Critchlow has never published a book or article focused specifically on Arizona history, nor has he taught courses in Arizona history or politics. (Tr. 1531-32.) Further, in many respects he offered one-sided opinions of Arizona's history, ignored incidents of discrimination, and failed to address the key political shift between the Democratic and Republican parties during the Civil Rights Movement. For example, he either was unfamiliar with or totally discounted the Republican strategy of confrontation of minority voters at the polls during "Operation Eagle Eye" in the 1960s. (Ex. 89 at 16; Tr. 1549.) Additionally, although Dr. Critchlow acknowledged that Arizona has a history of discrimination, his report appears to attribute past racial discrimination in Arizona only to the Democratic Party and claims that discrimination has not existed since the 1960s (in the Republican era). (Ex. 521 at 4.) For these reasons, the Court affords little weight to Dr. Critchlow's opinions

2. Sean Trende

Sean Trende critiqued Dr. Lichtman's analysis of Arizona's voting patterns and history of racial discrimination, but offered no new information or analysis. Though the Court found some of his criticisms worth considering, overall they were insignificant. For example, although Trende generally agreed with Dr. Lichtman that Arizona experiences racially polarized voting, he made much of the irrelevant fact that Arizona voting is not as racially polarized as voting in Alabama. (Tr. 1837.) Additionally, Trende's opinions on the weight to give certain evidence and on the proper interpretation and application of the law and

evidence—like those of Dr. Lichtman's—were not helpful and invade the province of the Court. Moreover, Trende does not have a Ph.D and has never written a peer-reviewed article. He has spent most of his professional career working as a lawyer or political commentator. He is not a historian and says nothing about the historical methods Dr. Lichtman utilized. (Tr. 1861-62.) For these reasons, the Court affords Trende's opinions little weight.

3. Dr. M.V. Hood

Dr. M.V. Hood is a Professor of Political Science at the University of Georgia. Dr. Hood responded to the reports of Drs. Lichtman, Rodden, and Berman. (Ex. 522 at 2-3.) For a number of reasons, the Court affords little weight to Dr. Hood's opinions.

Dr. Hood criticizes Dr. Berman's use of older historical information. Yet Dr. Critchlow, another expert retained by Defendants, agrees with Dr. Berman that older historical information is relevant to understanding patterns. (Ex. 521 at 8-10; Ex. 522 at 11.) Moreover, Dr. Hood admitted at trial that he examines historical information going back 50 to 200 years. (Tr. 2122-23.)

Dr. Hood opined that H.B. 2023 does not hinder Native American voting because the rates of early voting on the Navajo Nation increased from 2012 to 2016. He based that opinion on early votes cast in three counties. This opinion is not reliable. Dr. Hood's analysis did not include an assessment of racial disparities and turnout. He also conceded that myriad factors could affect turnout. (Tr. 2111-14.)

Dr. Hood prepared a cross-state comparative analysis of ballot collection laws and policies related to counting OOP ballots. Although his analysis offered some insight, it overall was not useful because he did not address statutory differences and nuances, and his analysis reflected an incomplete understanding of the laws he categorized. For example, some of the states he labeled as prohibiting ballot collection do not have laws comparable to H.B. 2023 because they prohibit only the delivery of the ballot, not the collection and mailing of the ballot on someone else's behalf. (Ex. 92 at 52-53.)

The Court also notes that Dr. Hood's testimony either has been rejected or given little weight in numerous other cases due to concerns over its reliability. *See Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at *24 (S.D. Ohio June 7, 2016), *aff'd in part, rev'd in part*, 837 F.3d 612 (6th Cir. 2016); *Veasey v. Perry*, 71 F. Supp. 3d 627, 663 (S.D. Tex. 2014); *Frank v. Walker*, 17 F. Supp. 3d 837, 881-84 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014); *Fla. v. United States*, 885 F. Supp. 2d 299, 324 (D.D.C. 2012); *Common Cause/Ga. v. Billups*, No. 4:05-cv-0201, 2007 WL 7600409, at *14 (N.D. Ga. Sept. 6, 2007). Additionally, most of Dr. Hood's work has been as an expert on behalf of states defending against allegations that their laws violated the Constitution or the VRA. (Tr. 2123-25.)

4. Dr. Janet Thornton

Dr. Janet Thornton is a Managing Director at Berkeley Research Group. Dr. Thornton did not conduct her own analysis, but instead offered her

opinion that Dr. Rodden's statistical work is flawed. (Ex. 525 at 1.) For example, she challenged Dr. Rodden's approaches to measuring racial disparities in OOP voting. One approach uses individual surname data and geographic coordinates to infer race. Among Dr. Thornton's critiques was the presence of measurement error, which is well-taken. Indeed, even Dr. Rodden concedes measurement error exists, especially as it pertains to African American probabilities. Dr. Thornton did not critique the Hispanic probabilities assessed by Dr. Rodden, however, and Dr. Rodden credibly explained that the measurement error for Hispanic probabilities leads only to the under-estimation of racial disparities.

The second approach that Dr. Rodden employed relied on data collected by the Census Department on race and ethnicity at the lowest possible level of geographic aggregation. Dr. Thornton's challenge to the aggregate approach was neither about the data nor the presence of racial disparities in OOP voting, but rather the statistical model employed by Dr. Rodden. Dr. Rodden, however, credibly showed that results similar to those reported by his analysis are obtained using the alternative model specification or measurement strategies recommended by Dr. Thornton.

Dr. Thornton's opinion that there should have been a systematic decline in the number of ballots cast in Arizona's 13 non-metropolitan counties during 2016 if the limits on ballot collection impacted the ability of rural and minority persons to vote is simplistic and not credible. The statistical evidence suggests that increased turnout in rural counties for the 2016

election was driven by non-minority voters, not Native American and Hispanic voters. (Ex. 98 at 21-26.) Moreover, many factors impact voter turnout, including controversial candidates and partisan mobilization efforts, all of which might drown out the potentially deleterious effects of H.B. 2023. Overall, the Court finds that Dr. Thornton's critiques do not significantly undermine Dr. Rodden's opinions and therefore affords them less weight.

D. Defendants' Lay Witnesses

Defendants called the following lay witnesses to testify at trial: Brad Nelson, Eric Spencer, Helen Purcell, James Drake, Michael Johnson, Michelle Ugenti-Rita, Amy Chan (formerly Amy Bjelland), Tony Rivero, and Scott Freeman. These witnesses include current and former lawmakers, elections officials, and law enforcement officials.

E. Witnesses Testifying By Deposition

In addition to the live testimony, the following witnesses testified by deposition: Sheila Healy, Randy Parraz, Samantha Pstross, Secretary Reagan, Spencer Scharff, Donald Shooter, Eric Spencer, Robyn Stallworth-Pouquette, Alexis Tameron, Victor Vasquez, and Dr. Muer Yang. The parties each raised admissibility objections to certain of these deposition designations. The Court addresses these objections, along with other outstanding evidentiary matters, in a separate order.

III. OVERVIEW OF CHALLENGED ELECTIONS PRACTICES

A. H.B. 2023

Voting in Arizona involves a flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day. Arizona voters do not need an excuse to vote early and Arizona permits early voting both in person and by mail during the 27 days before an election. A.R.S. § 16-541. For those voters who prefer to vote early and in-person, all Arizona counties operate at least one in-person early voting location. Some of these locations are open on Saturdays. (Doc. 361 ¶ 59.)

Arizona has allowed early voting by mail for over 25 years, and it has since become the most popular method of voting, accounting for approximately 80 percent of all ballots cast in the 2016 election. In 2007, Arizona implemented permanent no-excuse early voting by mail, known as the Permanent Early Voter List ("PEVL"). Arizonans now may vote early by mail either by requesting an early ballot on an election-by-election basis, or by joining the PEVL, in which case they will be sent an early ballot as a matter of course no later than the first day of the 27-day early voting period. A.R.S. §§ 16-542, -544. In 2002, Arizona also became the first state to make available an online voter registration option, allowing voters to register online through Arizona's Motor Vehicle Division ("MVD") website, www.servicearizona.com. When registering online through the MVD, voters can enroll in the PEVL by clicking a box. (Doc. 361 ¶ 56.)

To be counted, an early ballot must be received by the county recorder by 7:00 p.m. on Election Day. A.R.S. § 16-548(A). Early ballots contain instructions that inform voters of the 7:00 p.m. deadline. Voters may return their early ballots by mail postage-free, but they must mail them early enough to ensure that they are received by this deadline. Additionally, some Arizona counties provide special drop boxes for early ballots, and voters in all counties may return their early ballots in person at any polling place, vote center, or authorized election official's office without waiting in line. (Doc. 361 ¶¶ 57, 61.)

Since 1997, it has been the law in Arizona that "[o]nly the elector may be in possession of that elector's unvoted early ballot." A.R.S. § 16-542(D). In 2016, Arizona amended A.R.S. § 16-1005 by enacting H.B. 2023, which limits who may collect a voter's voted or unvoted early ballot:

> H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.
>
> I. Subsection H of this section does not apply to:
>
> 1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural

> lands or crops and that is authorized to conduct elections pursuant to title 48.
>
> 2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:
>
> (a) "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.
>
> (b) "Collects" means to gain possession or control of an early ballot.
>
> (c) "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.
>
> (d) "Household member" means a person who resides at the same residence as the voter.

A.R.S. § 16-1005(H)-(I). Voters therefore may entrust a caregiver, family member, household member, mail carrier, or elections official to return their early ballots, but may not entrust other, unauthorized third parties to do so.

B. Rejection of OOP Ballots

Since at least 1970, Arizona has required voters who choose to vote in person on Election Day to cast their ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the

correct precinct. (Doc. 361 ¶ 46.) Because elections involve many different overlapping jurisdictions, the precinct-based system ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote. (Ex. 95 at 10.) If a voter arrives at a precinct but does not appear on the precinct register, Arizona allows the voter to cast a provisional ballot. A.R.S. §§ 16-122, -135, -584. After Election Day, county elections officials review all provisional ballots. If a voter's address is determined to be within the precinct, the provisional ballot is counted. Arizona does not count any portion of a provisional ballot cast outside of a voter's correct precinct. A majority of states do not count OOP ballots, putting Arizona well within the mainstream on this issue.[5] Indeed, at no point has the DOJ objected to this practice, and Plaintiffs object to it for the first time in this case.

In 2011, Arizona amended its elections code to allow counties to choose whether to conduct elections under

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[5] *See* Ala. Code §§ 17-9-10, -10-2, -10-3; Ark. Code Ann. §§ 7-5-306(b), -308(d)(2); Conn. Gen. Stat. §§ 9-19j, -232n; Del. Code Ann. tit. 15, § 4948(b), h(7); Fla. Stat. § 101.048(1),(2); Haw. Admin. Rules § 3-172-140; Ind. Code §§ 3-11.7-2-1, -11-8-2, and -11.7-5-3; Iowa Code §§ 49.9, 49.79(2)(c), 49.80, 49.81, 53.23; Tit. 31 Ky. Admin. Regs. § 6:020(1),(14); Mich. Comp. Laws §§ 168.523a(1),(5),(7), 168.813(1); Miss. Code, Ann. § 23-15-573(1),(3)(b); Mo. Rev. Stat. § 115.430(2),(3),(6); Mont. Code §§ 13-15-107(1),(3), 13-2-512, 13-13-114(1)(a),(2); Neb. Rev. Stat. §§ 32-915(1), - 1002(5)(b),(e); Nev. Rev. Stat. § 293.3081(1), 293.3085(4); N.Y. U.C.C. Law §§ 8-302(3)(e), § 9-209; Ohio Rev. Stat. §§ 3505.181(A)(1), 3505.183(B)(1), (4)(a); S.C. Code Ann. §§ 7-13-820, 7-13-830; S.D. Sess. Laws § 12-18-39, 12-20-5.1; Tenn. Code Ann. § 2-7-112(a)(3)(A),(B); Tex. Elec. Code Ann. §§ 63.001(c),(g), 63.011(a),(b); Tex. Admin. Code § 81.172.

the traditional precinct model or to use a "vote center" system. 2011 Ariz. Legis. Serv. Ch. 331 (H.B. 2303) (April 29, 2011) (amending A.R.S. § 16-411). Unlike the precinct-based system, the vote center model requires each vote center to be equipped to print a specific ballot, depending on each voter's particular district, that includes all races for which that voter is eligible to vote. Thus, under a vote center system, voters may cast their ballots at any vote center in the county in which they reside and receive the appropriate ballot. A.R.S. § 16-411(B)(4). Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties have adopted the vote center model. These counties are mostly rural and sparsely populated. Precinct-based voting requirements, such as Arizona's policy to not count OOP ballots, have no impact on voters in these counties. By comparison, the most populous counties in Arizona, such as Maricopa, Pima, and Pinal, currently adhere to the traditional precinct-based model.

IV. PRELIMINARY ISSUES

A. Standing

Article III of the United States Constitution limits federal courts to resolving "Cases" and "Controversies," one element of which is standing. To have standing to litigate in federal court, a plaintiff "must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* -- U.S. --, 134 S. Ct. 1377, 1386 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Only one

plaintiff needs to have standing when only injunctive relief is sought. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7 (2008).

Plaintiffs have organizational standing to challenge the election regulations at issue. Ballot collection was a GOTV strategy used primarily by the Democratic Party to increase electoral participation by otherwise low-efficacy voters. (Tr. 416-26, 632-33, 659, 902, 930; Healy Dep. 28:15-29:13.) H.B. 2023's limitations will require Democratic organizations, such as the ADP, to retool their GOTV strategies and divert more resources to ensure that low-efficacy voters are returning their early mail ballots. Additionally, credible expert testimony shows that minority voters, who tend to vote disproportionately for Democratic candidates, vote OOP at higher rates than non-minority voters. Thus, Arizona's policy to not count OOP ballots places a greater imperative on organizations like the ADP to educate their voters. These are sufficiently concrete and particularized injuries that are fairly traceable to the challenged provisions. *See Crawford*, 472 F.3d at 951 ("Thus the new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."); *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 967 (W.D. Wis. 2016) (finding expenditure of resources for educating voters about how to comply with new state voter registration requirements sufficient to establish standing).

Plaintiffs also have associational standing to challenge these provisions on behalf of their members.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). A number of self-identified Democratic voters testified either that they have used ballot collection services in the past, or that they have voted OOP. The voting rights of such individuals are germane to Plaintiffs' goal of electing Democratic candidates to local, state, and federal offices. Further, neither the claims asserted nor the relief requested requires individual members to participate in this lawsuit.

Finally, Plaintiffs' asserted injuries can be redressed by a favorable decision of this Court. "[W]hen a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant[.]" *Am. Civil Liberties Union v. The Fla. Bar*, 999 F.2d 1486, 1490 (11th Cir. 1993). Here, county officials are responsible for counting ballots and verifying proper voter registration, *see* A.R.S. §§ 16-621(A), -584(E), but Secretary Reagan and Attorney General Brnovich also play a role in determining how OOP ballots are counted. Arizona law requires Secretary Reagan, after consulting with

county officials, to "prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). These rules are prescribed in the Election Procedures Manual and have the force of law. A.R.S. § 16-452(B)-(C). "Any person who does not abide by the Secretary of State's rules is subject to criminal penalties," *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) (citing A.R.S. § 16-452(C)), and Attorney General Brnovich is authorized to prosecute such violations, A.R.S. § 16-1021. Although county officials are responsible for physically counting ballots, they are not empowered to count or reject ballots at their discretion. Rather, "[a]ll proceedings at the counting center shall be under the direction of the board of supervisors or other officer in charge of elections and shall be conducted in accordance with the approved instructions and procedures manual[.]" A.R.S. § 16-621(A).

Though the Court cannot require Secretary Reagan and Attorney General Brnovich to physically count OOP ballots for races for which the voter was otherwise eligible to cast a vote, it can require them to prescribe such a procedure in the Election Procedures Manual, which county election officials then would be bound by law to follow. Further, Attorney General Brnovich can ensure compliance with such a directive because he is authorized to prosecute county officials who violate it.

Likewise, Attorney General Brnovich is empowered to enforce state election laws like H.B. 2023. He is not

the only official with such authority; Attorney General Brnovich is authorized to enforce Arizona's election laws "[i]n any election for state office, members of the legislature, justices of the supreme court, judges of the court of appeals or statewide initiative or referendum," but in elections for "county, city or town office, community college district governing board, judge or a county, city, or town initiative or referendum," that authority resides with "the appropriate county, city or town attorney[.]" A.R.S. § 16-1021. But most elections will include statewide races and therefore Attorney General Brnovich likely will share enforcement authority in most circumstances. Moreover, although Attorney General Brnovich might lack authority to direct the enforcement activities of county and municipal prosecutors, there is no reason to believe that these local law enforcement officials will attempt to enforce H.B. 2023 should the Court declare it unconstitutional or unlawful under the VRA.

Lastly, although there is no evidence that Secretary Reagan or other state or local elections officials play a direct role in the enforcement of H.B. 2023, Secretary Reagan has some indirect involvement in the law's implementation by virtue of her responsibility for drafting the Election Procedures Manual. If the Court were to enjoin H.B. 2023's implementation and enforcement, the Election Procedures Manual would need to reflect as much.

B. Effect of Preliminary Appellate Proceedings

On September 23, 2016, the Court denied Plaintiffs' motion to preliminarily enjoin enforcement of H.B.

2023. (Doc. 204.) On October 4, 2016, the Court also denied Plaintiffs' motion to preliminary enjoin enforcement of H.B. 2023 pending Plaintiffs' appeal of the Court's September 23 order. (Doc. 213.) Plaintiffs thereafter moved the Ninth Circuit Court of Appeals for an injunction pending appeal, which was denied by a three-judge motions panel. Later, on October 28, 2016, a divided three-judge merits panel affirmed the Court's order denying Plaintiffs' preliminary injunction motion. Chief Judge Thomas dissented.

On November 2, 2016, a majority the Ninth Circuit's non-recused active judges voted to rehear the case en banc. Two days later, a majority of the en banc panel voted to preliminarily enjoin enforcement of H.B. 2023 pending the panel's rehearing, essentially for the reasons provided in Chief Judge Thomas' dissent.[6] This preliminary injunction was short-lived, however, as the United States Supreme Court stayed the order on November 5, 2016, pending the Ninth Circuit's final disposition of the appeal.

In light of this history, the parties disagree over the effect that Chief Judge Thomas' dissent should have on the Court's post-trial analysis. As explained during the final pretrial conference, although the Court has considered Chief Judge Thomas' dissent, the Court is not bound by its factual analysis. To date, all appellate proceedings have occurred at the preliminary injunction stage on a less developed factual record.

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[6] The en banc panel technically issued a stay of the Court's order denying Plaintiffs' preliminary injunction motion, but the stay had the practical effect of an injunction pending appeal.

Findings and conclusions rendered at the preliminary injunction stage are just that—preliminary. They do not necessarily preclude the Court from making different findings or conclusions after thorough factual development and a full trial on the merits. Accordingly, although the Court is mindful of Chief Judge Thomas' critiques and their preliminary adoption by a majority of the en banc panel, the Court is not bound to make identical findings and conclusions as those made at a preliminary phase of the litigation.

And with that, the Court proceeds to the merits.

V. FIRST AND FOURTEENTH AMENDMENTS[7]

"[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). Relatedly, the First and Fourteenth Amendments protect the right of the people to associate for political purposes. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). "It does not follow, however, that the right to vote in any manner and the right to associate for political purposes . . . are absolute." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Rather, the Constitution empowers states to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, and states retain "control over

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[7] Because Plaintiffs challenge state election laws, their claims technically arise under the Fourteenth Amendment, which applies the First Amendment's protections against states and their political subdivisions. *See City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994).

the election process for state offices," *Tashjian*, 479 U.S. at 217. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick*, 504 U.S. at 433. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730 (1974).

Like an individual's voting and associational rights, however, a state's power to regulate elections is not absolute; it is "subject to the limitation that [it] may not be exercised in a way that violates other . . . provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). But because all election regulations "invariably impose some burden upon individual voters," *Burdick*, 504 U.S. at 433, "not every voting regulation is subject to strict scrutiny," *Pub. Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016).

> Instead, . . . a more flexible standard applies. A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments 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, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This framework commonly is referred to as the *Anderson/Burdick* test, after the two Supreme Court decisions from which it derives.

Under this framework, the degree to which the Court scrutinizes "the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* A law that imposes severe burdens is subject to strict scrutiny, meaning it must be narrowly tailored to serve a compelling state interest. *Id.* "Regulations imposing . . . [l]esser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434); *see also Pub. Integrity Alliance*, 836 F.3d at 1024 ("Applying these precepts, '[w]e have repeatedly upheld as 'not severe' restrictions that are generally applicable, evenhanded, politically neutral, and protect the reliability and integrity of the election process.'" (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)). Additionally, when applying *Anderson/Burdick*, the Court considers the state's election regime as a whole, including aspects that mitigate the hardships that might be imposed by the challenged provisions. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016); *see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008) (considering mitigating aspects of Indiana's election laws).

A. Application to H.B. 2023

1. Burden on Voting Rights

At most, H.B. 2023 minimally burdens Arizona voters as a whole. In fact, the vast majority of Arizona voters are unaffected by the law. Although voting by early mail ballot has steadily increased in Arizona, in any given election there remains a subset of voters who choose to vote in person, either early at a designated early voting site or on Election Day. In-person voters are not impacted by limitations on who may collect early mail ballots. For example, 2,323,579 registered voters cast ballots during the 2012 general election. (Ex. 543 at 2.) Of these, 1,542,855 submitted early mail ballots, over 99 percent of which were counted. (Ex. 95 at 17.) Thus, roughly a third of all Arizonans voted in person during the 2012 general election. Similarly, approximately 80 percent of the 2,661,497 Arizonans who voted during the 2016 general election cast an early ballot, meaning about 20 percent voted in person on Election Day. (Tr. 1925; Ex. 543.) H.B. 2023 has no impact on these voters.

Further, even under a generous interpretation of the evidence, the vast majority of voters who choose to vote early by mail do not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions. There are no records of the numbers of voters who, in any given election, return their ballots with the assistance of third parties. The ADP collected "a couple thousand" ballots in 2014. (Tameron Dep. 52:12-17.) According to Secretary Reagan, community advocate Randy Parraz testified before the Arizona Senate Elections Committee that he

had once collected 4,000 ballots. (Regan Dep. 101:12-21.) During closing argument, the Court asked Plaintiffs' counsel for his best estimate of the number of voters affected by H.B. 2023 based on the evidence at trial, to which he responded: "Thousands . . . but I don't have a precise number of that." (Tr. 2268.) An estimate of "thousands" offers little guidance for determining where, on the scale of 1,000 to 999,999, the number falls, but the evidence and Counsel's response suggests that possibly fewer than 10,000 voters are impacted.

Purely as a hypothetical, if the Court were to draw the unjustified inference that 100,000 early mail ballots were collected and returned by third parties during the 2012 general election, that estimate would leave over 1.4 million early mail ballots that were returned without such assistance. The point, of course, is that H.B. 2023's limitations have no effect on the vast majority of voters who vote by early mail ballot because, even under generous assumptions, relatively few early voters give their ballots to individuals who would be prohibited by H.B. 2023 from possessing them.

On its face, H.B. 2023 is generally applicable and does not increase the ordinary burdens traditionally associated with voting. The law merely limits who may possess, and therefore return, a voter's early mail ballot. Early voters may return their own ballots, either in person or by mail, or they may entrust a family member, household member, or caregiver to do the same. Thus, the burden H.B. 2023 imposes is the burden of traveling to a mail box, post office, early ballot drop box, any polling place or vote center

(without waiting in line), or an authorized election official's office, either personally or with the assistance of a statutorily authorized proxy, during a 27-day early voting period.[8]

Even with H.B. 2023's limitations, the burden on early voters to return their early mail ballots is less severe than the burden on in-person voters, who must travel to a designated polling place or vote center on Election Day, often necessitating taking time off work and waiting in line. Indeed, the burden on early mail voters is less severe even than the burden on early in-person voters, who must travel to a designated early voting location during the 27-day early voting period. Plaintiffs do not contend that the more onerous travel required of in-person voters is unconstitutionally burdensome, nor would the law support such an argument.

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[8] Throughout this case, Plaintiffs have conflated the burden imposed by H.B. 2023 with the circumstances that might make that burden harder to surmount for certain voters. That is, Plaintiffs conflate the burden with its severity. For example, during closing argument the Court asked Plaintiffs' counsel to summarize the precise burdens that H.B. 2023 imposes. (Tr. 2262.) Counsel responded that the burdens include lack of mail access, inadequate transportation, disabilities, low education attainment, and residential instability. (Tr. 2263.) But H.B. 2023 does not impose these conditions on any voter. The sole burden H.B. 2023 imposes is the burden of traveling to a mail box, post office, early ballot drop box, polling place or vote center, or authorized election official's office, either personally or with authorized assistance, during a 27-day early voting period. The socioeconomic circumstances cited by Plaintiffs might explain why this process is more difficult for some voters than others, but those circumstances are not themselves the burden imposed by the challenged law.

For example, in *Crawford* the Supreme Court considered whether Indiana's voter identification law, which required in-person voters to present photo identification, unconstitutionally burdened the right to vote. 553 U.S. at 185. A voter who had photo identification but was unable to present it on Election Day, or a voter who was indigent or had a religious objection to being photographed, could cast a provisional ballot, which then would be counted if the voter traveled to the circuit court clerk within ten days after the election and either presented photo identification or executed an affidavit. *Id.* at 185-86.

In his controlling opinion upholding the constitutionality of the challenged law, Justice Stevens explained "[t]he burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of" the challenged law. *Id.* at 198. The Court characterized these burdens as "the inconvenience of making a trip to the [Indiana Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph," to obtain the required identification, and concluded that this process "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."[9] *Id.* The Court also reasoned that "[t]he severity of that burden is . . .

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[9] The Supreme Court did not characterize the burdens imposed by Indiana's photo identification law as the circumstances of particular voters that made it harder to obtain the required identification. Rather, those conditions informed the analysis of the severity of the burden on discrete subgroups.

mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted," although to do so voters would need to make two trips: one to vote in the first instance and another to the circuit court clerk's office. *Id.* at 199.

At most, H.B. 2023 requires only that early mail voters make the first trip described in *Crawford*—the trip to vote. Further, the trip H.B. 2023 requires voters to make is less burdensome because an Arizona early mail voter has 27 days in which to make it, can choose between traveling to the nearer and most convenient of either a personal mailbox, post office, early ballot drop box, polling place or vote center, or authorized election official's office, and can have a family member, household member, or caregiver make the trip on her behalf. Voting early by mail in Arizona is far easier than traditional, in-person voting on Election Day, and if laws that do not "represent a significant increase over the usual burdens of voting" do not severely burden the franchise, *id.* at 198, it is illogical to conclude that H.B. 2023 imposes a severe burden on Arizona voters.

For these reasons, Plaintiffs' Fourteenth Amendment challenge is best understood as follows: H.B. 2023 has no impact on the vast majority of Arizona voters, but its limitations on who may return a voter's early mail ballot present special difficulties for a small subset of socioeconomically disadvantaged voters. When evaluating the severity of burdens imposed by a challenged law, "courts may consider not only a given law's impact on the electorate in general,

but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity Alliance*, 836 F.3d at 1024 n.2 (citing *Crawford*, 553 U.S. at 199-203, 212-17 (Souter, J., dissenting)). But to do so, the challengers must present sufficient evidence to enable the court to quantify the magnitude of the burden imposed on the subgroup. *Id.*; *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631-32 (6th Cir. 2016) (explaining that, even under this "more liberal approach to burden measuring," the record must contain "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of" the challenged law).

Thus, in *Crawford* the Supreme Court acknowledged that Indiana's voter identification law might place "a somewhat heavier burden . . . on a limited number of persons," such as "elderly persons born out of State, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed." 553 U.S. at 199. But the Court declined to consider these burdens because "on the basis of the evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that [was] fully justified." *Id.* at 200.

Like in *Crawford*, this Court has insufficient evidence from which to measure the burdens on discrete subsets of voters. The Court cannot quantify with any degree of certainty "the number of registered voters" who, in past elections, returned early mail ballots with the assistance of ballot collectors who do not fall within H.B. 2023's exceptions. *Id.* at 200. The Court therefore cannot determine how frequently voters will be impacted by H.B. 2023's limitations. And of the nebulous "thousands" who, in past elections, have entrusted their ballots to third parties, there is insufficient "concrete evidence" for the Court to gauge the magnitude of that burden or the portion of it that is justified. *Id.* at 201. Stated differently, it is not enough to know roughly how many voters have used ballot collection services—which, in any event, the Court cannot determine on this record. The Court also needs to know *why* voters used these services so that it may determine whether those voters did so out of convenience or personal preference, as opposed to meaningful hardship, and whether other aspects of Arizona's election system adequately mitigate those burdens.

The evidence available largely shows that voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways. Joseph Larios, a community advocate who has collected ballots in past elections, testified that in his experience returning early mail ballots presents special challenges for communities that lack easy access to outgoing mail services; the elderly, homebound, and disabled voters;

socioeconomically disadvantaged voters who lack reliable transportation; voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services; and voters who are unfamiliar with the voting process and therefore do not vote without assistance or tend to miss critical deadlines. (Tr. 416-26, 432-39.)

As to this latter category of voters who, due either to forgetfulness or unfamiliarity with the voting process, choose not to vote or neglect to mail their ballots in time for them to reach the county recorder by 7:00 p.m. on Election Day, H.B. 2023 does not impose a severe burden. Remembering relevant election deadlines "does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. Moreover, nothing in H.B. 2023 prohibits Plaintiffs or other organizations from educating voters and offering assistance in understanding and completing a ballot.

As for the other types of voters Larios identified, Arizona accommodates many of the circumstances that tend to make voting in general (and not just early mail voting) more difficult for them. For example, all counties must provide special election boards for voters who cannot travel to a polling location because of an illness or disability. A.R.S. § 16-549. If an ill or disabled voter timely requests an accommodation, the county recorder must arrange for a special election board to deliver a ballot to the voter in person. Although relatively few voters are aware of this service (Tr. 864-65), nothing in H.B. 2023 prevents Plaintiffs from

educating voters about the special election board option and assisting them in making those arrangements. Arizona also allows curbside voting at polling places, where election officials will go out to a vehicle to assist voters as necessary.[10]

For working voters, Arizona law requires employers to give an employee time off to vote if the employee is scheduled to work a shift on Election Day that provides fewer than three consecutive hours between either the opening of the polls and the beginning of the shift, or the end of the shift and the closing of the polls. A.R.S. § 16-402. An employer is prohibited from penalizing an employee for exercising this right. If voters nonetheless feel uncomfortable requesting time off, they have a 27-day window to vote in person at an on-site early voting location. Additionally, even under H.B. 2023 voters with transportation difficulties or time limitations may entrust their early ballots to family members, household members, caregivers, or elections officials.

The testimony of individual voters who have used ballot collection services in past elections largely confirms that H.B. 2023 does not impose significant burdens. Five voters testified at trial about their personal experiences with ballot collectors: Nellie Ruiz, Carolyn Glover, Daniel Magos, Carmen Arias, and

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[10] It is of no moment that entrusting a ballot to a volunteer is relatively more convenient than arranging a special election board. In *Crawford*, voting without the required identification certainly would have been easier than voting provisionally and then travelling to the circuit court clerk's office within ten days. Nonetheless, the controlling opinion found this option to be an adequate mitigating alternative.

Marva Gilbreath. None of these voters would be severely burdened by H.B. 2023's limitations.

Ruiz, a 71-year-old early mail voter in Phoenix, testified that she typically asks her neighbor to return her ballot because her rheumatoid arthritis and deteriorating eyesight make it difficult for her to return it personally. Ruiz lives with her adult son and daughter-in-law. Although Ruiz has a personal mailbox, she prefers not to mail important documents, like bill payments and ballots. Instead, her son delivers her bill payments whenever he delivers his own mail. Ruiz testified that she preferred to give her ballot to her neighbor because she "didn't want to impose on [her] children," but could not explain why her son could not return her ballot the same way he returns her bills, or why asking him to deliver a ballot was any more of an imposition than asking him to deliver her bills. Ruiz also was not aware that her son could drop off her ballot when he goes to the polls to vote in person. Ruiz testified that she was not able to give her early mail ballot to her neighbor during the 2016 general election because of H.B. 2023. Nonetheless, Ruiz successfully returned her ballot by mailing it from her home mailbox. (Tr. 93-96, 98-100, 102-103, 111.)

H.B. 2023 does not burden voters like Ruiz. She admittedly was able to mail her ballot in 2016 without relying on her neighbor and lives with her adult son who is capable of returning her ballots, either by mail the same way he returns her bill payments, or at a polling place when he votes in person.

Glover, a retired voter with mobility issues who resides in a senior citizens apartment complex in

Phoenix, testified that prior to the 2016 general election persons affiliated with the Democratic Party would collet her early mail ballot. Glover initially testified that her sister returned her ballot for her during the 2016 election, but on cross-examination Glover claimed her ballot was returned by her "sister from church," rather than a family member. Glover testified that her apartment building has outgoing mail, but the slots are too small for the ballot. Although a postal worker collects mail at the building, Glover sometimes forgets to give the postal worker her outgoing mail. Glover testified that others in the community have caregivers, but that she would not feel comfortable giving her ballot to a caregiver. Glover also testified that she was unaware she could request to vote via a special election board. (Tr. 222-25, 228-230, 232-33.)

H.B. 2023 does not severely burden voters like Glover, who admittedly can hand her ballot to a postal worker, provided she remembers to do so. Further, if Glover's mobility issues make it difficult for her to travel to a post office, she can request to vote via a special election board. Nothing in H.B. 2023 prevents volunteers from the Democratic Party from assisting her with making those arrangements.

Magos is a 72-year-old Phoenix resident who prefers to vote by mail. He has a home mailbox but prefers not to use it to send important items because his mailbox has been tampered with in the past. Magos once gave his ballot to a collector because a flood impacted his home and he did not want to leave his wife alone. But in most elections, he either takes his ballot to the post

office or drops it off at a polling place. Magos is capable of driving to a polling place and voting in person, and he has family members who could return his ballot if he found himself in need of such a service, though he testified that he "would hate to burden them with one more duty" because "they already do enough for" him. Magos successfully voted in 2016, even though H.B. 2023 was in effect. (Tr. 235, 238-40, 242, 247, 250.)

Arias is a registered voter in Phoenix who testified that she once gave her ballot to a collector because her vehicle had broken down. Additionally, Arias voted by early ballot in the 2016 presidential preference and general elections by driving to Democratic Party headquarters and dropping her voted early ballots off there, presumably so volunteers could later deliver those ballots to an appropriate destination. Although Arias testified that the postal service in her neighborhood is unreliable, she did not explain why she could drive her ballots to Democratic Party headquarters but not to a post office, early ballot drop box, polling location, or elections office. (Tr. 1166-68, 1173.)

The only early mail voter who testified that she did not vote during the 2016 general election was Gilbreath, a 72-year-old Laveen resident. Gilbreath testified that she has mobility issues due to her arthritis. During the 2014 election, Gilbreath gave her early mail ballot to a friend because she waited too long to mail it. Gilbreath voted in the 2016 presidential preference election by mailing her early ballot herself. She received an early mail ballot for the general election but did not return it because she waited too

long to mail it and was not sure where to go to deliver it in person. Thus, Gilbreath has access to a mailbox; she simply must remember to timely mail her ballot.[11] (Tr. 128, 130, 133, 135, 142.)

In addition to these voters, Plaintiffs designated for admission portions of the deposition testimony of Victor Vasquez, who said that he suffered a heart attack during the 2014 general election and asked a hospital nurse to return his early ballot for him, but she refused. Accordingly, he checked himself out of the hospital on Election Day and had a friend drive him to a polling place, where he cast a provisional ballot that ultimately was not counted because Vasquez was not in his assigned precinct. (Vasquez Dep. 15:18-18:13; 25:7-25.) The Court has concerns about the credibility of Vasquez's account. If Vasquez had already completed an early mail ballot, it is not clear why he completed an entirely new, provisional ballot at the polling place rather than simply drop off the early ballot he previously completed. Vasquez also stated that in a prior election he gave his ballot to a friend to mail at the post office because he does not trust the outgoing mail service where he lives, but he did not explain whether he easily can go to the post office on his own.

In sum, though for voters like those who testified at trial H.B. 2023 might have eliminated a preferred or convenient way of returning an early mail ballot, it

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[11] Plaintiffs do not challenge Arizona's requirement that early mail ballots be received by the county recorder by 7:00 p.m. on Election Day, which appears to cause more problems for voters than H.B. 2023's limitations on ballot collection.

does not follow that what H.B. 2023 expects them to do instead is burdensome. The Constitution does not demand "recognition and accommodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by members of certain identifiable segments of the voting public." *Ohio Democratic Party*, 834 F.3d at 630. Nor does it require states to prioritize voter convenience above all other regulatory considerations. *Id.* at 629. H.B. 2023 has no impact on the vast majority of Arizona voters, and the Court lacks sufficient evidence to assess whether the law imposes a more severe burden for discrete subsets of voters. The evidence that was adduced at trial, however, indicates that, for many, ballot collection is used out of convenience and not because the alternatives are particularly difficult.

2. Burden on Associational Rights

In Count V of their Second Amended Complaint, Plaintiffs alleged that H.B. 2023 unjustifiably infringes upon Plaintiffs' associational rights, as distinct from voting rights. (Doc. 233 ¶¶ 112-115.) The parties' joint proposed pretrial order, however, does not include this claim as a contested issue of fact and law. Instead, the proposed pretrial order states that Plaintiffs challenge H.B. 2023 under the Fourteenth Amendment only "because it imposes burdens on voters that outweigh the state's interest in this policy." (Doc. 360 at 7.) Although Plaintiffs' pretrial brief asserts that H.B. 2023 "infringes on the right to associate," it does not elaborate further on the issue. (Doc. 359 at 6.) Moreover, Plaintiffs' proposed findings of fact and conclusions of law contain no proposed factual findings

or legal conclusions regarding H.B. 2023's impact on associational rights. (Doc. 362 ¶ 131.) Defendants did not brief the associational rights issue because, based on the parties' joint description of contested issues in the joint proposed pretrial order, they understood that Plaintiffs would not be seeking to prove that claim at trial. (Doc. 356 at 11 n.6.) Plaintiffs did not seriously advance this issue at trial, though when asked whether the claim still is at issue, Plaintiffs' responded affirmatively and explained that the claim is "part and parcel of our *Anderson/Burdick* claim." (Tr. 1500.)

To the extent this claim has not been abandoned, Plaintiffs have offered no evidence or argument that would lead the Court to deviate from the conclusion it reached at the preliminary injunction stage, where Plaintiffs argued that H.B. 2023 burdens the associational rights of groups that encourage and facilitate voting through ballot collection. (Doc. 85 at 16-18.) The *Anderson/Burdick* framework applies to Plaintiff's First Amendment claim. *Timmons*, 520 U.S. at 358. As the party invoking the First Amendment's protection, however, Plaintiffs bear the additional, threshold burden of proving that it applies. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Conduct, such as collecting a ballot, is not "speech" for purposes of the First Amendment simply because "the person engaging in the conduct intends thereby to express an idea." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). Rather, the First Amendment extends "only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S.

47, 66 (2006). The Court continues to find persuasive the Fifth Circuit's opinion in *Voting for Am. v. Steen*, 732 F.3d 382 (5th Cir. 2013), which considered a challenge to various Texas laws that regulated the receipt and delivery of completed voter registration applications. The Fifth Circuit rejected the argument that collecting and delivering voter registration applications were inherently expressive activities protected by the First Amendment. *Id.* at 392. In doing so, the court agreed that "some voter registration activities involve speech—'urging' citizens to register; 'distributing' voter registration forms; 'helping' voters fill out their forms; and 'asking' for information to verify registrations were processed successfully." *Id.* at 389. It determined, however, that "there is nothing inherently expressive about receiving a person's completed [voter registration] application and being charged with getting that application to the proper place." *Id.* at 392 (internal quotation and citation omitted). Likewise, though many GOTV activities involve First Amendment protected activity, there is nothing inherently expressive or communicative about collecting a voter's completed early ballot and delivering it to the proper place.

Moreover, assuming that H.B. 2023 implicates protected associational rights, it does not impose severe burdens. Nothing in H.B. 2023 prevents Plaintiffs from encouraging, urging, or reminding people to vote, informing and reminding them of relevant election deadlines, helping them fill out early ballots or request special election boards, or arranging transportation to on-site early voting locations, post offices, county recorder's offices, or polling places. *See id.* at 393

(noting that voter registration volunteers remained "free to organize and run the registration drive, persuade others to register to vote, distribute registration forms, and assist others in filling them out"); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla. 2008) ("[The challenged law] does not place any restrictions on who is eligible to participate in voter registration drives or what methods or means third-party voter registration organizations may use to solicit new voters and distribute registration applications. Instead, [it] simply regulates an administrative aspect of the electoral process—the handling of voter registration applications by third-party voter registration organizations after they have been collected from applications."). H.B. 2023 merely regulates who may possess, and therefore return, another's early ballot. Accordingly, H.B. 2023 no more than minimally burdens Plaintiffs' associational rights.

3. Justifications

Because H.B. 2023 no more than minimally burdens Plaintiffs' First and Fourteenth Amendment rights, Defendants must show only that it serves important regulatory interests. *Wash. State Grange*, 552 U.S. at 452. Defendants advance two justifications for H.B. 2023. First, they claim that H.B. 2023 is a prophylactic measure intended to prevent absentee voter fraud by creating a chain of custody for early ballots and minimizing the opportunities for ballot tampering, loss, and destruction. Second, Defendants argue that H.B. 2023 improves and maintains public confidence in election integrity.

Fraud prevention and preserving public confidence in election integrity are facially important state regulatory interests. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."); *see also Crawford*, 553 U.S. at 195 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). Plaintiffs do not argue otherwise. Instead, they argue that H.B. 2023 is unjustified because (1) there is no evidence of absentee voter fraud perpetrated by ballot collectors or of widespread public perception that ballot collection leads to fraud and (2) H.B. 2023 is not an appropriately tailored means of accomplishing Arizona's objectives.

On the first point, there has never been a case of voter fraud associated with ballot collection charged in Arizona. (Tr. 1682, 1981, 2198.) Although three specific allegations of ballot collection voter fraud have been investigated in Arizona, none of the incidents resulted in a criminal prosecution. (Tr. 834-37 1659, 1680-81, 2163-68, 2185-87, 2202-05; Exs. 81, 372, 400.) No specific, concrete example of voter fraud perpetrated through ballot collection was presented by or to the Arizona legislature during the debates on H.B. 2023 or

its predecessor bills. No Arizona county produced evidence of confirmed ballot collection fraud in response to subpoenas issued in this case, nor has the Attorney General's Office produced such information. (Ex. 44, 65.)

The Republican National Lawyers Association ("RNLA") performed a study dedicated to uncovering cases of voter fraud between 2000 and 2011. (Tr. 1868.) The study found no evidence of ballot collection or delivery fraud, nor did a follow-up study through May 2015. (Ex. 91 at 19-20.) Although the RNLA reported instances of absentee ballot fraud, none were tied to ballot collection and delivery. (Tr. 1368-69.) Likewise, the Arizona Republic conducted a study of voter fraud in Maricopa County and determined that, out of millions of ballots cast in Maricopa County from 2005 to 2013, a total of 34 cases of fraud were prosecuted. Of these, 18 involved a felon voting without her rights first being restored. Fourteen involved non-Arizona citizens voting. The study uncovered no cases of fraud perpetrated though ballot collection. (Ex. 91 at 19.)

As for public perception of fraud, the legislative record contains no evidence of widespread public concern that ballot collectors were engaging in voter fraud. (Ex. 91 at 19.) H.B. 2023's sponsor, Representative Michelle Ugenti-Rita, was not aware of any polling data indicating that Arizonans lacked confidence in the State's election system at the time she introduced the bill. (Tr. 1805.)

Although there is no direct evidence of ballot collection fraud or of widespread public perception that ballot collection undermined election integrity,

Arizona's legislature is not limited to reacting to problems as they occur, nor is it required to base the laws it passes on evidence that would be admissible in court. *See Voting for Am.*, 732 F.3d at 394 (explaining that states "need not show specific local evidence of fraud in order to justify preventative measures"). A more exacting review of the evidence supporting Arizona's concerns might be appropriate if H.B. 2023 severely burdened the franchise. But because H.B. 2023's burdens are at most minimal, the Court's review is less exacting. *Timmons*, 520 U.S. at 358.

For example, in *Crawford* the Supreme Court upheld Indiana's voter identification requirement as a measure designed to prevent in-person voter fraud even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 195. Similarly, in *Munro v. Socialist Workers Party*, the Supreme Court upheld a Washington law requiring all minor party candidates for partisan office to receive at least one percent of all votes cast during the primary election in order to appear on the general election ballot. 479 U.S. 189 (1986). Washington argued that the law prevented voter confusion from ballot overcrowding by ensuring candidates appearing on the general election ballot had sufficient community support. *Id.* at 194. In upholding the law, the Supreme Court explained: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidates prior to the imposition of reasonable restrictions on ballot access." *Id.* at 194-95. Rather, "[l]egislatures . . . should be permitted to respond to potential deficiencies in the

electoral process with foresight rather than reactively[.]" *Id.* at 195; s*ee also Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 609 (E.D. Va. 2016) ("Outlawing criminal activity before it occurs is not only a wise deterrent, but also sound public policy."), *aff'd*, 843 F.3d 592 (4th Cir. 2016).

Furthermore, many courts have recognized that absentee voting presents a greater opportunity for fraud. *See Crawford*, 553 U.S. at 225 (Souter, J. dissenting) (noting that "absentee-ballot fraud . . . is a documented problem in Indiana"); *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) ("Voting fraud . . . is facilitated by absentee voting."); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1197 (Ill. App. Ct. 2004) ("It is evident that the integrity of the vote is even more susceptible to influence and manipulation when done by absentee ballot."). Indeed, mail-in ballots by their very nature are less secure than ballots cast in person at polling locations. Accordingly, the Court finds that the regulatory interests Arizona seeks to advance are important.

The question then becomes one of means-end tailoring. Because H.B. 2023 does not impose severe burdens, it need not be narrowly tailored to achieve the State's goals. Nevertheless, the Court still must take into consideration the extent to which Arizona's important regulatory interests make it necessary to impose those minimal burdens. *Burdick*, 504 U.S. at 434

Plaintiffs contend that H.B. 2023 is not necessary because Arizona law already includes measures designed to ensure the security of early mail ballots,

and because H.B. 2023 is unlikely to be a useful tool to prevent or deter voter fraud or to preserve public confidence in election integrity. For example, ballot tampering, vote buying, or discarding someone else's ballot all were illegal prior to the passage of H.B. 2023. (Shooter Dep. 51:16-52:5.) Arizona law has long provided that any person who knowingly collects voted or unvoted ballots and does not turn those ballots in to an elections official is guilty of a class 5 felony. A.R.S. § 16-1005. Further, Arizona has long made all of the following class 5 felonies: "knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election;" "receiv[ing] or agree[ing] to receive any consideration in exchange for a voted or unvoted ballot;" possessing another's voted or unvoted ballot with intent to sell; "knowingly solicit[ing] the collection of voted or unvoted ballots by misrepresenting [one's self] as an election official or as an official ballot repository or . . . serv[ing] as a ballot drop off site, other than those established and staffed by election officials;" and "knowingly collect[ing] voted or unvoted ballots and . . . not turn[ing] those ballots in to an election official . . . or any . . . entity permitted by law to transmit post." A.R.S. §§ 16-1005(a)-(f). The early voting process also includes a number of other safeguards, such as tamper evident envelopes and a rigorous voter signature verification procedure. (Tr. 834-35, 1563-66, 1752, 1878, 2209.)

Plaintiffs also note that, to the extent Arizona wanted to create a chain of custody for early ballots, the legislature rejected a less restrictive amendment to H.B. 2023 proposed by Representative Ken Clark and Senator Martin Quezada, which would have allowed

ballot collection if the collector issued a tracking receipt. (Shooter Dep. at 50:21-23; Ex. 91 at 12; Ex. 16 at 54.) As enacted, H.B. 2023 is less effective at creating a chain of custody because it allows certain individuals to possess another's voted early ballot but does not require a record of that collection. (Reagan Dep. 83:25-85:20.) H.B. 2023 also is not enforced by county recorders. (Ex. 526 at 5 n.15; Ex. 75.) Instead, county recorders will accept all ballots, even those returned by prohibited possessors under H.B. 2023.

Plaintiffs raise fair concerns about whether, as a matter of public policy, H.B. 2023 is the best way to achieve Arizona's stated goals. If H.B. 2023 severely burdened the franchise, and Arizona consequently was required to narrowly tailor the law to achieve compelling ends, Plaintiffs' arguments would carry more weight. But because H.B. 2023's burdens are minimal, and the Court's review consequently less exacting, H.B. 2023's means-end fit can be less precise.

Defendants contend that one of H.B. 2023's purposes is to reduce the opportunity for early mail ballot fraud by limiting who may possess a voter's early ballot. They also use the term "fraud" broadly to encompass not just vote tampering, which is amply addressed by other provisions of Arizona law, but also early ballot loss or destruction. By limiting who may possess another's early ballot, H.B. 2023 reasonably reduces opportunities for early ballots to be lost or destroyed.

Although Arizona's legislature arguably could have addressed this concern through a more narrowly tailored, but also more complex, system of training and

registering ballot collectors and requiring tracking receipts or other proof of delivery, the Constitution does not require Arizona to erect such a bureaucracy if the alternative it has chosen is not particularly burdensome. Arizona reasonably chose to limit possession of early ballots to the voter herself, and to a handful of presumptively trustworthy proxies, such as family and household members. Indeed, H.B. 2023 closely follows the recommendation of the bipartisan Commission on Federal Election Reform, chaired by former President Jimmy Carter and former Secretary of State James A. Baker III, which in 2005 wrote:

> Fraud occurs in several ways. Absentee ballots remain the largest source of potential voter fraud. . . . Absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation. Vote buying schemes are far more difficult to detect when citizens vote by mail. States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting "third-party" organizations, candidates, and political party activists from handling absentee ballots.

Building Confidence in U.S. Elections § 5.2 (Sept. 2005) ("Carter-Baker Report"), *available at* https://www.eac.gov/assets/1/6/Exhibit%20M.PDF.[12]

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[12] The Carter-Baker Report was not offered into evidence by either party. It was part of the record in *Crawford*, however, and the Supreme Court cited it favorably. 553 U.S. at 193. It also was cited

Though it might not be the most narrowly tailored provision, H.B. 2023 is one reasonable way to advance what are otherwise important state regulatory interests. Accordingly, H.B. 2023 does not violate the First and Fourteenth Amendments.

B. Application to OOP Ballot Policy

1. Burden on Voting Rights

Arizona consistently is at or near the top of the list of states that collect and reject the largest number of provisional ballots each election. (Ex. 95 at 23-25.) In 2012 alone "[m]ore than one in every five [Arizona in-person] voters . . . was asked to cast a provisional ballot, and over 33,000 of these—more than 5 percent of all in-person ballots cast—were rejected. No other state rejected a larger share of its in-person ballots in 2012." (Ex. 95 at 24-25.) Interstate comparisons of provisional voting are complicated, however, because states use provisional ballots in different ways, and some states do not utilize provisional voting in any

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favorably by Judge Bybee in his dissent from the en banc Ninth Circuit panel's November 4, 2016 order temporarily enjoining enforcement of H.B. 2023 pending en banc review of this Court's order denying a preliminary injunction. *See Feldman v. Ariz. Sec. of State's Office*, 843 F.3d 366, 414 (9th Cir. 2016) (Bybee, J. dissenting). The Court may take judicial notice of the Carter-Baker Report's recommendations pursuant to Federal Rule of Evidence 201. The Carter-Baker Report is a government document publicly available on the United States Election Assistance Commission's website. Though Plaintiffs might disagree with the Carter-Baker Report's recommendations, their continued validity, or their relevance to this case, there is no question that this recommendation was made and is authentic.

form. For example, nationwide a much higher proportion of provisional votes are rejected for reasons not specified or because the voter voted in an incorrect jurisdiction, as compared to Arizona. Moreover, the overall number of provisional ballots in Arizona, both as a percentage of the registered voters and as a percentage of the number of ballots cast, has consistently declined.

One of the most frequent reasons that provisional ballots are rejected in Arizona is because they are cast OOP. (Ex. 95 at 22-29.) Arizona's rejection of OOP ballots, however, has no impact on the vast majority of Arizona voters. Early mail voting is the most popular method of voting in Arizona, accounting for approximately 80 percent of all ballots cast in the 2016 election. Voters who cast early mail ballots are unaffected by Arizona's policy to not count OOP ballots. Likewise, this policy has no impact on voters in Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties, which have adopted the vote center model.

Moreover, the vast majority of in-person voters successfully vote in their assigned precincts, and OOP voting has consistently declined as a percentage of the total ballots cast in Arizona. In the 2008 general election, Arizona voters cast 14,885 OOP ballots out of the 2,320,851 ballots cast statewide, meaning OOP ballots constituted 0.64 percent of all votes cast in that election. In the 2012 general election, Arizona voters cast 10,979 OOP ballots out of the 2,323,579 ballots cast statewide, accounting for 0.47 percent of all votes cast. In that same election, 1,542,855 Arizona voters

submitted early ballots, and more than 99 percent were counted. In the 2016 general election, Arizona voters cast 3,970 OOP ballots out of the 2,661,497 ballots cast statewide, representing 0.15 percent of all votes cast. Since 2008, OOP voting during general presidential elections has declined 73 percent statewide, dropping from 14,885 in 2008 to 3,970 in the 2016 election. (Tr. 1927-32; Exs. 578, 581.)

OOP voting has declined in midterm elections, as well. In the 2010 general election, Arizona voters cast 4,919 OOP ballots out of the 1,750,840 ballots cast statewide, constituting 0.28 percent of all votes cast. By comparison, in the 2014 general election, Arizona voters cast 3,582 OOP ballots out of the 1,537,671 ballots cast statewide, constituting 0.23 percent of all votes cast. During this same period, the number of registered voters in Arizona increased as follows: 2,987,451 in 2008; 3,146,418 in 2010; 3,124,712 in 2012; 3,235,963 in 2014; and 3,588,466 in 2016. (Exs. 577, 578.)

These trends also hold true at the county level. For example, Maricopa County (Arizona's most populous) has experienced a consistent decline in the number of OOP ballots, both in terms of raw numbers and as a percentage of the total ballots cast. In the 2008 general election, Maricopa County voters cast 9,159 OOP ballots out of the 1,380,571 ballots cast countywide, accounting for 0.66 percent of the all votes cast. In the 2012 general election, Maricopa County voters cast 7,529 OOP ballots out of the 1,390,836 ballots cast countywide, representing 0.54 percent of all votes. In the 2016 general election, Maricopa County voters cast

2,197 OOP ballots out of the 1,608,875 ballots cast countywide, representing 0.14 percent of all votes cast. Likewise, in the 2010 general midterm election, Maricopa County voters cast 3,527 OOP ballots out of the 1,004,125 ballots cast countywide, accounting for 0.35 percent of all votes. In the 2014 general election, Maricopa County voters cast 2,781 OOP ballots out of the 877,187 ballots cast countywide, constituting 0.32 percent of all votes. Between 2008 and 2016, Maricopa County had a staggering decrease of 76 percent in the raw number of OOP ballots. During this same period, the number of registered voters in Maricopa County increased as follows: 1,730,886 in 2008; 1,851,956 in 2010; 1,817,832 in 2012; 1,935,729 in 2014; and 2,161,716 in 2016. (Exs. 579, 582.)

Pima County (Arizona's second most populous) also has experienced a consistent decline in OOP voting. In the 2008 general election, Pima County voters cast 3,227 OOP ballots out of the 397,503 ballots cast countywide, accounting for 0.81 percent of all votes. In the 2012 general election, Pima County voters cast 2,212 OOP ballots out of the 385,725 ballots cast countywide, accounting for 0.57 percent of all votes. In the 2016 general election, Pima County voters cast 1,150 OOP ballots out of the 427,102 ballots cast countywide, representing 0.27 percent of all votes. As for Pima County midterm elections, in the 2010 general election Pima County voters cast 641 OOP ballots out of the 318,995 ballots cast countywide, or 0.20 percent of all votes. By comparison, in the 2014 general election, Pima County voters cast just 371 OOP ballots out of the 274,449 ballots cast countywide, constituting 0.14 percent of the total ballots. The raw number of

OOP ballots thus dropped by 64 percent in Pima County between 2008 and 2016. During this same period, the number of registered voters in Pima County increased as follows: 498,777 in 2008; 486,697 in 2010; 494,630 in 2012; 497,542 in 2014; and 544,270 in 2016. (Exs. 580, 583.)

In light of these figures, and much like their H.B. 2023 claim, Plaintiffs' challenge to Arizona's treatment of OOP ballots is best described as follows: Arizona's rejection of OOP ballots has no impact on the vast majority of Arizona voters, though a small subset of voters is affected more often because of their special circumstances. But Plaintiffs' contention that Arizona's rejection of OOP ballots severely burdens this small subset of voters is unavailing for two independent reasons.

First, Plaintiffs do not directly challenge the electoral practices actually responsible for higher rates of OOP voting. For example, high rates of residential mobility are associated with higher rates of OOP voting. Almost 70 percent of Arizonans have changed their residential address in the decade between 2000 and 2010, the second highest rate of any state. The vast majority of Arizonans who moved in the last year moved to another address within their current city of residence and, compared with other states, Arizona has the second highest rate of within-city moves. Most of these within-city moves took place in Maricopa and Pima Counties. (Ex. 95 at 11-12.) Relatedly, rates of OOP voting are higher in neighborhoods where renters make up a larger share of householders. (Ex. 96 at 41.) One significant reason residential mobility tends to

result in higher rates of OOP voting is because voters who move sometimes neglect to timely update their voter registration. (*See, e.g.*, Tr. 602-06.) Relatedly, voters registered for PEVL who move and do not update their address information will not have their early ballot forwarded to their new address. Arizona in-person voters are more likely to vote OOP if they have signed up for the PEVL and have moved. (*See, e.g.*, Tr. 124, 987-89.)

Additionally, changes in polling locations from election to election, inconsistent election regimes used by and within counties, and placement of polling locations all tend to increase OOP voting rates. (Ex. 95 at 12-15, 26-27, 44-52, 54-58.) In Maricopa County, between 2006 and 2008 at least 43 percent of polling locations changed from one year to the next. Likewise, approximately 40 percent of Maricopa County's active registered voters' polling locations changed between 2010 and 2012. Changes in Maricopa County polling locations and election regimes continued to occur in 2016, when Maricopa County experimented with 60 vote centers for the presidential preference election, then reverted to a precinct-based system with 122 polling locations for the May special election, and then implemented over 700 assigned polling places in the August primary and November general elections. The OOP voting rate was 40 percent higher for voters who had experienced such polling place changes. (Ex. 95 at 14-15, 56-57.) Further, some individual voters testified that they arrived at an incorrect polling place but were not redirected by poll workers to the correct location, nor were the implications of casting a provisional ballot explained. These voters stated that they would have

gone to the correct polling location had they been so advised. (Tr. 120, 265-66, 352-54, 493, 935-36.)

Plaintiffs do not challenge as unconstitutional the manner in which Arizona and its counties allocate or relocate polling places, inform voters of their assigned precincts, or train poll workers. They do not challenge Arizona's requirement that voters update their voter registrations after moving to a new address. Nor do Plaintiffs challenge Arizona's use of the precinct-based system, though the logical implication of their argument is that Arizona may utilize a precinct-based system but cannot enforce it as to races for which an OOP voter otherwise would be eligible to vote (usually so-called "top of the ticket" races). (Tr. 1495-96.) Instead, Plaintiffs challenge what Arizona does with OOP ballots after they have been cast. But there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots. Though the consequence of voting OOP might make it more imperative for voters to correctly identify their precincts, it does not increase the burdens associated with doing so.

Second, the burdens imposed by precinct-based voting—a system which, again, Plaintiffs do not directly challenge—are not severe. Precinct-based voting merely requires voters to locate and travel to their assigned precincts, which are ordinary burdens traditionally associated with voting.[13] *See Colo.*

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[13] Plaintiffs again conflate the burdens imposed by the (indirectly) challenged practice with the socioeconomic circumstances that can

Common Cause v. Davidson, No. 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."); *see also Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (explaining that voters cannot be absolved "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").

Moreover, Arizona does not make it needlessly difficult for voters to find their assigned precincts. Indeed, a 2016 Survey of Performance of American Elections ("SPAE") found that none of the survey respondents for Arizona reported that it was "very difficult" to find their polling places. By comparison, several other states had respondents who reported that it was very difficult to find their polling places. The 2016 SPAE also reported that approximately 94 percent of the Arizona respondents thought it was very easy or somewhat easy to find their polling places. (Tr. 1350-51.)

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make those burdens more difficult for certain subsets of voters to surmount. Arizona's precinct-based system does not impose residential instability, transportation difficulties, or informational deficits on any voter. These circumstances exist independent of the precinct-based system. Instead, the precinct-based system imposes on voters the burden of locating and travelling to an assigned precinct, which might be more difficult for some voters to do because of their circumstances.

In Arizona counties with precinct-based systems, voters generally are assigned to precincts near where they live, and county officials consider access to public transportation when assigning polling places. (Tr. 1570-73.) Arizona voters also can learn of their assigned precincts in a variety of ways. (*See* Ex. 526 at 11-18.)

If precincts or polling places have been altered since the previous election, registered voters are sent a mailing informing them of this fact and of where their new polling places are located. (Tr. 1575-76.) State law requires that election officials send each household with a registered voter who is not on the PEVL a sample ballot at least eleven days prior to election day, A.R.S. § 16-510(C), which contains instructions and identifies their polling location. (Doc. 361 ¶ 52.) The Secretary of State's Office operates several websites that make voter-specific polling place information available and allow the Secretary's staff to respond directly to voter inquiries. The Secretary of State's Office also mails a publicity pamphlet to voters, which includes information on how to locate their correct precincts. This information is provided in English and Spanish. The Secretary also uses social media, town halls, and live events (such as county and state fairs) to register voters and answer questions.

In addition, several Arizona counties, including Maricopa and Pima Counties, operate online polling place locators that are available in English and Spanish. Voters also can learn their assigned polling locations by calling the office of the county recorder for the county in which they reside. Counties spread

awareness about polling place locations and the consequences of OOP voting through news and social media. This information is communicated in both English and Spanish. Some counties—including the state's most populous, Maricopa and Pima—post signs at polling places informing voters that OOP ballots will not be counted. (Tr. 1586-88; Ex. 368.) Poll workers also are trained to direct voters who appear at an incorrect polling location to their correct polling location and to notify such voters that their votes will not be counted if they vote with a provisional ballot at the wrong location.

The Arizona Citizens Clean Elections Commission ("CCEC") operates a website in English and Spanish that provides a tool for voters to determine their polling place. The CCEC also engages in advertising to help educate voters on where to vote. Partisan groups, such as the ADP and political campaigns, also help educate voters on how to find their assigned polling places. (Tr. 1575-76.)

In sum, Arizona's rejection of OOP ballots has no impact on the vast majority of voters. Although a small and ever-dwindling subset of voters still vote OOP, how Arizona treats OOP ballots after they have been cast does not make it difficult for these voters to find and travel to their correct precincts. To the extent Plaintiffs' claim may properly be considered as an indirect challenge to Arizona's strictly enforced precinct-based system, the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens traditionally associated with

voting. Moreover, for those who find it too difficult to locate their assigned precinct, Arizona offers generous early mail voting alternatives.[14]

2. Justifications

Weighing against the minimal burdens imposed by precinct-based voting are numerous important state regulatory interests. Precinct-based voting serves an important planning function for Arizona counties by helping them estimate the number of voters who may be expected at any particular precinct, which allows for better allocation of resources and personnel. In turn, orderly administration of elections helps to increase voter confidence in the election system and reduces wait times. (Tr. 1608-10, 1896-913.) Because elections involve many different overlapping jurisdictions, the precinct-based system also ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote. Precincts must be created, and ballots printed, so that the residential address of every voter is connected to the correct assortment of local elected officials. The system thus promotes voting for local candidates and issues and helps make ballots less confusing by not providing voters with ballots that include races for which they are not eligible to vote. (Ex. 95 at 10; Doc. 361 ¶ 47.)

Indeed, other courts have recognized these numerous and significant advantages:

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[14] If a voter is capable of travelling to an incorrect precinct, she certainly is capable of mailing an early ballot. Moreover, early mail voters may drop their ballots off at any polling place, even one to which they are not assigned.

> [Precinct-based voting] caps the number of voters attempting to vote in the same place on election day; it allows 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 Cty. Democratic Party v. Blackwell, 387 F.3d 565, 569 (6th Cir. 2004).

Plaintiffs do not quarrel with the importance or legitimacy of these interests or contest that precinct-based voting brings significant advantages. Instead, they argue that Arizona need not reject OOP ballots in their entirety to accomplish these goals. Plaintiffs contend that Arizona can just as easily accomplish these goals and reap these benefits by partially counting OOP ballots, accepting votes in races for which the voter is eligible to vote and rejecting votes in races for which the voter is not.

Counting OOP ballots is administratively feasible. Twenty states partially count OOP ballots. (Ex. 94 at 32-33.) These include the neighboring states of California, Utah, and New Mexico. Cal. Elec. Code §§ 14310(a)(3), 14310 (c)(3), 15350; Utah Code Ann. § 20A-4-107(1)(b)(iii), 2(a)(ii), 2(c); N.M. Stat. Ann § 1-12-25.4(F); N.M. Admin. Code 1.10.22.9(N). Elections administrators in these and other states have

established processes for counting only the offices for which the OOP voter is eligible to vote. Some states, such as New Mexico, use a hand tally procedure, whereby a team of elections workers reviews each OOP ballot, determines the precinct in which the voter was qualified to vote, and marks on a tally sheet for that precinct the votes cast for each eligible office. *See* N.M. Admin Code 1.10.22.9(H)-(N). Other states, such as California, use a duplication method, whereby a team of elections workers reviews each OOP ballot, determines the precinct in which the voter was qualified to vote, obtains a new paper ballot for the correct precinct, and duplicates the votes cast on the OOP ballot onto the ballot for the correct precinct. Only the offices that appear on both the OOP ballot and the ballot for the correct precinct are copied. The duplicated ballot then is scanned through the optical scan voting machine and electronically tallied. (Tr. 777-81.)

Arizona has a similar duplication procedure that it uses to process certain types of ballots that cannot be read by an optical scan voting machine, such as ballots that are damaged, marked with the wrong color pen, or submitted to the county recorder by a military or overseas voter via facsimile. (Tr. 1564-66; Ex. 455 at 177-78.) Arizona also uses the duplication procedure to process some provisional ballots cast by voters who are eligible to vote in federal elections, but whom Arizona does not permit to vote in state elections. (Ex. 455 at 187.) This duplication procedure takes about twenty minutes per ballot. (Tr. 1604-606.)

If strict scrutiny applied and Arizona were required to narrowly tailor its precinct enforcement to achieve compelling state interests, Plaintiffs' critiques might carry more weight. But in light of the minimal burdens associated with the precinct-based system, Arizona's policy need not be the narrowest means of enforcement.

Moreover, Plaintiffs are incorrect that Arizona can accomplish all of its goals without its strict enforcement regime. If voters in precinct-based counties can have their ballots counted for statewide and countywide races even if they vote in the wrong precinct, they will have far less incentive to vote in their assigned precincts and might decide to vote elsewhere. Other voters might incorrectly believe that that they can vote at any location and receive the correct ballot. Voters might also be nefariously directed to vote elsewhere. North Carolina, for example, has experienced a problem with "political organizations intentionally transporting voters to the wrong precinct." *See N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 461 (M.D.N.C. 2016) *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016). This, in turn, would undermine both the ability of Arizona counties to accurately estimate the number of voters who may be expected at any particular precinct and allocate appropriate resources and personnel, and Arizona's goal of promoting voting for local candidates. Consequently, if OOP ballots are partially counted in Arizona, candidates for local office will have to expend resources to educate voters on why it nevertheless is important to vote within their assigned precincts. Moreover, requiring counties to review all OOP ballots for any given election and determine the specific

contests in which each voter was eligible to vote would impose a significant financial and administrative burden on Maricopa and Pima Counties because of their high populations.

Plaintiffs' requested relief essentially would transform Arizona's precinct-based counties, including its two most populous, into quasi-vote-center counties. But the vote-center model is not appropriate for every jurisdiction. Compared to precinct-based polling places, it can be difficult for counties to predict the number of voters at each vote center. Consequently, vote centers can cause voter wait times to increase, with corresponding decreases in turnout, due to the potential for uneven distribution of voters. (Tr. 1607-611, 1896-913.) Plaintiffs' requested relief therefore would deprive precinct-based counties of the full range of benefits that correspond with the precinct-based system.

Precinct-based voting is a quintessential time, place, and manner election regulation. Arizona's policy to not count OOP ballots is one mechanism by which it enforces and administers this precinct-based system to ensure that it reaps the full extent of its benefits. This policy is sufficiently justified in light of the minimal burdens it imposes. Accordingly, Arizona's rejection of OOP ballots does not violate the Fourteenth Amendment.

VI. SECTION 2 OF THE VOTING RIGHTS ACT (RESULTS TEST)

"Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights

Act." *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013). In its original form, § 2 of the VRA prohibited all states from enacting any "standard, practice, or procedure . . . imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* (quoting § 2, 79 Stat. 437).

"At the time of passage of the Voting Rights Act of 1965, § 2, unlike other provisions of the Act, did not provoke significant debate in Congress because it was viewed largely as a restatement of the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991). The Supreme Court took a similar view, holding in a 1980 plurality opinion that "the language of § 2 no more than elaborates upon that of the Fifteenth Amendment," and therefore § 2 is violated only if a state enacted the challenged law with the intent to discriminate on account of race or color. *City of Mobile v. Bolden*, 446 U.S. 55, 60-62 (1980) (plurality opinion).

In 1982, in response to the Supreme Court's opinion in *Bolden*, "Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone[.]" *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). In its current form, § 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301. To succeed on a § 2 claim, a plaintiff now may show either that the challenged law was enacted with the intent to discriminate on account of race or color, or that "under the totality of the circumstances, a challenged election law or procedure ha[s] the effect of denying a protected minority equal chance to participate in the electoral process." *Gingles*, 478 U.S. at 44 n.8. "The essence of a § 2 claim" brought under the so-called "effects" or "results test" "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority and non-minority] voters to elect their preferred representatives." *Id.* at 47.

When determining whether, under the totality of the circumstances, a challenged voting practice interacts with social and historical conditions to cause inequality in the electoral opportunities of minority and non-minority voters, courts may consider, as relevant, the following factors derived from the Senate Report accompanying the 1982 amendments to the VRA ("Senate Factors"):

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)). Courts also may consider "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.*; *see also Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426-27 (1991) (explaining that courts may consider a state's "justification for its electoral system"). "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45.

Until relatively recently, "Section 2's use . . . has primarily been in the context of vote-dilution cases," which "'involve challenges to methods of electing representatives—like redistricting or at-large districts—as having the effect of diminishing minorities voting strength.'" *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 239 (4th Cir. 2014) (quoting *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds by* 2014 WL 10384647 (6th Cir. 2014)). *Gingles* itself was a vote dilution case. "While vote-dilution jurisprudence is well-developed, numerous courts and commentators have noted that applying Section 2's 'results test' to vote-denial claims is challenging, and a clear standard for its application has not been conclusively

established."[15] *Ohio Democratic Party*, 834 F.3d at 636; *see also Veasey v. Abbott*, 830 F.3d 216, 243-44 (5th Cir. 2016) ("Although courts have often applied the *Gingles* factors to analyze claims of vote dilution . . . there is little authority on the proper test to determine whether the right to vote has been *denied* or *abridged* on account of race."); *League of Women Voters*, 769 F.3d at 239 ("[T]here is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context."); *Ohio State Conference*, 768 F.3d at 554 ("A clear test for Section 2 vote denial claims . . . has yet to emerge."); *Simmons v. Galvin*, 575 F.3d 24, 41-42 n.24 (1st Cir. 2009) ("'While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge . . . [and] the Supreme Court's seminal opinion in *Gingles* . . . is of little use in vote denial cases.'" (quoting Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights A*ct, 57 S.C. L. Rev. 689, 709 (2006))); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 595 (2013) ("[T]he legal contours of vote denial claims remain woefully underdeveloped as compared to vote dilution claims."). Indeed, some of the Senate Factors cited by the *Gingles* Court as relevant to the totality of the circumstances inquiry do not seem particularly germane to vote denial claims. *Cf. Gingles*, 478 U.S. at 45 ("While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly

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[15] A "vote denial" claim generally refers "to any claim that is not a vote dilution claim." *Ohio State Conference*, 768 F.3d at 554

to vote dilution claims, other factors may also be relevant and considered."); *see Frank v. Walker*, 768 F.3d 744, 752-55 (7th Cir. 2014) (questioning usefulness of Senate Factors in vote denial claims); *Ohio Democratic Party*, 834 F.3d at 638 (explaining that totality of circumstances inquiry in vote denial cases is "*potentially* informed by the 'Senate Factors' discussed in *Gingles*" (emphasis added)).

Several circuit courts that recently have analyzed vote denial claims have adopted the following two-part framework based on the text of § 2 and the Supreme Court's guidance in *Gingles*:

> First, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> 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.

League of Women Voters, 769 F.3d at 240 (internal quotations and citations omitted); *see also Veasey*, 830 F.3d at 244; *Ohio Democratic Party*, 834 F.3d at 636; *Frank*, 768 F.3d at 754-55 (adopting two-park framework for sake of argument but expressing skepticism of the second step "because it does not distinguish between discrimination by [the state] from other persons' discrimination"). The Ninth Circuit

likewise endorsed this two-part framework in the context of this case. *Feldman v. Ariz. Sec. of State's Office*, 840 F.3d 1057, 1070 (9th Cir. 2016); *id.* at 1091 (Thomas, C.J. dissenting); *Feldman*, 843 F.3d at 367.

"The first part of this two-prong framework inquires about the nature of the burden imposed and whether it creates a disparate effect[.]" *Veasey*, 830 F.3d at 244. Drawing on the Supreme Court's guidance in *Gingles*, "[t]he second part . . . provides the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both." *Id.* That is, "the second step asks not just whether social and historical conditions 'result in' a disparate impact, but whether the challenged *voting standard or practice* causes the discriminatory impact as *it* interacts with social and historical conditions." *Ohio Democratic Party*, 834 F.3d at 638 (emphasis in original).

> Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of a causal connection between the challenged voting practice and a prohibited result is 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.

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

Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997).

A close reading of the decisions of courts that recently have grappled with vote denial claims reveals two important nuances of the results test. The first bears on the meaning of "disparity" as it has been used in vote denial cases. "No state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank*, 768 F.3d at 754. Perfect racial parity is unlikely to exist in any aspect of a state's election system, which is to say it is unlikely that minorities and non-minorities will be impacted by laws in perfect proportion to their representation in the overall voting population. Unless the VRA is to be interpreted to sweep away all elections regulations, some degree of disproportionality must be tolerable.

Therefore, not every disparity between minority and non-minority voters is cognizable under the VRA. Rather, to be cognizable the disparity must be meaningful enough to work "an inequality in the opportunities enjoyed by [minority as compared to non-minority] voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47; *see Gonzales*, 677 F.3d at 405 (suggesting that disparity must be "relevant"). For example, the Seventh Circuit rejected the notion that:

> if whites are 2% more likely to register than blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2. Motor-voter

> registration, which makes it simple for people to register by checking a box when they get drivers' licenses, would be invalid, because black and Latino citizens are less likely to own cars and therefore less likely to get drivers' licenses. . . . Yet it would be implausible to read § 2 as sweeping away almost all registration and voting rules. It is better to understand § 2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command[.]

Frank, 768 F.3d at 754.

The second nuance bears on the definition of "impact" or "effect." To be cognizable, the challenged voting practice must "impose a discriminatory burden," *League of Women Voters*, 769 F.3d at 240, and not merely result in a "disproportionate impact," *Salt River Project*, 109 F.3d at 595. Section 2 "does not sweep away all election rules that result in a disparity in the convenience of voting." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016). A contrary interpretation would require the Court to accept:

> an unjustified leap from the disparate inconveniences that voters face when voting to the denial or abridgment of the right to vote. Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others. For example, every polling place will, by necessity, be located closer to some voters than to others. To interpret § 2 as prohibiting any regulation that imposes a disparate inconvenience would mean that every polling

> place would need to be precisely located such that no group had to spend more time traveling to vote than did any other. Similarly, motor-voter registration would be found to be invalid [if] members of [a] protected class were less likely to possess a driver's license. Yet, courts have also correctly rejected that hypothetical.

Id.; *see also N.E. Ohio Coal. for the Homeless*, 837 F.3d at 628 ("A law cannot disparately impact minority voters if its impact is insignificant to begin with."); *Ohio Democratic Party*, 834 F.3d at 623 ("[W]hile the challenged regulation may slightly diminish the convenience of registration and voting, it applies even-handedly to all voters, and, despite the change, Ohio continues to provide generous, reasonable, and accessible voting options to all Ohioans. The issue is not whether some voter somewhere would benefit from six additional days of early voting or from the opportunity to register and vote at the same time. Rather, the issue is whether the challenged law results in a cognizable injury under the Constitution or the Voting Rights Act."); *Frank*, 843 F.3d at 753 ("[U]nless the State of Wisconsin made it 'needlessly hard' to obtain the requisite photo identification for voting, this requirement did not result in a 'denial' of anything by Wisconsin, as § 2(a) requires."); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) ("While it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of 'meaningful access to the political process.'" (quoting *Osburn v. Cox*, 369 F.2d 1283, 1289 (11th Cir. 2004)); *Glover v. S.C. Democratic*

Party, No. C/A 4-04-CV-2171-25, 2004 WL 3262756, at *6 (D.S.C. Sept. 3, 2004) ("[T]he Court does not find that difficulty voting equates with a 'denial or abridgment' of the right to vote.").

With these principles in mind, the Court first will apply step one of the two-part vote denial framework to each of the challenged voting practices to determine whether either disparately burdens minority voters. The Court then will discuss step two and the Senate Factors.

A. Step One (Disparate Impact)

1. H.B. 2023

H.B. 2023 is facially neutral. It applies to all Arizonans regardless of race or color. Plaintiffs nonetheless allege that H.B. 2023 disparately burdens Hispanic, Native American, and African American voters as compared to non-minority voters because these groups disproportionately rely on others to collect and return their early ballots. But there are no records of the numbers of people who, in past elections, have relied on now-prohibited third parties to collect and return their early mail ballots, and of this unknown number Plaintiffs have provided no quantitative or statistical evidence comparing the proportion that is minority versus non-minority.

This evidentiary hole presents a practical problem. Disparate impact analysis is a comparative exercise. To determine whether a practice disparately impacts minorities, the Court generally must know approximately: (1) how many people will be affected by the practice, and (2) their racial composition. Without

this information, it becomes difficult to compare the law's impact on different demographic populations and to determine whether the disparities, if any, are meaningful. That is, it might be true that minorities broadly have used ballot collection services more often than non-minorities, but the discrepancy might be slight enough that it does not meaningfully deny minorities an equal opportunity to participate in the political process and elect their preferred representatives. *See Frank*, 768 F.3d at 754.

Indeed, the Court is aware of no vote denial case in which a § 2 violation has been found without quantitative evidence measuring the alleged disparate impact of a challenged law on minority voters. Rather, the standards developed for analyzing § 2 vote denial cases suggest that proof of a relevant statistical disparity might be necessary at step one, even though it is not alone sufficient to prove a § 2 violation because of the causation requirement at step two.[16] *See Gonzales*, 677 F.3d at 405; *Veasey*, 830 F.3d at 244 (noting that "courts regularly utilize statistical analyses to discern whether a law has a discriminatory

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[16] In vote dilution cases the Senate Factors "are sometimes used as a non-statistical proxy . . . to link disparate impacts to current or historical conditions of discrimination." *Ohio Democratic Party*, 834 F.3d at 637 n.11. But to use the *Gingles* factors to prove the existence of a disparity essentially would collapse the step one and step two inquiries. That is, a plaintiff could simply assume that the challenged law causes a meaningful disparity between minorities and non-minorities because of social and historical discrimination in the state. This perhaps is another illustration of how the *Gingles* vote-dilution framework is an imperfect fit for vote denial claims.

impact"). Further, in other contexts courts have "recognized the necessity of statistical evidence in disparate impact cases." *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008) (Fair Housing Act); *Pottenger v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003) (Age Discrimination in Employment Act); *Cooper v. S. Co.*, 390 F.3d 695, 716 (11th Cir. 2004), *overruled on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (Title VII); *Rollins v. Alabama Cmty. Coll. Sys.*, No. 2:09-CV-636-WHA, 2010 WL 4269133, at *9 (M.D. Ala. Oct. 25, 2010) (Equal Pay Act); *Davis v. City of Panama City, Fla.*, 510 F. Supp. 2d 671, 689 (N.D. Fla. 2007) (Title VII and 42 U.S.C. § 1983).

The Court is not suggesting that quantitative evidence of a challenged voting practice's actual effect is needed in vote denial cases. As Chief Judge Thomas noted in his dissent during the preliminary appellate phase of this case, "quantitative evidence of the effect of a rule on voting behavior is only available after an election has occurred, at which point the remedial purpose of the Voting Rights Act is no longer served." *Feldman*, 840 F.3d at 1092 n.5 (Thomas, C.J. dissenting). But quantitative evidence of the number of voters who used ballot collection *before* H.B. 2023's enactment, together with similar evidence of those voters' demographics, would permit the Court to reasonably infer how many voters would be affected by H.B. 2023's limitations in future elections, and whether

those voters disproportionately would be minorities.[17] As one commentator has argued:

> It can be difficult to document the racial composition of those who use a voting opportunity . . . , given that election and other public records often do not include racial or ethnic data. There is no getting around this problem. But given that § 2 forbids the denial or abridgement of the vote on account of race, it is reasonable that plaintiffs be required to make a threshold showing they are disproportionately burdened by the challenged practice, in the sense that it eliminates an opportunity they are more likely to use or imposes a requirement they are less likely to satisfy.

Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 476 (2015).

The Court is mindful, however, that no court has explicitly required quantitative evidence to prove a vote denial claim, and a majority of the en banc Ninth Circuit panel reviewing the preliminary phase of this case appears to have rejected such a rule. The Court therefore does not find against Plaintiffs on this basis. Rather, the Court finds that Plaintiffs' circumstantial and anecdotal evidence is insufficient to establish a cognizable disparity under § 2.

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[17] Notably, the trial in this matter occurred after H.B. 2023 had been in effect for two major elections—the 2016 presidential preference election and the 2016 general election—yet Plaintiffs still were unable to produce data on the law's impact.

To overcome the lack of quantification, Plaintiffs attempt to prove the existence of a meaningful disparity through two general categories of circumstantial evidence. First, lawmakers, elections officials, and community advocates testified that ballot collection tends to be used more by communities that lack easy access to secure, outgoing mail services; the elderly, homebound, and disabled; the poor; those who lack reliable transportation; those who work multiple jobs or lack childcare; and less educated voters who are unfamiliar with or more intimidated by the voting process. In turn, data shows that these socioeconomic circumstances are disproportionately reflected in minority communities. (*See* Ex. 97 at 57; Tr. 59-60, 416-26, 432-39, 629-35, 895-900.) It stands to reason, then, that prior to H.B. 2023's enactment minorities generally were more likely than non-minorities to give their early ballots to third parties.

For example, relative to non-minorities, Hispanics and African Americans are nearly two times more likely to live in poverty, and the poverty rate for Native Americans is over three times higher. (Ex. 93 at 15.) Wages and unemployment rates for Hispanics, African Americans, and Native Americans consistently have exceeded non-minority unemployment rates for the period of 2010 to 2015. (Ex. 91 at 40; Ex. 93 at 15.) According to the 2015 American Community Survey 1-year estimates, unemployment rates were 10.5 percent for African Americans, 7.7 percent for Hispanics, 16.8 percent for Native Americans, and only 5.6 percent for non-minorities. In Arizona, 68.9 percent of non-minorities own a home, whereas only 32.3 percent of African Americans, 49 percent of Hispanics, and 56.1

percent of Native Americans do so. (Ex. 93 at 15, 17; Ex. 98 at 33.)

Non-minorities remain more likely than Hispanics, Native Americans, and African Americans to graduate from high school, and are nearly three times more likely to have a bachelor's degree than Hispanics and Native Americans. Additionally, in a recent survey, over 22.4 percent of Hispanics and 11.2 percent of Native Americans rated themselves as speaking English less than "very well," as compared to only 1.2 percent of non-minorities. (Ex. 93 at 16.) Due to their lower levels of literacy and education, minority voters are more likely to be unaware of certain technical rules, such as the requirement that early ballots be received by the county recorder, rather than merely postmarked, by 7:00 p.m. on Election Day. (Ex. 91 at 38.)

As of 2015, Hispanics, Native Americans, and African Americans fared worse than non-minorities on a number of key health indicators. (Ex. 93 at 18.) Native Americans in particular have much higher rates of disability than non-minorities, and Arizona counties with large Native American populations have much higher rates of residents with ambulatory disabilities. For example, "17 percent of Native Americans are disabled in Apache County, 22 percent in Navajo County, and 30 percent in Coconino County." Further, "11 percent [of individuals] have ambulatory difficulties in Apache County, 13 percent in Navajo County, and 12 percent in Coconino County, all of which contain significant Native American populations and reservations." (Ex. 97 at 60.)

Hispanics, Native Americans, and African Americans also are significantly less likely than non-minorities to own a vehicle, more likely to rely upon public transportation, more likely to have inflexible work schedules, and more likely to rely on income from hourly wage jobs. (Ex. 93 at 12-18; Ex. 97 at 51-52; Tameron Dep. 155:5-20; Pstross Dep. 34:11-22.) Ready access to reliable and secure mail service is nonexistent in some minority communities. (Ex. 97 at 57; Ex. 98 at 18; Tr. 506.)

These disparities exist in both urban and rural areas. For example, Representative Charlene Fernandez described a lack of home mail service in rural San Luis, a city that is 98 percent Hispanic. Almost 13,000 residents rely on a post office located across a major highway. With no mass transit, a median income of $22,000, and many people not owning cars, receiving and sending mail in San Luis can be more difficult than in other communities. (Tr. 40-46.) A surprising number of voters in the Hispanic community also distrust returning their voted ballot via mail, particularly in low-income communities where mail theft is common. Although a lack of outgoing mail presents a problem for rural minority voters, unsecure mailboxes are an impediment for urban minorities who distrust the mail service and prefer instead to give their ballots to a volunteer. (Tr. 98, 238-39, 896-97, 1170; Healy Dep. 97:18-24; Scharff Dep. 92:5-17.)

These problems are particularly acute in Arizona's Native American communities, in which vehicle ownership is significantly lower than non-minority

Arizonans. (Ex. 91 at 42.) Between one quarter and one half of all households on Native American reservations lack access to a vehicle. (Ex. 98 at 16.) Moreover, according to Dr. Rodden, "the extent to which rural Native Americans lack mail service is quite striking." "[T]he majority of Native Americans in non-metropolitan Arizona do not have residential mail service." "Only 18 percent of Native American registered voters have home mail delivery. . . . The rate at which registered voters have home mail service is over 350 percent higher for non-Hispanic whites than for Native Americans." As such, most Native American registered voters must travel to a town to retrieve their mail, "[y]et rates of vehicle access are quite low." (Ex. 97 at 57.) On the Navajo Reservation, most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families. (Tr. 172-75, 297-98.)

There is no home delivery in the Tohono O'odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. The postmaster for the Tohono O'odham Nation anecdotally related to Representative Fernandez that she observes residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month. (Tr. 52-58, 315-17.)

Thus, "for many Native Americans living in rural locations, especially on reservations, voting is an activity that requires the active assistance of friends and neighbors." (Ex. 97 at 60.) LeNora Fulton—a

member of the Navajo Nation, former representative of the Fort Defiance Chapter of the Navajo National Council, member of the Navajo Election Board of Supervisors, and the Apache County Recorder from 2004 through 2016, where her responsibilities included overseeing voter registration, early voting and voter outreach—explained that people in the Navajo Nation trust non-family members to deliver their early ballots because "[i]t's part of the culture. . . . [T]here is a clan system. They may not be related by blood, but they are related by clan. Everyone on the Navajo Nation is related one way or another through the clan system." Ballot collection and delivery by those with the means to travel "was the standard practice with the Apache County . . . but also with the Nation[.]" "We have many people that would come into our office in St. Johns that help individuals that not are not able to get a ballot, you know, to the office. They would bring it in. And so it was just a standard practice . . . It was a norm for us." According to Fulton, limiting who may collect and deliver early ballots "would be a huge devastation . . . . The laws are supposed to be helpful to people, but in this instance, it's harmful." (Tr. 283-85, 300, 322-324.)

The second category of circumstantial evidence concerns those who tend to offer ballot collection services. Within the last decade, ballot collection has become a larger part of the Democratic Party's GOTV strategy. The Democratic Party and community advocacy organizations have focused their ballot collection efforts on low-efficacy voters, who trend disproportionately minority. In turn, minorities in Arizona tend to vote for Democratic candidates. (Ex. 93 at 4-6, 11; Tr. 92, 283, 309, 416-26, 632-33, 659, 902-03,

1143, 1191-96, 1200, 1407, 1770-71, 1843-44; Healy Dep. 28:15-29:13.) Individuals who have collected ballots in past elections observed that minority voters, especially Hispanics, were more interested in utilizing their services. Indeed, Helen Purcell, who served as the Maricopa County Recorder for 28 years from 1988 to 2016, observed that ballot collection was disproportionately used by Hispanic voters. (Tr. 417-19, 635, 642, 866, 895-900, 931-32, 1039-40, 1071, 1170.)

In contrast, the Republican Party has not significantly engaged in ballot collection as a GOTV strategy. The base of the Republican Party in Arizona trends non-minority. On average, non-minorities in Arizona vote 59 percent for Republican candidates, as compared with 35 percent of Hispanic voters. Individuals who have collected ballots in past elections have observed that voters in predominately non-minority areas were not as interested in ballot collection services. (Tr. 430-31, 898, 1170, 1192, 1408; Ex. 91 at 31.)

Based on this evidence, the Court finds that prior to H.B. 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties. The Court, however, cannot speak in more specific or precise terms than "more" or "less." Although there are significant socioeconomic disparities between minorities and non-minorities in Arizona, these disparities are an imprecise proxy for disparities in ballot collection use. Plaintiffs do not argue that all or even most socioeconomically disadvantaged voters use ballot collection services, nor does the evidence support such

a finding. Rather, the anecdotal estimates from individual ballot collectors indicate that a relatively small number of voters have used ballot collection services in past elections. It reasonably follows, then, that even among socioeconomically disadvantaged voters, most do not use ballot collection services to vote. Considering the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions, it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities.

Moreover, H.B. 2023 does not impose burdens beyond those traditionally associated with voting. Although, for some voters, ballot collection is a preferred and more convenient method of voting, H.B. 2023 does not deny minority voters meaningful access to the political process simply because the law makes it slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots. In fact, no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote. The Court therefore finds that Plaintiffs have not carried their burden at step one of the vote denial framework.

2. OOP Voting

Unlike their H.B. 2023 challenge, Plaintiffs provided quantitative and statistical evidence of disparities in OOP voting through the expert testimony of Dr. Rodden. Because Arizona does not track the racial demographics of its voters, Dr. Rodden used an

open-source software algorithm that he found online to predict each voter's race. (Tr. 378-414, 520-24.) Specifically, Dr. Rodden placed the names of individuals who cast ballots in particular elections into Census blocks and tracts, for which racial data is available from the Census, and then combined that information with surname data to estimate the race of each voter. This approach has become common in academic studies, as well as VRA litigation. Dr. Rodden added further precision to his estimates by conditioning them on not just surnames and neighborhood race statistics, but also on additional information found in the voter file, such as the individual's age and party.[18] (Ex. 97 at 10-15.)

Dr. Rodden's analysis is credible and shows that minorities are over-represented among the small number of voters casting OOP ballots. For example, in Maricopa County—which accounts for 61 percent of Arizona's population—non-minority voters accounted for only 56 percent of OOP ballots cast during the 2012 general election, despite casting 70 percent of all in-

[18] Dr. Thornton criticized Dr. Rodden's analysis of racial disparities in OOP voting among the smallest minority groups in Arizona's smaller counties, but when Dr. Rodden conducted an analysis addressing Dr. Thornton's criticisms he reached the same results. Dr. Thornton also was critical of Dr. Rodden's analysis because the application of the algorithm to Arizona voters includes unidentifiable measurement error. But because there is no concrete racial data for individual voters, Dr. Rodden has no means to compare his estimates. Indeed, if such concrete data existed, there would have been no need for Dr. Rodden's estimates. Moreover, as Dr. Rodden explains in his Second Expert Report, his methods lead to more conservative estimates of disparities, a fact not challenged by Dr. Thornton. (Ex. 98 at 3, 8-11.)

person votes. In contrast, African American and Hispanic voters made up 10 percent and 15 percent of in-person voters, but accounted for 13 percent and 26 percent of OOP ballots, respectively. Native American voters accounted for 1.1 percent of in-person voters, and 1.3 percent of OOP ballots. Dr. Rodden observed similar results for Pima County. (Ex. 91 at 52; Ex. 95 at 31-33, 37, 43.)

Similarly, minority voters cast a disproportionate share of OOP ballots during the 2016 general election. In Maricopa County, estimated rates of OOP voting were twice as high for Hispanics, 86 percent higher for African Americans, and 73 percent higher for Native Americans than for their non-minority counterparts. In Pima County, rates of OOP voting were 150 percent higher for Hispanics, 80 percent higher for African Americans, and 74 percent higher for Native Americans than for non-minorities. Moreover, in Pima County the overall rate of OOP voting was higher, and the racial disparities larger, in 2016 than in 2014. Among all counties that reported OOP ballots in the 2016 general election, a little over 1 in every 100 Hispanic voters, 1 in every 100 African-American voters, and 1 in every 100 Native American voters cast an OOP ballot. For non-minority voters, the figure was around 1 in every 200 voters. Racial disparities in OOP voting were found in all counties except La Paz County, which has a small minority population. (Ex. 97 at 3, 19-21, 28-34.)

Although Dr. Rodden's race estimation is credible, his analysis paints an incomplete picture of the practical impact of OOP voting because the majority of

Arizonans successfully vote by mail and therefore are unaffected by precinct requirements. For example, in the 2012 general election Arizona voters cast 10,979 OOP ballots out of the 2,323,579 ballots cast statewide, accounting for 0.47 percent of all votes cast. In Maricopa County, 1,390,836 total ballots were cast, of which 7,529 (or 0.54 percent) were rejected for being cast out of the voter's assigned precinct. OOP ballots cast by non-minority voters therefore accounted for only 0.3 percent of all votes cast in Maricopa County during the 2012 election, whereas OOP ballots cast by Hispanic and African American voters accounted only for approximately 0.14 percent and 0.07 percent, respectively. These figures dropped substantially in the 2016 general election, during which only 3,970 Arizonans voted OOP out of the 2,661,497 ballots cast statewide, representing only 0.15 percent of all votes cast. In Maricopa County, 1,608,875 total ballots were cast, of which only 2,197 (or 0.14 percent) were cast OOP. (Tr. 1927-32; Exs. 578-79, 581.)

Considering OOP ballots represent such a small and ever-decreasing fraction of the overall votes cast in any given election, OOP ballot rejection has no meaningfully disparate impact on the opportunities of minority voters to elect their preferred representatives. To be clear, the Court is not suggesting that the votes of individuals who show up at the wrong precinct are unimportant. But, as a practical matter, the disparity between the proportion of minorities who vote at the wrong precinct and the proportion of non-minorities who vote at the wrong precinct does not result in minorities having unequal access to the political process. *See* Fed. Judicial Ctr., *Reference Manual on*

Scientific Evidence 252 (3d ed. 2011) (discussing difference between statistical significance and practical significance). No state has exactly equal rates at every stage of its voting system, and in the end the vast majority of all votes in Arizona—cast by minority and non-minority voters alike—are counted. *See Frank*, 768 F.3d at 754.

Moreover, Arizona's policy to not count OOP ballots is not the cause of the disparities in OOP voting. Dr. Rodden's analysis confirms that OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently. These groups, in turn, are disproportionately composed of minorities. (Ex. 97 at 16-18.) Because minority voters in Arizona have disproportionately higher rates of residential mobility, they are more likely to need to renew their voter registration and reeducate themselves about their new voting locations. (Ex. 91 at 39; Ex. 93 at 17; Ex. 95 at 4, 7-12; Ex. 98 at 33.)

Polling place locations present additional challenges for Native American voters. For example, Navajo voters in Northern Apache County lack standard addresses, and their precinct assignments for state and county elections are based upon guesswork, leading to confusion about the voter's correct polling place. Additionally, boundaries for purposes of tribal elections and Apache County precincts are not the same. As a result, a voter's polling place for tribal elections often differs from the voter's polling place for state and county elections. Inadequate transportation access also

can make travelling to an assigned polling place difficult. (Ex. 97 at 51-54; Tr. 299-301.)

Plaintiffs, however, do not challenge the manner in which Arizona counties allocate and assign polling places or Arizona's requirement that voters re-register to vote when they move. Plaintiffs also offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information. Nor have they shown that precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters. To the contrary, there are many ways for voters in Arizona to locate their assigned precincts, and state, county, and local elections officials engage in substantial informational campaigns and voter outreach. Plaintiffs, instead, have challenged what Arizona does with OOP ballots after they have been cast, which does not cause the observed disparities in OOP voting.

In sum, Plaintiffs have not carried their burden at step one of the vote denial framework for two independent reasons. First, they have not shown that Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts. Second, given that OOP ballots account for such a small fraction of votes cast statewide, Plaintiffs have not shown that the racial disparities in OOP voting are practically significant enough to work a meaningful inequality in the opportunities of minority voters as

compared to non-minority voters to participate in the political process and elect their preferred representatives.

B. Step Two (Senate Factors)

Step two of the results test is informed by the Senate Factors and asks whether the disparate burdens imposed by the challenged voting practices are in part caused by or linked to social and historical conditions within the state that have or currently produce discrimination against the affected minorities. The Court does not need to reach this step because Plaintiffs have not shown at step one that the challenged voting practices impose meaningfully disparate burdens on minority voters as compared to non-minority voters. *Cf. Ohio Democratic Party*, 834 F.3d at 638 ("If this first element is met, the second step comes into play, triggering consideration of the 'totality of the circumstances,' potentially informed by the 'Senate Factors' discussed in '*Gingles*.'"). Nonetheless, to ensure that the record is fully developed, the Court will address below the evidence pertinent to the Senate Factors. The Court will not discuss factors three and four, however, because they are not germane to the challenged voting practices and there is insufficient evidence to warrant discussion.

1. Relevant History of Official Discrimination

Arizona has a history of discrimination against Native Americans, Hispanics, and African Americans. Such discrimination began as early as 1912, when Arizona became a state, and continued into the modern

era. In 1975, Arizona's history of discrimination resulted in it becoming one of only nine states to be brought wholly under § 5 of the VRA as a "covered jurisdiction." In addition to being covered under § 5, it was one of only three states to be covered under § 4(f)(4) of the Act for Spanish Heritage. (Ex. 89 at 5-24; Ex. 91 at 2, 24-30; Ex. 521 at 43-45; Doc. 361 ¶ 42.)

When Arizona became a state in 1912, Native Americans were excluded from voting. Even after Congress acknowledged that Native Americans were citizens in 1924, thereby affording them the right to vote, Arizona's Constitution continued to deny Native Americans that right. (Ex. 89 at 17; Ex. 521 at 43.) It was not until 1948—24 years after federal law allowed Native Americans to vote—that the Arizona Supreme Court found the State's disenfranchisement of Native Americans was unconstitutional and finally granted Native Americans the right to vote. (Doc. 361 ¶ 17; Ex. 89 at 17; Ex. 521 at 45.); *Harrison v. Laveen*, 196 P.2d 456, 463 (Ariz. 1948).

Despite this ruling, Native Americans, as well as Hispanics and African Americans, continued to face barriers to participation in the franchise. For example, in 1912 Arizona enacted an English literacy test for voting. The test was enacted specifically to limit "the ignorant Mexican vote," but it also had the effect of reducing the ability of African Americans and Native Americans to register and vote, as registrars applied the test to these communities as well. Well into the 1960s, white Arizonans challenged minority voters at the polls by asking them to read and explain literacy

cards. (Doc. 361 ¶ 14; Ex. 89 at 14-17; Ex. 521 at 44-45.)

In 1970, Congress amended the VRA to enact a nationwide ban on literacy tests after finding that they were used to discriminate against voters on account of their race or ethnicity. In reaching that finding, Congress cited evidence that showed application of the literacy test had significantly lowered the participation rates of minorities. It specifically found that in Arizona "only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average." It also noted that Arizona had a serious deficiency in Native American voter registrations. Rather than comply with the VRA and repeal its literacy test, Arizona challenged the ban, arguing that it could not be enforced to the extent that it was inconsistent with the State's literacy requirement. Even after the Supreme Court upheld Congress's ban, Arizona waited an additional two years to formally repeal its literacy test. (Ex. 89 at 14-18; Ex. 91 at 24); *see Or. v. Mitchell*, 400 U.S. 112, 118 (1970).

The effects of Arizona's literacy test were compounded by the State's history of discrimination in the education of its Hispanic, Native American, and African American citizens. (Doc. 361 ¶¶ 2-4; Ex. 89 at 9-10; Ex. 91 at 5.) From 1912 until the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), segregated education was widespread throughout Arizona and sanctioned by both the courts and the state legislature. (Ex. 521 at 35-39; Ex. 89 at 9-12); *see also Dameron v. Bayless*, 126 P. 273 (Ariz. 1912); *Gonzales v. Sheely*, 96 F. Supp. 1004, 1008-09

(D. Ariz. 1951) (enjoining segregation of Mexican school children in Maricopa County). In fact, the Tucson Public Schools only recently reached a consent decree with the DOJ over its desegregation plan in 2013. (Ex. 91 at 27.) The practice of segregation also extended beyond schools; it was common place to have segregated public spaces such as restaurants, swimming pools, and theaters. (Ex. 89 at 15; Ex. 521 at 34.) Even where schools were not segregated, Arizona enacted restrictions on bilingual education. As recently as 2000, Arizona banned bilingual education with the passage of Proposition 203. (Ex. 89 at 20; Ex. 91 at 47.)

Arizona has a record of failing to provide adequate funding to teach its non-English speaking students. This under-funding has taken place despite multiple court orders instructing Arizona to develop an adequate funding formula for its programs, including a 2005 order in which Arizona was held in contempt of court for refusing to provide adequate funding for its educational programs. (Ex. 91 at 46-47); *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005), *vacated*, 204 Fed. App'x 580 (9th Cir. 2006). "According to the Education Law Center's latest National Report Card that provided data for 2013, Arizona ranked 47th among the states in per-student funding for elementary and secondary education." (Ex. 91 at 47.)

Along with the State's hostility to bilingual education, Maricopa County has sometimes failed to send properly translated education materials to its Spanish speaking residents, resulting in confusion and distrust from Hispanic voters. For example, in 2012, Maricopa County misprinted the date of the election on

over 2,000 Spanish language information cards and bookmarks, some of which were distributed into the community. (Ex. 89 at 22; Ex. 91 at 51; Healy Dep. 114:1-22.)

With that said, discrimination against minorities in Arizona has not been linear. (Ex. 521 at 4.) For example, Arizona was subject to § 5 preclearance requirements until 2013. In *Shelby*, however, the Supreme Court found the formula used to determine which states were subject to preclearance requirements unconstitutional because it was "based on 40–year–old facts having no logical relation to the present day." 570 U.S. at 553-54. Moreover, during the time that Arizona was under preclearance requirements (1975-2013), the DOJ did not issue any objections to any of its statewide procedures for registration or voting.

From 1982 to 2002, the DOJ objected to four of Arizona's statewide redistricting plans. Arizona acted to avoid the politics of racially discriminatory redistricting when, in 2000, the Arizona Independent Redistricting Commission ("AIRC") was formed pursuant to a voter initiative (Proposition 106). The AIRC is composed of two Republicans, two Democrats, and an Independent, and it is tasked with redrawing of legislative and congressional district lines following each decennial Census. According to its enacting constitutional provisions, the AIRC considers the following six criteria when redistricting: (a) equal population; (b) compactness and contiguousness; (c) compliance with the Constitution and the VRA; (d) respect for communities of interest; (e) incorporation of visible geographic features,

including city, town and county boundaries, as well as undivided census tracts; and (f) creation of competitive districts where there is no significant detriment to other goals. (Doc. 361 ¶ 44.) The most recent AIRC set a goal to pass preclearance with its first submittal to DOJ. The AIRC did this by ensuring the competitiveness of legislative and congressional districts and ensuring that minorities have the opportunity to elect candidates of their choice. *See Harris v. Ariz. Indep. Redistricting Comm'n*,-- U.S. --, 136 S. Ct. 1301, 1308 (2016). The Commission succeeded, and the DOJ approved Arizona's new maps on April 9, 2012 without objection.

In sum, "[d]iscriminatory action has been more pronounced in some periods of state history than others . . . [and] each party (not just one party) has led the charge in discriminating against minorities over the years." Sometimes, however, partisan objectives are the motivating factor in decisions to take actions detrimental to the voting rights of minorities. "[M]uch of the discrimination that has been evidenced may well have in fact been the unintended consequence of a political culture that simply ignores the needs of minorities." (Ex. 90 at 8.) Arizona's recent history is a mixed bag of advancements and discriminatory actions.

2. Racially Polarized Voting

Arizona has a history of racially polarized voting, which continues today. (Ex. 91 at 30-33, 44-45). In the most recent redistricting cycle, experts for the AIRC found that at least one congressional district and five legislative districts clearly exhibited racially polarized voting. (Ex. 91 at 29-33.) Exit polls for the 2016 general

election demonstrate that voting between non-minorities and Hispanics continues to be polarized along racial lines. (Ex. 91 at 29-33, 44-45; Ex. 92 at 12, 14; Ex. 94 at 4); *see also Gonzalez*, 677 F.3d at 407.

3. Socioeconomic Effects of Discrimination

Racial disparities between minorities and non-minorities in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona. (Ex. 89 at 7-8, 12, 23; Ex. 91 at 39-43; Ex. 93 at 12-18, 21, 24; Ex. 95 at 4, 9-11; Ex. 97 at 46-52, 56-58; Ex. 98 at 16, 18, 33; Tameron Dep. 155:5-20; Pstross Dep. 34:11-22; Tr. 506.) Of these, disparities in transportation, housing, and education are most pertinent to the specific burdens imposed by the challenged laws.

4. Racial Appeals in Political Campaigns

Arizona's racially polarized voting has resulted in racial appeals in campaigns. For example, when Raul Castro ran for governor in the 1970s, his opponents urged support for the white candidate because "he looked like a governor." In that same election, a newspaper published a picture of Fidel Castro with a headline that read "Running for governor of Arizona." (Ex. 89 at 19.) In a 2010 bid for State Superintendent of Public Education, John Huppenthal "ran an advertisement in which the announcer said that Huppenthal was 'one of us.' The announcer noted that Huppenthal voted against bilingual education and 'will stop La Raza.'" Similarly, when running for governor in 2014, Maricopa County Attorney Andrew Thomas ran

an ad describing himself as "the only candidate who has stopped illegal immigration" while "simultaneously show[ing] a Mexican flag with a red strikeout line through it superimposed over the outline of Arizona." (Ex. 91 at 44.)

Moreover, racial appeals have been made in the specific context of legislative efforts to limit ballot collection. During the legislative hearings on earlier bills to criminalize ballot collection, Republican sponsors and proponents expressed beliefs that ballot collection fraud regularly was occurring but struggled with the lack of direct evidence substantiating those beliefs. In 2014, the perceived "evidence" arrived in the form of a racially charged video created by Maricopa County Republican Chair A.J. LaFaro (the "LaFaro Video") and posted on a blog. (Ex. 121.) The LaFaro Video showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots. It also contained a narration of "Innuendos of illegality . . . [and] racially tinged and inaccurate commentary by . . . LaFaro." (Ex. 91 at 18 n.40; Ex. 524 at 23-24.) LaFaro's commentary included statements that the man was acting to stuff the ballot box; that LaFaro did not know if the person was an illegal alien, a dreamer, or citizen, but knew that he was a thug; and that LaFaro did not follow him out to the parking lot to take down his tag number because he feared for his life. The LaFaro Video goes on to tell about ballot parties where people gather en mass and give their un-voted ballots to operatives of organizations so they can not only collect them, but also vote them illegally. (Ex. 91 at 18; Ex. 121.)

The LaFaro Video did not show any obviously illegal activity and there is no evidence that the allegations in the narration were true. Nonetheless, it "became quite prominent in the debates over H.B. 2023." (Tr. 1154.) The LaFaro video also was posted on Facebook and YouTube, shown at Republican district meetings, and was incorporated into a television advertisement—entitled "Do You Need Evidence Terry?"—for Secretary Reagan when she ran for Secretary of State. (Ex. 91 at 18; Ex. 107.) In the ad, the LaFaro Video plays after a clip of then-Arizona Attorney General Terry Goddard stating he would like to see evidence that there has been ballot collection fraud. While the video is playing, Secretary Reagan's narration indicates that the LaFaro Video answers Goddard's request for evidence of fraud. The LaFaro Video, however, merely shows a man of apparent Hispanic heritage dropping off ballots and not obviously violating any law.[19] (Ex. 107.)

5. Minority Representation in Public Offices

Notwithstanding racially polarized voting and racial appeals, the disparity in the number of minority elected officials in Arizona has declined. Arizona has been recognized for improvements in the number of Hispanics and Native Americans registering and voting, as well as in the overall representation of

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[19] Notably, LaFaro was not called as a witness in this case, Defendants do not rely on the LaFaro Video as evidence of fraud, and, despite the implications of her campaign advertisement, Secretary Reagan testified in deposition that "I have never accused anyone collecting ballots as doing fraudulent activities[.]" (Reagan Dep. 91:2-3.)

minority elected officials in the State. (Ex. 521 at 27-28.) "Nonwhites make up 25 percent of Arizona's elected office holders, compared to 44 percent of the total population. This gives [Arizona] the 16th best representation ratio in the country." (Ex. 524 at 44.)

Nevertheless, Arizona has seen only one Hispanic and one African American elected to statewide office, and Arizona has never elected a Native American to statewide office. No Native American or African American has been elected to represent Arizona in the United States House of Representatives. Further, no Hispanic, Native American, or African American has ever served as a United States Senator representing Arizona or as Arizona Attorney General. (Ex. 91 at 45; Ex. 93 at 19-20; Ex. 89 at 19, 22.)

6. Lack of Responsiveness to Minority Needs

Plaintiffs' evidence on this factor, presented through the analysis and opinions of Dr. Lichtman, is insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups. Dr. Lichtman ignored various topics that are relevant to whether elected officials have shown responsiveness, and he did not conduct research on the issues in Arizona when considering this factor.

Notably, the CCEC engages in outreach to various communities, including the Hispanic and Native American communities, to increase voter participation. The CCEC develops an annual voter education plan in consultation with elections officials and stakeholders, and the current Chairman of the CCEC is Steve Titla,

an enrolled member of the San Carlos Apache Tribe, who has been particularly vocal in supporting CCEC outreach to Native Americans.

7. Justifications for Challenged Provisions

Precinct-based voting helps Arizona counties estimate the number of voters who may be expected at any particular precinct, allows for better allocation of resources and personnel, improves orderly administration of elections, and reduces wait times. The precinct-based system also ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote, thereby promoting voting for local candidates and issues and making ballots less confusing. Arizona's policy to not count OOP ballots is one mechanism by which it strictly enforces this system to ensure that precinct-based counties maximize the system's benefits. This justification is not tenuous.

As for H.B. 2023, there is no direct evidence that the type of ballot collection fraud the law is intended to prevent or deter has occurred. Although the justifications for H.B. 2023 are weaker than the justifications for the State's OOP ballot policy, Arizona nonetheless has a constitutionally adequate justification for the law: to reduce opportunities for early ballot loss or destruction.

8. Overall Assessment

In sum, of the germane Senate Factors, the Court finds that some are present in Arizona and others are not. Plaintiffs have shown that past discrimination in Arizona has had lingering effects on the socioeconomic status of racial minorities. But Plaintiffs' causation

theory is too tenuous to support their VRA claim because, taken to its logical conclusion, virtually any aspect of a state's election regime would be suspect as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters. Such a loose approach to causation, which potentially would sweep away any aspect of a state's election regime in which there is not perfect racial parity, is inconsistent with the Ninth Circuit's repeated emphasis on the importance of a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Salt River Project*, 109 F.3d at 595. For these reasons, the Court concludes that Plaintiffs have not carried their burden at either step of the § 2 results test.

VII. FIFTEENTH AMENDMENT/§ 2 (INTENTIONAL DISCRIMINATION)

Lastly, Plaintiffs contend that H.B. 2023 violates § 2 and the Fifteenth Amendment because it was enacted with the intent to suppress minority votes. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and authorizes Congress to enforce this mandate "by appropriate legislation." Section 2 is such legislation. Although Congress amended the VRA in 1982 to add the results test, § 2 continues to prohibit intentional discrimination in a manner coextensive with the Fifteenth Amendment. Consequently, the standards for both the statutory and the constitutional claim overlap.

The parties agree that the standard for finding unconstitutional, intentional racial discrimination is governed by the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). There, the Supreme Court explained that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65. Rather, "[p]roof of racially discriminatory intent or purpose is required to show a violation" of the Constitution. *Id.* at 265.

Discriminatory purpose must be "a motivating factor in the decision," but it need not be the only factor. *Id.* at 265-66. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Wash. v. Davis*, 426 U.S. 229, 242 (1976). "But the ultimate question remains: did the legislature enact a law 'because of,' and not just 'in spite of,' its discriminatory effect." *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 200 (4th Cir. 2016) (quoting *Pers. Adm'r of Mass. v. Fenney*, 442 U.S. 256, 279 (1979)).

To guide this inquiry, the *Arlington Heights* Court articulated a non-exhaustive list of factors courts should consider. These so-called "*Arlington Heights* Factors" include: (1) the historical background and sequence of events leading to enactment;

(2) substantive or procedural departures from the normal legislative process; (3) relevant legislative history; and (4) whether the law has a disparate impact on a particular racial group. *Arlington Heights*, 429 U.S. at 266-68. If "racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). This same framework applies to § 2 claims based on allegations of discriminatory purpose. *See Garza v. Cty. of L.A.*, 918 F.2d 763, 766 (9th Cir. 1990).

Having considered these factors, the Court finds that H.B. 2023 was not enacted with a racially discriminatory purpose. Though some individual legislators and proponents of limitations on ballot collection harbored partisan motives—perhaps implicitly informed by racial biases about the propensity of GOTV volunteers in minority communities to engage in nefarious activities—the legislature as a whole enacted H.B. 2023 in spite of opponents' concerns about its potential effect on GOTV efforts in minority communities, not because of that effect. Despite the lack of direct evidence supporting their concerns, the majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting.

Beginning with the historical background, H.B. 2023 emerged in the context of racially polarized

voting, increased use of ballot collection as a Democratic GOTV strategy in low-efficacy minority communities, and on the heels of several prior efforts to restrict ballot collection, some of which were spearheaded by former Arizona State Senator Don Shooter.[20] Due to the high degree of racial polarization in his district, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy. (Tr. 1061-63, 1200, 1687-88, 2158-62; Ex. 89 at 24; Ex. 91 at 52-55; Ex. 92 at 2-10; Ex. 93 at 2; Shooter Dep. at 117:5-16.) Indeed, Shooter's 2010 election was close: he won with 53 percent of the total vote, receiving 83 percent of the non-minority vote but only 20 percent of the Hispanic vote. (Ex. 94 at 4.)

Shooter's efforts to limit ballot collection were marked by unfounded and often farfetched allegations of ballot collection fraud. (Tr. 1064, 2162, 2194, 2205; Ex. 3 at 7-8; Ex. 10 at 3-9; Ex. 25 at 22-23; Ex. 91 at 19-20; Ex. 123.) Though his allegations were demonstrably false, they—along with the racially-tinged LaFaro Video—spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting.[21] (Tr. 1644, 1687, 2158-59, 2161-62; Ex. 10 at 49-53; Ex. 17 at 15-16; Ex. 23 at 83-84.)

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[20] Shooter most recently was a member of the Arizona House of Representatives but served as a state senator during the relevant time period.

[21] Although the video referenced by various proponents of ballot collection limitations was not always identified as such, it is plain from their descriptions that they were describing the LaFaro video.

Turning to the relevant legislative history, proponents of H.B. 2023 repeatedly voiced concerns that mail-in ballots were less secure than in-person voting, and that ballot collection created opportunities for fraud. Although no direct evidence of ballot collection fraud was presented to the legislature or at trial, Shooter's allegations and the LaFaro Video were successful in convincing H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting, and these proponents appear to have been sincere in their beliefs that this was a potential problem that needed to be addressed. (Ex. 17 at 11-13, 17-75, 83-84; Ex. 19 at 56-57; Ex. 21 at 11; Ex. 23 at 36; Tr. 1450, 1805, 1822-23.) Notably, H.B. 2023 found support among some minority officials and organizations. For example, the measure was supported by the Arizona Latino Republican Association for the Tucson Chapter, which expressed concerns that elderly people in the Latino community were being taken advantage of by ballot collectors. (Ex. 17 at 71-75.) Likewise, Michael Johnson, an African American who had served on the Phoenix City Council, strongly favored H.B 2023 and expressed concern about stories of ballot collectors misrepresenting themselves as election workers. (Ex. 17 at 45-50.) Further, although some Democratic lawmakers accused their Republican counterparts of harboring partisan or racially discriminatory motives, this view was not shared by all of H.B. 2023's opponents. (Tr. 697.) For example, Representative Fernandez testified that she has no reason to believe H.B. 2023 was enacted with the intent to suppress Hispanic voting. (Tr. 83.)

As for departures from the normal legislative process, Plaintiffs cite two prior efforts to limit ballot collection as examples of procedural discrepancies. First, in 2011 Arizona enacted S.B. 1412, which required any person who delivered more than ten early ballots to provide a copy of her photo identification to the receiving elections official. If a ballot collector could not produce a copy of her photo identification, the elections official was directed to record the information from whatever identification that the ballot collector had available. Within 60 days of each election, the Secretary of State was to compile a public statewide report listing the identities and personal information of all ballot collectors. (Ex. 2 at 16-19; Ex. 91 at 6-7.)

When S.B. 1412 became law, Arizona still was subject to § 5 preclearance. Accordingly, S.B. 1412 could not go into effect until the law had been precleared by the DOJ or a federal court. The Arizona Attorney General submitted the law for preclearance on April 26, 2011, and on June 27, 2011 the DOJ precleared all provisions except for the provision regulating ballot collection. (Ex. 41; Ex. 91 at 6-7.) As to that provision, the DOJ stated that "the information sent [wa]s insufficient to enable us to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." The DOJ asked for more information and stated that "if no response is received within sixty days of this request, the Attorney General may object to the proposed changes." (Ex. 41.) Rather than respond to the DOJ's request for more information, the Attorney General chose to voluntarily withdraw the

ballot collection provision on July 28, 2011, rendering the law unenforceable. (Ex. 91 at 6-7; Ex. 42.) "Of 773 preclearance submissions this was one of only 6 that were fully or partially withdrawn in Arizona." (Ex. 91 at 7.) Arizona formally repealed the law shortly thereafter. (Ex. 5.)

Second, Republican legislators again tried to restrict ballot collection in 2013 with the enactment of H.B. 2305, which banned partisan ballot collection and required other ballot collectors to complete an affidavit stating that they had returned the ballot. Violation of the law was a misdemeanor. H.B. 2305 was passed along nearly straight party lines in the waning hours of the legislative session. (Ex. 7; Ex. 91 at 7-10.) Shortly after its enactment, citizen groups organized a referendum effort and collected more than 140,000 signatures to place H.B. 2305 on the ballot for a straight up-or-down vote. (Tr. 1071-72; Ex. 91 at 11.) Had H.B. 2305 been repealed by referendum, the legislature could not have enacted related legislation except on a supermajority vote, and only to "further[] the purposes" of the referendum. Ariz. Const. art. 4, pt. 1, § 1(6)(C), (14). Rather than face a referendum, Republican legislators again repealed their own legislation along party lines. The bill's primary sponsor, Secretary Reagan (who, at the time, was a State Senator), admitted that the legislature's goal was to break the bill into smaller pieces and reintroduce individual provisions "a la carte." (Ex. 91 at 11.)

Although the circumstances surrounding these prior bills are somewhat suspicious, these departures have less probative value because they involve different bills

passed during different legislative sessions by a substantially different composition of legislators. *See Burton v. City of Belle Glade*, 178 F.3d 1175, 1195 (11th Cir. 1999) ("[W]e fail to see how evidence of . . . a [city's] prior refusal to annex [a housing project] standing alone establishes any intent, let alone a discriminatory one" for later annexation decision); *Kansas City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir. 1962) (noting the "questionable import that the rejection of prior bills may have in determining congressional intent as to subsequently enacted legislation").

Plaintiffs also claim that H.B. 2023 represents a substantive deviation from normal legislative processes because it differs from these prior bills. But the fact that different bills from different sponsors and different legislative sessions did not have the same substance is not alone surprising, nor is it particularly probative of discriminatory intent. Moreover, although Plaintiffs argue that the legislature made H.B. 2023 harsher than previous ballot collection bills by imposing felony penalties, they ignore that H.B. 2023 in other respects is more lenient than its predecessors given its broad exceptions for family members, household members, and caregivers.

Finally, Plaintiffs highlight the law's impact on minority voters. As previously noted, ballot collection was used as a GOTV strategy in mostly low-efficacy minority communities, though the Court cannot say how often voters used ballot collection, nor can it measure the degree or significance of any disparities in its usage. The legislature was aware that the law could

impact GOTV efforts in low-efficacy minority communities; numerous democratic lawmakers speaking in opposition to the bill expressed concerns that it would adversely impact minority GOTV efforts. (Ex. 17 at 74; Ex. 19 at 17-18, 20, 35-37; Ex. 23 at 89-91; Ex. 25 at 27-28.) But this evidence shows only that the legislature enacted H.B. 2023 in spite of its impact on minority GOTV efforts, not because of that impact. Indeed, proponents of the bill seemed to view these concerns as less significant because of the minimal burdens associated with returning a mail ballot. (*See, e.g.*, Ex. 23 at 81-82.)

Based on the totality of the circumstances, Plaintiffs have not shown that the legislature enacted H.B. 2023 with the intent to suppress minority votes. Rather, some individual legislators and proponents were motivated in part by partisan interests. Shooter, for example, first raised concerns about ballot collection after winning a close election. In addition to raising concerns about ballot collectors impersonating election workers, Johnson complained that ballot collection put candidates "who don't have accessibility to large groups to go out and collect those ballots" at a disadvantage. Likewise, Richard Hopkins, a proponent of the bill and a 2014 Republican candidate for the Arizona House of Representatives, claimed that he lost his election because of "ballot harvesting." (Ex. 17 at 17, 45-49.) In opposing ballot collection restrictions, Democratic Senator Steve Farley stated "[t]he problem we're solving is that one party is better at collecting ballots than the other one." (Ex. 25 at 35.)

But partisan motives are not necessarily racial in nature, even though racially polarized voting can sometimes blur the lines. Importantly, both the Fifteenth Amendment and § 2 of the VRA—upon which Plaintiffs' intentional discrimination claims are based—address racial discrimination, not partisan discrimination. That some legislators and proponents harbored partisan interests, rather than racially discriminatory motives, is consistent with Arizona's history of advancing partisan objectives with the unintended consequence of ignoring minority interests. (Ex. 90 at 8.)

Moreover, partisan motives did not permeate the entire legislative process. Instead, many proponents acted to advance facially important interests in bringing early mail ballot security in line with in-person voting security, notwithstanding the lack of direct evidence that ballot collection fraud was occurring. Though Plaintiffs might disagree with the manner in which the legislature chose to address its concerns about early ballot security, "the propriety of doing so is perfectly clear," and the legislature need not wait until a problem occurs to take proactive steps it deems appropriate. *Crawford*, 553 U.S. at 196; *see also Lee*, 188 F. Supp. 3d at 609.

The Court therefore finds that the legislature that enacted H.B. 2023 was not motivated by a desire to suppress minority voters. The legislature was motivated by a misinformed belief that ballot collection fraud was occurring, but a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting. Some proponents also

harbored partisan motives. But, in the end, the legislature acted in spite of opponents' concerns that the law would prohibit an effective GOTV strategy in low-efficacy minority communities, not because it intended to suppress those votes.

VIII. CONCLUSION

Plaintiffs have not carried their burden to show that the challenged election practices severely and unjustifiably burden voting and associational rights, disparately impact minority voters such that they have less opportunity than their non-minority counterparts to meaningfully participate in the political process, or that Arizona was motivated by a desire to suppress minority turnout when it placed limits on who may collect early mail ballots. Plaintiffs have raised fair concerns about the wisdom of H.B. 2023 and Arizona's treatment of OOP ballots as matters of public policy. The Court, however, is not charged with second-guessing the prudence of Arizona's laws. The Court's authority extends only to determining whether, in exercising its constitutional authority to regulate the times, places, and manner of elections, Arizona has acted within permissible constitutional and statutory bounds. In exercising this duty, the Court also is constrained by decisions of the Supreme Court, including those standing for the proposition that legislatures may act prophylactically rather than upon specific evidence of a documented problem, and those finding that prevention of voter fraud and preservation of public confidence in election integrity are important state interests. *See Purcell*, 549 U.S. at 4; *Crawford*, 553 U.S. at 195; *Munro*, 479 U.S. at 194-95; *Eu*, 489

U.S. at 231. Based on a careful review of the evidence and governing case law, the Court concludes that the challenged provisions contravene neither the Constitution nor the VRA. Therefore,

IT IS ORDERED as follows:

1. Defendants' oral motion for judgment on partial findings (Doc. 384) is **DENIED** as moot.

2. The Court finds in favor of Defendants and against Plaintiffs on all claims.

3. The Clerk of the Court shall enter judgment accordingly and terminate this case.

Dated this 10th day of May, 2018.

/s/Douglas L. Rayes
Douglas L. Rayes
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV-16-01065-PHX-DLR

[Filed May 8, 2018]

Leslie Feldman, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
Arizona Secretary of State's Office, et al.,	)
	)
Defendants.	)
	)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed May 8, 2018, judgment is entered in favor of defendants and against plaintiffs on all claims. This action is hereby terminated.

Brian D. Karth
District Court Executive/Clerk of Court

May 8, 2018

s/ A. Duran
By Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-16-01065-PHX-DLR

[Filed May 8, 2018]

Democratic National Committee, DSCC, and Arizona Democratic Party,	)
Plaintiffs,	)
v.	)
Michele Reagan and Mark Brnovich,	)
Defendants.	)

ORDER

This order addresses a number of evidentiary issues raised during the bench trial in this matter.

I. Deposition Designations

Upon review of deposition transcripts, the Court issues the following rulings on Plaintiffs' and Defendants' objections and counter-designations.

A. July 14, 2016 Deposition of Sheila Healy

1. Defendants' objection to Plaintiffs' designation from page 5 at line 10, through page 7 at line 22, on the rule of completeness is sustained;

2. Defendants' objection from page 8, lines 1 through 5, on the issue of relevance is overruled;

3. Defendants' objection from page 9 at line 18, through page 10 at line 7, on the rule of completeness is sustained;

4. Defendants' objection from page 13 at line 10, through page 15 at line 11, on the rule of completeness is sustained;

5. Defendants' objection from page 13 at line 10, through page 15 at line 11, on the issue of relevance is sustained;

6. Defendants' objection from page 17 at line 14, through page 18 at line 14 on the issue of relevance is overruled;

7. Defendants' objection from page 31 at line 18, through page 32 at line 4 on the issue of relevance is overruled;

8. Defendants' objection from page 32 at lines 5 through 18, on the rule of completeness is sustained;

9. Defendants' objection from page 32 at line 25, through page 33 at line 4 on the rule of completeness is sustained;

10. Defendants' objection from page 47 at line 24, through page 48 at line 8 on the rule of completeness is sustained;

11. Defendants' objection from page 50 at line 10, through page 51 at line 5, and from page 52 at lines 2-8 on the rule of completeness is sustained;

12. Defendants' objection from page 61 at lines 15 through 22 on the rule of completeness is sustained;

13. Defendants' objection from page 61 at line 23, through page 62 at line 1 on Healy's lack of personal knowledge is overruled;

14. Defendants' objection from page 64 at lines 1 through 12 on the issue of legal conclusions is overruled;

15. Defendants' objection from page 64 at lines 13 through 22 on Healy's lack of personal knowledge is sustained;

16. Defendants' objection from page 65 at lines 1 through 3 for lack of foundation and Healy's lack of personal knowledge is overruled;

17. Defendants' objection from page 66 at line 22, through page 67 at line 3 on the issue of legal conclusions is overruled;

18. Defendants' objection from page 78 at line 12 through page 79 at line 8 on the issue of relevance is overruled;

19. Defendants' objection from page 79 at lines 11 through 15 on the issue of legal conclusions is overruled;

20. Defendants' objection from page 80 at line 24, through page 81 at line 20 on the issue of relevance is sustained;

21. Defendants' objection from page 82 at line 17, through page 83 at line 6, for Healy's lack of personal knowledge is overruled;

22. Defendants' objection from page 83 at line 18, through page 87 at line 2, for foundation and legal conclusions is sustained;

23. Defendants' objection from page 90 at line 7, through page 91 at line 9, and page 91 at lines 10 through 24, for Healy's lack of personal knowledge is overruled;

24. Defendants' objection from page 95 at line 3, through page 97 at line 3 on the issues of foundation, relevance, and Healy's lack of personal knowledge is overruled;

25. Defendants' objection from page 97 at line 18, through page 98 at line 14 on Healy's lack of personal knowledge is overruled;

26. Plaintiffs' objection to Defendant's counter-designation from page 98 at lines

15 through 24 on foundation and calls for speculation are overruled;

27. Defendants' objection from page 98 at line 25, through page 99 at line 22, on the issue of Healy's lack of personal knowledge is overruled;

28. Defendants' objection from page 102 at line 24, through page 103 at line 7, on the issue of legal conclusions is overruled;

29. Defendants' objection from page 114 at line 1, through page 115 at line 4 on Healy's lack of personal knowledge is sustained;

30. Defendants' objection to Plaintiffs' counter-designation on page 90 from lines 2 through 17 on the issue of hearsay is sustained;

31. Plaintiffs' objection on page 63 from lines 1 through 4 on the issue of Healy's lack of personal knowledge is overruled;

32. Defendants' objection to Plaintiffs' counter-designation on page 82 at line 17, through page 83 at line 6 on foundation and hearsay issues is overruled;

33. Plaintiffs' objection from page 70 at line 17, through page 71 at line 14 regarding calls for impermissible opinion testimony is overruled;

34. Plaintiffs' objection on page 77 from line 13 through 16 on Healy's lack of personal knowledge, foundation, and attempt to use for legal conclusion issues is overruled;

35. Defendants' objection to Plaintiffs' counter-designation from page 82 at line 17, through page 83 at line 6, on foundation and hearsay issues is overruled;

36. Plaintiffs' objection on page 95 from line 7 through 15 on speculation and improper legal opinion is overruled;

37. Defendants' objection to Plaintiffs' counter-designation from page 96 at line 13, through page 97 at line 3, and from page 97 at lines 18 through 24, on foundation, hearsay, and improper expert opinion issues is overruled;

38. Plaintiffs' objection on page 98 at lines 3 through 14 on the foundation of Healy's testimony is overruled.

B. July 7, 2016 Deposition of Randy Parraz

1. Defendants' objection from page 4 at line 17, through page 5 at line 3 on the relevance of Parraz's testimony is overruled;

2. Defendants' objection from page 5 at lines 4 through 7 on the rule of completeness is sustained;

3. Defendants' objection from page 10 at lines 13 through 23 on the rule of completeness is sustained;

4. Defendants' objection from page 11 at line 24, through page 12 at line 6 on the rule of completeness is sustained;

5. Defendants' objection from page 26 at line 12, through page 57 at line 14 on issues of relevance and lack of personal knowledge is overruled;

6. Defendants' objection from page 52 at line 12, through page 53 at line 3 on issues of foundation and lack of personal knowledge is overruled;

7. Defendants' objection from page 57 at line 20, through page 67 at line 24, and from page 60 at line 23, through page 61 at line 21 on the relevance of Parraz's testimony is sustained;

8. Defendants' objection from page 73 at line 10, through page 74 at line 25 on the relevance of Parazz's testimony is overruled;

9. Defendants' objection from page 76 at line 24, through page 77 at line 1 on the rule of completeness is sustained;

10. Defendants' objection from page 88 at lines 1 through 3, on foundational and lack of knowledge issues is overruled;

11. Defendants' objection from page 90 at line 18, through page 91 at line 19 on the rule of completeness is sustained;

12. Defendants' objection on page 96 from lines 5 through 18, on the rule of completeness is sustained;

13. Defendants' objection on page 104 from lines 4 through 10, on the rule of completeness is sustained;

14. Defendants' objection on page 104 at line 4, through page 105 at line 2, on lack of personal knowledge is overruled;

15. Defendants' objection on page 105 from lines 3 through 25, on the rule of completeness is sustained;

16. Defendants' objection from page 112 at line 16, through page 113 at line 25, on the rule of completeness is sustained;

17. Defendants' objection on page 117 at lines 16 through 25, on the rule of completeness is sustained;

18. Defendants' objection from page 127 at line 18, through page 128 at line 10, on foundation and lack of personal knowledge issues is overruled;

19. Defendants' objections to Plaintiffs' counter-designations from pages 30 at lines 6 through 13 and from page 30 at line 17, through page 31 at line 5 are sustained.

C. May 15, 2017 Deposition of Samantha Pstross

1. Defendants' objection from page 10 at line 20, through page 12 at line 5 on the rule of completeness is sustained;

2. Defendants' objection from page 21 at line 20, through page 22 at line 24 on the rule of completeness is sustained;

3. Defendants' objection from page 23 at line 15, through page 24 at line 19 on the rule of completeness is sustained;

4. Defendants' objections from page 24 at line 23, through page 25 at line 19 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

5. Defendants' objections from page 25 at line 24, through page 32 at line 18 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

6. Defendants' objections from page 32 at line 24, through page 34 at line 22 regarding foundation, lack of personal

knowledge, and the rule of completeness, are all overruled;

7. Defendants' objections from page 35 at line 14, through page 36 at line 9 regarding foundation, lack of personal knowledge, and the rule of completeness, are all overruled, but are not admitted for the truth of the matter asserted;

8. Defendants' objections from page 38 at lines 6 through 18 regarding foundation, as well as the issue of lack of personal knowledge, are both sustained;

9. Defendants' objections from page 36 at line 18, through page 38 at line 5 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

10. Defendants' objections from page 40 at line 10, through page 42 at line 17 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

11. Defendants' objection from page 42 at line 25, through page 45 at line 1 on the rule of completeness is sustained;

12. Defendants' objection from page 48 at line 17, through page 49 at line 12 on the issue of relevance is overruled;

13. Defendants' objection from page 51 at line 5, through page 56 at line 4 on the rule of completeness is sustained;

14. Defendants' objections from page 60 at lines 19 through 24 regarding the rule of completion, foundation, and lack of personal knowledge are all sustained;

15. Defendants' objections from page 62 at line 14, through page 64 at line 24 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

16. Defendants' objection from page 66 at lines 4 through 19 on the rule of completeness is sustained;

17. Defendants' objections from page 66 at lines 4 through 19 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

18. Defendants' objections from page 70 at line 20, through page 71 at line 23 regarding foundation, as well as the issue of lack of personal knowledge, are both sustained;

19. Defendants' objections from page 82 at lines 10 through 15 regarding foundation, as well as the issue of lack of personal knowledge, are both sustained;

20. Defendants' objections from page 80 at line 3, through page 82 at line 9 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

21. Defendants' objections from page 82 at line 16, through page 84 at line 1 regarding foundation, as well as the issue of lack of personal knowledge, are both overruled;

22. Defendants' objection from page 99 at line 9 through page 100 at line 24 on the rule of completeness is sustained;

23. Defendants' objection from page 102 at line 15 through page 103 at line 14 on the rule of completeness is sustained;

24. Defendants' objection from page 107 at line 5, through page 108 at line 25 on the issue of legal conclusions is overruled;

25. Plaintiffs' objection to Defendants' counter-designations from page 109 at line 3 to page 114 at line 5, on the issue of scope is overruled.

D. May 22, 2017 Deposition of Michele Reagan

1. Defendants' objection from page 34 at line 25, through page 34 at line 6 on the rule of completeness is sustained;

2. Defendants' objection from page 37 at line 21, through page 38 at line 17 on the rule of completeness is sustained;

3. Defendants' objection from page 42 at line 17, through page 43 at line 3 on the issue of legislative privilege is overruled;

4. Defendants' objection from page 46 at line 14, through page 47 at line 14 on the issue of legislative privilege is overruled;

5. Defendants' objection from page 53 at lines 15 through 19 on the issue of lack of personal knowledge is overruled;

6. Defendants' objection from page 53 at line 24, through page 54 at line 9 regarding the Plaintiffs' misstatement of the contents of a document is overruled;

7. Defendants' objection from page 54 at lines 14 through 24 on the issue of lack of personal knowledge is overruled;

8. Defendants' objection from page 103 at lines 7 through 14 on the issue of lack of personal knowledge is overruled;

9. Defendants' objection from page 98 at line 22, through page 99 at line 3 on the issue of personal knowledge is overruled;

10. Defendants' objections from page 111 at line 2, through page 114 at line 11 regarding calls for legal conclusions, as well as the issue of lack of personal knowledge, are both overruled.

E. June 1, 2017 Deposition of Donald Shooter

1. Defendants' objection from page 19 at line 8, through page 20 at line 3, and page 54 at line 10, through page 55 at line 9 is overruled.

2. Defendants' objection from page 40 at line 25, through page 42 at line 8 on the rule of completeness is sustained;

3. Defendants' objection from page 49 at lines 17 through 25 due to Plaintiffs' allegedly misstating the content of a bill amendment is overruled;

4. Plaintiffs' objection on page 92 from lines 14 through 23 on the lack of foundation on Defendant's counter-designation is sustained;

5. Defendants' objections from page 83 at line 17 through page 87 at line 4 on the issues of Shooter's lack of personal knowledge and Plaintiff's alleged calls for legal conclusion are overruled;

6. Defendants' objection from page 117 at lines 9 through 16 on the issue of Shooter's lack of personal knowledge is overruled;

7. Plaintiffs' objection to Defendants' counter-designation from page 96 at line 22, through page 98 at line 4, and from page 98 at line 9, through page 99 at line

22 on the issues of foundation and Shooter's lack of personal knowledge is sustained;

8. Plaintiffs' objection to Defendants' counter-designation from page 112 at lines 1 through 17 on the rule of completeness is sustained.

F. May 4, 2017 Deposition of Eric Spencer

1. Defendants' objection from page 8 at line 8, through page 11 at line 1 on the rule of completeness is sustained;

2. Defendants' objection from page 20 at line 20, through page 26 at line 15 on the rule of completeness is sustained;

3. Defendants' objection from page 26 at line 23, through page 27 at line 13 on the rule of completeness is sustained;

4. Defendants' objection from page 62 at line 7, through page 66 at line 13 on the rule of completeness is sustained;

5. Defendants' objections from page 88 at line 20, through page 90 at line 4 on relevance, as well as the issue of lack of personal knowledge, are both overruled;

6. Defendants' objection from page 90 at line 16, through page 91 at line 10 on the rule of completeness is sustained;

7. Defendants' objection from page 92 at line 25, through page 94 at line 17 on relevance is sustained;

8. Defendants' objection from page 96 at lines 7 through 14 on relevance is sustained;

9. Defendants' objection from page 98 at line 9, through page 100 at line 18 on relevance is sustained;

10. Defendants' objection from page 102 at line 4, through page 107 at line 10 on relevance is overruled.

G. June 13, 2017 Deposition of Robyn Stallworth-Pouquette:

1. Plaintiffs' objection to Defendants' counter-designation from page 28 at line 20, through page 33 at line 1 regarding scope, as well as the rule of completeness, are both overruled;

2. Plaintiffs' objection to Defendants' counter-designation from page 35 at line 11, through page 36 at line 18 regarding scope, as well as the rule of completeness, are both overruled;

3. Plaintiffs' objection to Defendants' counter-designation from page 38 at line 22, through page 39 at line 25 regarding scope, as well as the rule of completeness, are both overruled;

4. Plaintiffs' objection to Defendants' counter-designation from page 40 at lines 4 through 10 regarding scope, as well as the rule of completeness, are both overruled;

5. Plaintiffs' objection to Defendants' counter-designation from page 41 at line 20, through page 42 at line 24 regarding scope, as well as the rule of completeness, are both overruled;

6. Plaintiffs' objection to Defendants' counter-designation from page 43 at lines 4 through 11 regarding scope, as well as the rule of completeness, are both overruled;

7. Plaintiffs' objection to Defendants' counter-designation from page 43 at line 18, through page 44 at line 6 regarding scope, as well as the rule of completeness, are both overruled;

8. Plaintiffs' objection to Defendants' counter-designation from page 44 at line 10, through page 45 at line 16 regarding scope, as well as the rule of completeness, are both overruled;

9. Plaintiffs' objection to Defendants' counter-designation from page 51 at lines 6 through 13 regarding scope, as well as the rule of completeness, are both overruled;

10. Plaintiffs' objection to Defendants' counter-designation from page 59 at line 3, through page 60 at line 13 regarding scope, as well as the rule of completeness, are both overruled;

11. Plaintiffs' objection to Defendants' counter-designation from page 62 at line 10, through page 63 at line 17 regarding scope, as well as the rule of completeness, are both overruled;

12. Plaintiffs' objection to Defendants' counter-designation from page 65 at line 9, through page 66 at line 6 regarding scope, as well as the rule of completeness, are both overruled;

13. Plaintiffs' objection to Defendants' counter-designation from page 94 at line 11, through page 95 at line 19 regarding scope, as well as the rule of completeness, are both overruled;

14. Plaintiffs' objection to Defendants' counter-designation from page 111 at line 24, through page 112 at line 2 regarding scope, as well as the rule of completeness, are both overruled;

15. Plaintiffs' objection to Defendants' counter-designation from page 112 at line 4, through page 113 at line 9 regarding scope, as well as the rule of completeness, are both overruled;

16. Plaintiffs' objection to Defendants' counter-designation from page 125 at line 9, through page 127 at line 15 regarding scope, as well as the rule of completeness, are both overruled;

17. Plaintiffs' objection to Defendants' counter-designation from page 131 at line 13, through page 132 at line 8 regarding scope, as well as the rule of completeness, are both overruled;

18. Plaintiffs' objections to Defendants' counter-designation from page 31 at line 14, through page 32 at line 1 on the issue of hearsay, as well as the lack of personal knowledge, are both sustained;

19. Plaintiffs' objection to Defendants' counter-designation from page 38 at line 22, through page 39 at line 17 on the issue of hearsay is sustained;

20. Plaintiffs' objections to Defendants' counter-designation from page 42 at lines 8 through 14 on the issues of hearsay, foundation, and lack of personal knowledge, are all sustained;

21. Plaintiffs' objections to Defendants' counter-designation from page 42 at lines 19 through 24 regarding foundation, as well as the issue of lack of personal knowledge, are both sustained;

22. Plaintiffs' objection to Defendants' counter-designation from page 44 at line 10, through page 45 at line 16 on the issue of hearsay is sustained;

23. Plaintiffs' objection to Defendants' counter-designation from page 51 at lines 6 through 13 on the issue of hearsay is sustained;

24. Plaintiffs' objection to Defendants' counter-designation from page 59 at line 3, through page 60 at line 13 on the issue of hearsay is sustained;

25. Plaintiffs' objection to Defendants' counter-designation from page 62 at line 10, through page 63 at line 17 on the issue of hearsay is sustained;

26. Plaintiffs' objection to Defendants' counter-designation from page 11 at line 24, through page 112 at line 2 on the issue of hearsay is sustained;

27. Plaintiffs' objection to Defendants' counter-designation from page 112 at lines 4 through 10 on the issue of hearsay is sustained;

28. Plaintiffs' objection to Defendants' counter-designation from page 65 at line 9, through page 6 at line 6 on the issue of hearsay is sustained;

29. Plaintiffs' objections to Defendants' counter-designation from page 94 at line 11, through page 95 at line 19 on the issues of hearsay and lack of foundation are both sustained;

30. Plaintiffs' objection to Defendants' counter-designation from page 112 at lines 12 through 15 for lack of foundation is sustained;

31. Defendants' objection from page 23 at lines 16 through 19 for lack of personal knowledge is sustained;

32. Defendants' objection from page 24 at lines 1 through 3 for lack of personal knowledge is overruled;

33. Defendants' objection from page 24 at lines 4 through 5 for lack of personal knowledge is overruled;

34. Defendants' objection from page 27 at lines 4 through 12 for lack of personal knowledge is overruled.

H. May 9, 2017 Deposition of Victor Vasquez:

1. Defendants' objection from page 15 at line 14, through page 18 at line 13, on the issue of narrative is overruled;

2. Defendants' objection from page 66 at line 22, through page 70 at line 8, on the issue of relevance is overruled;

3. Defendants' objections from page 58 at line 4, through page 59 at line 3, on the issues of narrative and relevance are both overruled;

4. Defendants' objections from page 69 at line 23, through page 69 at line 3, on the issues of narrative and relevance are both overruled.

I. May 10, 2017 Deposition of Alexis Tameron

1. Defendants' objection from page 34 at line 4, through page 35 at line 11, for use of First Amendment privilege, is overruled;

2. Defendants' objections from page 52 at line 18, through page 53 at line 3, regarding foundation and lack of personal knowledge, are both overruled;

3. Plaintiffs' objections from page 72 at line 17, through page 75 at line 5, regarding foundation, hearsay, and impermissible opinion testimony, are all overruled;

4. Plaintiffs' objections from page 82 at line 17, through page 83 at line 2, regarding foundation, speculation, and hearsay, are all overruled;

5. Plaintiffs' objections from page 83 at line 9 through line 13, regarding foundation, speculation, and hearsay, are all overruled;

6. Plaintiffs' objections from page 83 at line 14 through line 24, regarding foundation and speculation, are both overruled;

7. Plaintiffs' objection from page 83 at line 25, through page 84 at line 2, regarding foundation, is overruled;

8. Plaintiffs' objection to Defendants' designations from page 88 at line 25, through page 89 at line 17, regarding hearsay, is sustained;

9. Defendants' objections from page 160 at line 19, through page 162 at line 7, regarding foundation, improper opinion, and calls for legal conclusion, are all overruled;

10. Plaintiffs' objections to Defendants' designations from page 91 at line 10 through line 18, regarding foundation and speculation, are both overruled;

11. Plaintiffs' objection from page 126 at line 4 through line 6, regarding improper testimony, is overruled;

12. Plaintiffs' objections from page 126 at line 10, through page 127 at line 23, regarding foundation, speculation, and improper opinion testimony, are all overruled;

13. Plaintiffs' objections from page 133 at line 12 through line 15, regarding form,

foundation, speculation, and legal conclusion, are all sustained;

14. Defendants' objections to Plaintiffs' counter-designations from page 165 at line 1 through line 16, regarding improper foundation, legal conclusion, and the improper use of opinion testimony, are all sustained;

15. Defendant's objection to Plaintiffs' counter-designation from page 147 at line 11, to page 148 at line 10, on the issue of counsel testifying, is sustained;

16. Defendants' objection to Plaintiffs' counter-designation from page 34 at line 4, through page 35 at line 11, for use of First Amendment privilege, is overruled.

J. June 6, 2017 Deposition of Spencer Scharff:

1. Defendant's objection from page 17 at line 8 through line 14, on the issue of a statement from counsel, is sustained.

II. Admission of Exhibits Containing Legislator Statements

The Court took under advisement the admissibility of Exhibits 47, 53, 54, 56, 87, and 88, which contain statements by Representative Michelle Ugenti-Rita, pending briefing by the parties. Having considering the parties' briefs (Docs. 390, 396), the Court finds as follows:

Exhibits 87 and 88 are admitted into evidence. Defendants' hearsay objection is overruled. Representative Ugenti-Rita's statements made during the public presentation and discussion at an Arizona State Bar continuing legal education seminar are statements of a party opponent. Although she is not a named party, Representative Ugenti-Rita was the sponsor of H.B. 2023. For purposes of the issues associated with the passage of H.B. 2023, she was exercising the authority of the State. Her relationship to the State was illustrated by Defendants' argument that her testimony should be given more weight than other evidence on the subject of the discriminatory intent. (Tr. 2313.) Exhibits 87 and 88 are not hearsay. Fed. R. Evid. 801(d)(2).

Exhibit 47 is not admitted into evidence. Defendants' objection is sustained. An email to Representative Ugenti-Rita from a reporter asking several questions, for which there is no evidence she read and to which she did not respond, is not relevant. Fed. R. Evid. 401-403.

Exhibit 53 is admitted into evidence. Defendants' objection is overruled. The email chain between Representative Ugenti-Rita and General Counsel to the Secretary of State is relevant as foundation for the admission of Exhibits 87 and 88. It is evidence that Representative Ugenti-Rita was acting as if she were a party to the litigation. Fed. R. Evid. 401.

Exhibit 54 is admitted into evidence. Defendants' Rule 403 objection is overruled. The probative value of the email chain between Representative Ugenti-Rita, legislative staff, and other legislators regarding the

scheduling of a stakeholder meeting is not substantially outweighed by a danger of needlessly presenting cumulative evidence. Fed. R. Evid. 403.

Exhibit 56 is not admitted into evidence. Defendants' relevance objection is sustained. Fed. R. Evid. 401-403.

III. Expert Witness Testimony of Drs. Allan Lichtman and Jonathan Rodden

Defendants move to exclude the following: (1) Dr. Lichtman's testimony on legislative intent, (2) Dr. Lichtman's testimony on housing discrimination and socioeconomic disparities; (3) Dr. Rodden's testimony on racial disparities in OOP voting, and (4) Dr. Rodden's testimony on disparities in home mail access. (Doc. 356.)

Pursuant to Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 requires expert testimony to be both relevant and reliable. *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014). Testimony is relevant if "[t]he evidence . . . logically advance[s] a material aspect of the party's case," *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007), and reliable if it has "a reliable basis in the knowledge and experience of the relevant discipline," *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999).

When assessing the reliability of expert witness testimony, the court should consider the non-exhaustive factors identified by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*: (1) whether the method "can be (and has been) tested;" (2) whether the method "has been subjected to peer review and publication;" (3) the method's "known or potential rate of error;" (4) whether there are "standards controlling the technique's operation;" and (5) whether the method has "general acceptance" within the "relevant scientific community." 509 U.S. 579, 592-94 (1993). "[T]he test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire*, 526 U.S. at 141.

With that said, "[r]ejection of expert testimony is the exception rather than the Rule. *Daubert* did not work a 'seachange over federal evidence law,' and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" Rule 702

advisory committee note to the 2000 amendment (quoting *United States v. 14.38 Acres of Land Situated in Leflore Cty., Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996)). Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

A. Dr. Lichtman

Defendants' motion to exclude Dr. Lichtman's opinions on the ultimate conclusion of legislative intent is granted. Those ultimate opinions will not be considered. "Courts routinely exclude as impermissible expert testimony as to intent, motive, or state of mind." *Siring v. Or. St. Bd. of Higher Educ. ex rel. E. Or. Univ.*, 927 F. Supp. 2d 1069, 1077 (D. Or. 2013). This is so because:

> Expert testimony as to intent, motive, or state of mind offers no more than the drawing of an inference from the facts of the case. The [fact-finder] is sufficiently capable of drawing its own inferences regarding intent, motive, or state of mind from the evidence, and permitting expert testimony on this subject would be merely substituting the expert's judgment for the [fact-finder] and would not be helpful[.]

Id.

To the extent Defendants seek to exclude other aspects of Dr. Lichtman's testimony, or the information he curated to form his opinions, the motion is denied. Though Dr. Lichtman's ultimate opinions on legislative

intent are not helpful, his curation of material facts surrounding the legislative history and his underlying research are both helpful and reliable.

Defendants' motion to exclude Dr. Lichtman's testimony about housing discrimination and socioeconomic disparities is denied. Dr. Lichtman is a Distinguished Professor of History at American University in Washington, D.C., where he has been employed for 42 years. He formerly served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. He received his B.A. in History from Brandeis University in 1967 and his Ph.D. in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. Dr. Lichtman's areas of expertise include political history, electoral analysis, and historical and quantitative methodology. Dr. Lichtman also has worked as a consultant or expert witness for plaintiffs and defendants in more than 80 voting and civil rights cases, and has testified several times on issues of intentional discrimination and application of Section 2 of the Voting Rights Act ("VRA") of 1965. The Court finds that Dr. Lichtman is adequately qualified to opine on these matters. Defendants' critiques go to the weight of Dr. Lichtman's testimony, not to its admissibility.

B. Dr. Rodden

Defendants' motion to exclude Dr. Rodden's opinions on racial disparities in OOP voting and disparities in home mail delivery is denied. Dr. Rodden is a tenured Professor of Political Science at Stanford

University and the founder and director of the Stanford Spatial Social Science Lab, a center for research and teaching with a focus on the analysis of geo-spatial data in the social sciences. Prior to joining the Stanford faculty, Dr. Rodden was the Ford Professor of Political Science at the Massachusetts Institute of Technology. He received his Ph.D. from Yale University and his B.A. from the University of Michigan, Ann Arbor, both in political science.

Dr. Rodden has expertise in the use of large data sets and geographic information systems to analyze aspects of political representation. He has developed a national data set of geo-coded precinct-level election results that has been used extensively in policy-oriented research related to redistricting and representation. He also has worked extensively with Census data from the United States and other countries.

Dr. Rodden has published papers on political geography and representation in a variety of academic journals and has been featured in popular publications like the Wall Street Journal, the New York Times, and Boston Review. Dr. Rodden also has testified as an expert witness in recent election law cases.

The Court finds Dr. Rodden's use of a combination of individual-level and aggregate data analyses to assess racial disparities in OOP voting, both of which have been accepted in previous cases analyzing questions under the VRA, to be helpful and reliable. Defendants' criticisms go to weight, not admissibility.

Dr. Rodden also employed standard and accepted methods in his field to analyze the "mailability" of Arizona's non-metropolitan counties in order to estimate the populations that likely would be most affected by H.B. 2023's ballot collection restrictions. Though somewhat imprecise, the Court finds his method of analysis to be generally reliable and based on sufficient data given the circumstances, though the Court is mindful of the limitations of his methods. Defendants' criticisms again go to weight, not admissibility.

IT IS ORDERED as follows:

1. The parties' objections to the admissibility of various deposition designations are addressed as stated herein.

2. Plaintiffs' Exhibits 53, 54, 87, and 88 are admitted into evidence.

3. Plaintiffs' Exhibits 47 and 56 are not admitted into evidence.

4. Defendants' motion to exclude Dr. Lichtman's expert witness testimony (Doc. 356) is **GRANTED IN PART** and **DENIED IN PART** as explained herein.

5. Defendants' motion to exclude Dr. Rodden's expert witness testimony (Doc. 356) is **DENIED** as explained herein.

Dated this 8th day of May, 2018.

/s/Douglas L. Rayes
Douglas L. Rayes
United States District Judge

APPENDIX F

U.S. Const. amend. XV

§1 The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

§2 The Congress shall have power to enforce this article by appropriate legislation.

52 U.S.C. § 10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in

> the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Ariz. Rev. Stat. § 16-122. Registration and records prerequisite to voting

> No 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 or list of the precinct and election districts or proposed election districts in which such person resides, except as provided in §§ 16-125, 16-135 and 16-584.

Ariz. Rev. Stat. § 16-135. Change of residence from one address to another

> A. An elector who is correcting the residence address shown on the elector's voter registration record shall reregister with the new residence address or correct the voter registration record as prescribed by this section.
>
> B. An elector who moves from the address at which he is registered to another address within the same county and who fails to notify the county recorder of the change of address before the date of an election shall be permitted to correct the voter registration records at the appropriate

polling place for the voter's new address. The voter shall present a form of identification that includes the voter's given name and surname and the voter's complete residence address that is located within the precinct for the voter's new residence address. The voter shall affirm in writing the new residence address and shall be permitted to vote a provisional ballot.

C. When an elector completes voting a provisional ballot, the election official shall place the ballot in an envelope for provisional ballots and shall deposit the envelope in the ballot box designated for provisional ballots.

D. Within ten calendar days after a general election that includes an election for a federal office and within five business days after any other election, a provisional ballot shall be compared to the signature roster for the precinct in which the voter was listed and if the voter's signature does not appear on the signature roster for that election and if there is no record of that voter having voted early for that election, the provisional ballot shall be counted. If the signature roster or early ballot information indicates that the person did vote in that election, the provisional ballot for that person shall remain unopened and shall not be counted.

E. An elector may also correct the residence address on the elector's voter registration record by requesting the address change on a written request for an early ballot that is submitted

pursuant to § 16-542 and that contains all of the following:

1. A request to change the voter registration record.
2. The elector's new residence address.
3. An affirmation that the information is true and correct.
4. The elector's signature.

Ariz. Rev. Stat. § 16-452. Rules; instructions and procedures manual; approval of manual; field check and review of systems; violation; classification

A. After consultation with each county board of supervisors or other officer in charge of elections, the secretary of state shall prescribe rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots. The secretary of state shall also adopt rules regarding fax transmittal of unvoted ballots, ballot requests, voted ballots and other election materials to and from absent uniformed and overseas citizens and shall adopt rules regarding internet receipt of requests for federal postcard applications prescribed by section 16-543.

B. The rules shall be prescribed in an official instructions and procedures manual to be issued not later than December 31 of each odd-numbered year immediately preceding the general election. Before its issuance, the manual shall be approved by the governor and the attorney general. The secretary of state shall submit the manual to the governor and the attorney general not later than October 1 of the year before each general election.

C. A person who violates any rule adopted pursuant to this section is guilty of a class 2 misdemeanor.

D. The secretary of state shall provide personnel who are experts in electronic voting systems and procedures and in electronic voting system security to field check and review electronic voting systems and recommend needed statutory and procedural changes.

Ariz. Rev. Stat. § 16-584. Qualified elector not on precinct register; recorder's certificate; verified ballot; procedure

A. A qualified elector whose name is not on the precinct register and who presents a certificate from the county recorder showing that the elector is entitled by law to vote in the precinct shall be entered on the signature roster on the blank following the last printed name and shall be given the next consecutive register number, and the qualified elector shall sign in the space provided.

B. A qualified elector whose name is not on the precinct register, on presentation of identification verifying the identity of the elector that includes the voter's given name and surname and the complete residence address that is verified by the election board to be in the precinct or on signing an affirmation that states that the elector is a registered voter in that jurisdiction and is eligible to vote in that jurisdiction, shall be allowed to vote a provisional ballot.

C. If a voter has moved to a new address within the county and has not notified the county recorder of the change of address before the date of an election, the voter shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the voter's new address. The voter shall be permitted to vote a provisional ballot. The voter shall present a form of identification that includes the voter's given name and surname and the voter's complete residence address. The residence address must be within the precinct in which the voter is attempting to vote, and the voter shall affirm in writing that the voter is registered in that jurisdiction and is eligible to vote in that jurisdiction.

D. On completion of the ballot, the election official shall place the ballot in a provisional ballot envelope and shall deposit the envelope in the ballot box. Within ten calendar days after a general election that includes an election for a

federal office and within five business days after any other election or no later than the time at which challenged early voting ballots are resolved, the signature shall be compared to the precinct signature roster of the former precinct where the voter was registered. If the voter's name is not signed on the roster and if there is no indication that the voter voted an early ballot, the provisional ballot envelope shall be opened and the ballot shall be counted. If there is information showing the person did vote, the provisional ballot shall remain unopened and shall not be counted. When provisional ballots are confirmed for counting, the county recorder shall use the information supplied on the provisional ballot envelope to correct the address record of the voter.

E. When a voter is allowed to vote a provisional ballot, the elector's name shall be entered on a separate signature roster page at the end of the signature roster. Voters' names shall be numbered consecutively beginning with the number V-1. The elector shall sign in the space provided. The ballot shall be placed in a separate envelope, the outside of which shall contain the precinct name or number, a sworn or attested statement of the elector that the elector resides in the precinct, is eligible to vote in the election and has not previously voted in the election, the signature of the elector and the voter registration number of the elector, if available. The ballot shall be verified for proper registration of the elector by the county recorder

before being counted. The verification shall be made by the county recorder within ten calendar days after a general election that includes an election for a federal office and within five business days following any other election. Verified ballots shall be counted by depositing the ballot in the ballot box and showing on the records of the election that the elector has voted. If registration is not verified the ballot shall remain unopened and shall be retained in the same manner as voted ballots.

F. For any person who votes a provisional ballot, the county recorder or other officer in charge of elections shall provide for a method of notifying the provisional ballot voter at no cost to the voter whether the voter's ballot was verified and counted and, if not counted, the reason for not counting the ballot. The notification may be in the form of notice by mail to the voter, establishment of a toll free telephone number, internet access or other similar method to allow the voter to have access to this information. The method of notification shall provide reasonable restrictions that are designed to limit transmittal of the information only to the voter.

Ariz. Rev. Stat. § 16-1005 (H)-(I). Ballot abuse; violation; classification

H. A person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony. An election official, a United States postal service worker or any other person who is allowed by law to transmit United

States mail is deemed not to have collected an early ballot if the official, worker or other person is engaged in official duties.

I. Subsection H of this section does not apply to:

1. An election held by a special taxing district formed pursuant to title 48 for the purpose of protecting or providing services to agricultural lands or crops and that is authorized to conduct elections pursuant to title 48.

2. A family member, household member or caregiver of the voter. For the purposes of this paragraph:

a. "Caregiver" means a person who provides medical or health care assistance to the voter in a residence, nursing care institution, hospice facility, assisted living center, assisted living facility, assisted living home, residential care institution, adult day health care facility or adult foster care home.

b. "Collects" means to gain possession or control of an early ballot.

c. "Family member" means a person who is related to the voter by blood, marriage, adoption or legal guardianship.

d. "Household member" means a person who resides at the same residence as the voter.

APPENDIX G

No. 18-15845

Oral Argument Calendared For The Week Of March 25, 2019

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs-Appellants

v.

KATIE HOBBS, *et al.*,

Defendants-Appellees,

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenor-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES ON REHEARING EN BANC AND SUPPORTING AFFIRMANCE

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[*Table of Contents and Authorities Omitted in this Appendix*]

INTEREST OF THE UNITED STATES

This case presents important questions regarding the standards for liability under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, in cases challenging voting practices alleged to result in unequal access to the ballot box for minority voters (often referred to as vote denial or abridgement cases). The Department of Justice is charged with the VRA's enforcement, 52 U.S.C. 10308(d), and thus has a substantial interest in how courts construe and apply the statute.

STATEMENT OF THE ISSUES

1. Whether Arizona House Bill 2023 (2016) (H.B. 2023), which prohibits individuals who do not fall into certain categories from collecting completed ballots from voters, violates the VRA Section 2 results test.

2. Whether Arizona's longstanding requirement that in-person, election-day voters cast their ballot in their assigned precinct violates the VRA Section 2 results test.[1]

STATEMENT OF THE CASE

1. Challenged Provisions Of Arizona Law

a. Arizona provides voters with multiple options to cast a ballot, including early voting in person or by mail and traditional in-person voting on election day. Arizona voters do not need an excuse to vote early in person or by mail, Ariz. Rev. Stat. Ann. § 16-541 (2018), and all counties operate at least one in-person early voting location. E.R. 12.[2]

Arizona has allowed early voting by mail for more than 25 years, and it is the most popular method of voting in the State. In the 2012 general election, approximately 66% of voters submitted early mail ballots. In the 2016 general election, 80% of voters

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[1] The United States takes no position on any other issue.

[2] "Doc. __, at __" refers to the docket entry number and relevant pages of the filings below in *Feldman* v. *Arizona Sec'y of State's Office*, No. 16-cv-1065 (D. Ariz.). "E.R." refers to appellants' Excerpts of Record.

submitted early mail ballots. E.R. 12-13, 22. Voters may request a mail ballot on an election-by-election basis or may join Arizona's Permanent Early Voter List, which ensures that participants automatically receive a mail ballot no later than the first day of the 27-day early voting period. See Ariz. Rev. Stat. Ann. §§ 16-542, 16-543, 16-544 (2018); 2007 Ariz. Sess. Laws 183.

In order to be counted, early ballots must be received by the county recorder by 7 p.m. on election day. See Ariz. Rev. Stat. Ann. § 16-548(A) (2018). Voters may return their early ballots by mail postage-free. Voters may also return their early ballots at any polling place or authorized election official's office without waiting in line. Some counties provide additional drop boxes for early ballots. E.R. 13.

As relevant here, H.B. 2023 makes it a felony for anyone other than the voter to possess that voter's completed early mail ballot, unless the possessor fits one of the statute's exceptions. Under those exceptions, the only third persons permitted to collect and return a voter's completed early mail ballot are a caregiver, family or household member, mail carrier, or election official. See Ariz. Rev. Stat. Ann. § 16-1005(H)-(I) (2018).

b. Since "at least 1970," Arizona has required that in-person voters cast their ballots at their assigned polling places in order for their votes to be counted. E.R. 14. When a voter arrives at a polling place but is not listed in the precinct register, that voter will receive a provisional ballot, which election officials will later review to determine whether it may be counted.

See Ariz. Rev. Stat. Ann. §§ 16-122, 16-135, 16-584 (2018). If the voter is registered and resides in the precinct where the provisional ballot was cast, that ballot is counted. See Ariz. Rev. Stat. Ann. § 16-584(C)-(E) (2018). Arizona does not count any portion of a provisional ballot cast outside of the voter's correct precinct. E.R. 14.

Since 2011, Arizona counties may choose whether to conduct in-person, election-day voting by dividing the county into different precincts or by using "vote centers." 2011 Ariz. Sess. Laws 331, § 3(B)(4). A voter in a county using vote centers can cast his or her ballot at any vote center in the county, as each has the capability to print a ballot that lists the correct races for each voter. See Ariz. Rev. Stat. Ann. § 16-411 (2018). Some populous counties generally have continued to use precinct-based, election-day voting. E.R. 15. Nonetheless, the number of voters affected by Arizona's prohibition on out-of-precinct (OOP) voting has declined in recent elections. In the 2008 general election, 0.64% of all votes cast were not counted because they were cast OOP. That figure dropped to 0.47% in the 2012 general election, and to 0.15% in the 2016 general election. E.R. 40.

2. Procedural History

a. Plaintiffs filed this case and sought a preliminary injunction to enjoin H.B. 2023's enforcement and Arizona's OOP voting restrictions in time for the 2016 general election. Docs. 72, 84. Plaintiffs alleged that both practices violated Section 2 of the VRA and the First and Fourteenth Amendments. They further alleged that the Arizona legislature

enacted H.B. 2023 with racially discriminatory intent. The district court denied preliminary injunctive relief as to each practice. Doc. 204 (H.B. 2023 claims); Doc. 214 (OOP voting claims).

This Court granted expedited review and a divided panel affirmed. See *Feldman* v. *Arizona Sec'y of State's Office*, 840 F.3d 1057 (9th Cir. 2016) (H.B. 2023 claims); *Feldman* v. *Arizona Sec'y of State's Office*, 842 F.3d 613 (9th Cir. 2016) (OOP voting claims). Days before the 2016 general election, this Court voted to rehear both appeals en banc and to enjoin enforcement of H.B. 2023 pending rehearing. The Supreme Court then stayed this Court's injunction of H.B. 2023. See *Arizona Sec'y of State's Office* v. *Feldman*, No. 16A460 (Nov. 5, 2016). Thus, Arizona enforced both H.B. 2023 and the State's in-precinct voting requirements during the 2016 elections.

b. After a ten-day bench trial, the district court rejected each of plaintiffs' claims. E.R. 1-83. The court used a two-step framework to analyze plaintiffs' Section 2 claims. The court stated that plaintiffs first must show that the challenged practices "impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." E.R. 53. If they established such a burden, the court stated that plaintiffs then must show that "the burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against minority voters." E.R. 53. For

both challenged practices, the court held that plaintiffs could not make the required showing at either step.

With respect to any burden imposed by H.B. 2023, the court found that "[t]here are no records of the numbers of voters who, in any given election, return[ed] their ballots with the assistance of third parties" before H.B. 2023's enactment. E.R. 22. Instead, the court stated that "even under a generous interpretation of the evidence, the vast majority of voters who choose to vote early by mail d[id] not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions." E.R. 22 (citing testimony that ballot collectors affiliated with the Arizona Democratic Party collected "a couple thousand" ballots during the 2014 election). While the court credited circumstantial evidence that minority voters were "generically more likely" to use third-party ballot collectors than other voters, the court explained that plaintiffs had failed to adduce evidence that would allow for more specific findings as to how much more likely minority voters had been than non-minority voters to rely on third-party ballot collectors, or what percentage of those voters could not rely on a person excepted under H.B. 2023 to return their ballot. E.R. 62.

Based on the evidence before it, the court held that plaintiffs had failed to prove that H.B. 2023 imposes a discriminatory burden on Hispanic, African-American, or Native-American voters. E.R. 63. The court summarized that H.B. 2023 "does not deny minority voters meaningful access to the political process simply because the law makes it slightly more difficult or

inconvenient for a small, yet unquantified subset of voters to return their early ballots." E.R. 63.

With respect to OOP ballots, the court found that minority voters have been disproportionately likely to cast an OOP ballot that goes uncounted. E.R. 65. The court credited expert evidence showing that, among all counties that reported receiving OOP ballots in the 2016 general election, 1 in every 100 Hispanic voters, 1 in every 100 African-American voters, and 1 in every 100 Native-American voters cast an out-of-precinct ballot. In contrast, for non-minority voters, "the figure was around 1 in every 200 voters." E.R. 64-65. The court concluded, however, that plaintiffs had not shown that Arizona's OOP voting practices impose a discriminatory burden for two reasons. First, the court stated that plaintiffs had not shown that "Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." E.R. 67. Second, the court reasoned that, because OOP ballots account for "such a small fraction of votes cast statewide," plaintiffs had not shown a racial disparity in voting "practically significant enough to work a meaningful inequality in the opportunities of minority voters" as compared to other voters. E.R. 67.

c. A divided panel of this Court affirmed. *Democratic Nat'l Comm. (DNC)* v. *Reagan*, 904 F.3d 686 (2018). The majority rejected plaintiffs' Section 2 results challenge to H.B. 2023 for two principal reasons. First, the majority reasoned that, because of the "small number" of voters affected, the "unavailability of third party ballot collection would

have minimal effect on the opportunity of minority voters to elect representatives of their choice." *Id.* at 716. Second, it explained that, even as to "those few minority voters who used third party ballot collection," the burden at issue "was minimal" as "not a single voter testified at trial that H.B. 2023 made it significantly more difficult to vote." *Id.* at 716-717.

For similar reasons, the majority also rejected plaintiffs' challenge to Arizona's ban on OOP voting. Specifically, it held that the ban did not violate Section 2 because the burden of complying with the requirement was minimal, the number of affected voters was small, and the requirement did "not cause any particular group to have less opportunity to 'influence the outcome of an election.'" *DNC*, 904 F.3d at 730 (quoting *Chisom* v. *Roemer*, 501 U.S. 380, 397 (1991)).

Chief Judge Thomas dissented. He would have held that, in addition to violating the First and Fourteenth Amendments, Arizona's restrictions on third-party ballot collection and out-of-precinct voting violate Section 2. *DNC*, 904 F.3d at 733-754.

SUMMARY OF THE ARGUMENT

Section 2 prohibits voting practices that, in the totality of circumstances, result in members of one racial group having less opportunity, on account of race or color, to participate in the political process and elect representatives of their choice. 52 U.S.C. 10301(a) and (b). On this record, neither H.B. 2023 nor Arizona's in-precinct voting requirement violates Section 2.

Accordingly, this Court should affirm the district court's rejection of both Section 2 results claims.

In reaching that conclusion, this Court should clarify three crucial principles of law. First, the Court should reaffirm its long-standing precedent that the VRA does not ban any voting practice merely because it results in some racial disparity, but only practices that, when viewed in light of the jurisdiction's entire voting scheme, actually result in unequal access to the political process on account of race or color. Second, the Court should adopt a legal standard that fully captures the essential statutory elements and analysis for vote denial or abridgement claims. Finally, this Court should clarify that Section 2 liability in this context does not require that a challenged practice affect a certain number of voters or change electoral outcomes. After all, Section 2 protects the right to equal participation and electoral opportunities, and as the Supreme Court has explained, "any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom* v. *Roemer*, 501 U.S. 380, 397 (1991). As explained more fully below, plaintiffs' failure to show any such abridgement warrants affirmance of the rejection of their Section 2 results claims.

ARGUMENT

PLAINTIFFS HAVE NOT SHOWN THAT EITHER CHALLENGED PRACTICE VIOLATES SECTION 2 OF THE VRA

A. Section 2 Prohibits Voting Practices That, In The Totality Of Circumstances, Result In Less Opportunity, On Account Of Race Or Color, For Protected Voters To Participate In The Political Process And Elect Representatives Of Their Choice

1. Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cty.* v. *Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits jurisdictions from imposing or applying a "prerequisite to voting" or "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, or in contravention of the guarantees set forth in section 10303(f)(2), as provided in [Section 2(b)]." 52 U.S.C. 10301(a); see 52 U.S.C. 10303(f)(2) (applying VRA protections to language minorities). Section 2(b) provides that a violation is established if, "based on the totality of circumstances," "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of" a racial group, "in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A voting practice therefore violates Section 2 if, considering the totality of circumstances, it results in voters having less opportunity, on account of race or

color, to participate in the political process and elect their chosen representatives.

A Section 2 plaintiff need not prove that a voting rule is intentionally discriminatory. Congress specifically amended Section 2 in 1982 to reject an intent requirement and make clear that a statutory violation can be established by showing a discriminatory result. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); see also S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report). As this Court has long recognized, however, Section 2 liability cannot rest on mere statistical racial disparities in an electoral system or correlations between race and poverty. See *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 & 405 n.32 (9th Cir. 2012) (en banc), aff'd sub nom. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). The ultimate question Section 2(a) asks, which Section 2(b) helps courts to answer, is whether a challenged voting practice denies or abridges individuals' right to vote "on account of race or color." 52 U.S.C. 10301(a). Although a plaintiff need not prove that the challenged rule's intended purpose was to impose racially disparate burdens, the rule must still *result* in persons having less opportunity to vote on account of their race. A contrary reading that allowed any statistical disparity to invalidate a practice could call into question countless commonplace, long-established, race-neutral voting practices, and could raise constitutional concerns. Cf. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

Rather, as the Supreme Court has explained, the "essence" of a Section 2 results claim is that a challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47; see Senate Report 27-30 & nn.109-120. A finding of a Section 2 violation thus requires a "peculiarly" fact-based inquiry into the "design and impact of the contested electoral mechanism[]" in light of the jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (citations omitted).

2. The Supreme Court has never decided a Section 2 vote denial or abridgement case on the merits and, therefore, has never articulated the governing test for such claims. Most lower courts have applied a two-step framework in this context:

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and]
>
> [2] [T]hat 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.

League of Women Voters of N.C. (*LWV*) v. *North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); see also, *e.g.*, *Michigan State A. Phillip Randolph Inst.* v.

Johnson, 833 F.3d 656, 667 n.2 (6th Cir. 2016); *Veasey* v. *Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); cf. *Frank* v. *Walker*, 768 F.3d 744, 754-755 (7th Cir. 2014) (*Frank I*) (applying test "for the sake of argument").

The parties litigated, and the district court decided, this case under this two-step framework. E.R. 52-53. On appeal, the panel majority applied a modified version of the two-step test. *DNC* v. *Reagan*, 904 F.3d 686, 715 (9th Cir. 2018). If applied too literally, this test could be troublingly over-inclusive and could invalidate many commonplace rules of modern election administration, such as voter registration or precinct voting. See, *e.g.*, *Frank I*, 768 F.3d at 753-754. But not all racially disparate impacts, including those rooted in socio-economic disparities, will actually result in "less opportunity" to vote. See *Gonzalez*, 677 F.3d at 405; *Frank I*, 768 F.3d at 753 ("[Section] 2[] does not condemn a voting practice [merely] because it has a disparate effect on minorities."); accord, *e.g.*, *Salt River*, 109 F.3d at 595; *Ortiz* v. *City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 312-316 (3d Cir. 1994). Moreover, this two-part test does not precisely capture the essential elements or scope of analysis that Section 2's plain text requires, including the "results in" and "totality of circumstances" elements. 52 U.S.C. 10301(a) and (b).

a. To violate Section 2, a voting rule or practice must result in voters of a racial group "hav[ing] *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b)

(emphasis added). A challenged voting practice results in "less opportunity" within the meaning of Section 2 when it results in protected voters having unequal access to "participate in the political process" and "elect representatives of their choice." 52 U.S.C. 10301(b); *Chisom*, 501 U.S. at 397; see *Lee* v. *Virginia State Bd. of Elections*, 843 F.3d 592, 600-601 (4th Cir. 2016); *LWV*, 769 F.3d at 240; *Frank I*, 768 F.3d at 754-755; *Gonzalez*, 677 F.3d at 405; *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1237-1239 (11th Cir. 2005) (en banc) (Tjoflat, J., concurring).

A showing of any disproportionate burden, without more, does not satisfy this element. See *Veasey*, 830 F.3d at 253-254; *Frank I*, 768 F.3d at 753; *Gonzalez*, 677 F.3d at 405. Rather, the burden a challenged rule imposes on the right to vote thus must be not only disproportionate, but also material to the voter's ability to vote, taking into account the totality of circumstances. Such a burden exists when members of a protected class face materially greater difficulty in complying with the challenged practice than other voters, and that burden is not sufficiently mitigated by other voting practices in the jurisdiction. *E.g.*, *Lee*, 843 F.3d at 600-601; *LWV*, 769 F.3d at 240; *Veasey*, 830 F.3d at 254; *Frank I*, 768 F.3d at 754-755; *Gonzalez*, 677 F.3d at 405. Plaintiffs may establish that the burden is "disproportionate" by showing that a challenged practice is more likely to affect the protected group (or groups) than other voters, or that the group has less relative ability to overcome the burdens that the challenged practice imposes on the right to vote. And a burden is material if it creates an impediment to the ability to vote that is not offset by

other opportunities to register or vote. See, *e.g.*, *Lee*, 843 F.3d at 601; compare also *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (election rules that impose "the usual burdens of voting" do not violate Constitution); *Storer* v. *Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some other order, rather than chaos, is to accompany the democratic process.").

Applying Section 2 by its terms to require plaintiffs to demonstrate that members of a racial group have less opportunity to vote—*i.e.*, that the challenged rule disproportionately and materially burdens their ability to vote—not only is faithful to the text, but also avoids improper invalidation of a host of commonplace, long-established voting practices that Congress could not have intended to sweep aside. As the Seventh Circuit reasoned, omitting or misapplying the less-opportunity requirement would have far-reaching consequences under Section 2, for "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank I*, 768 F.3d at 754. Section 2, however, "does not sweep away all election rules that result in a disparity in the convenience of voting." *Lee*, 843 F.3d at 601. The requirement that plaintiffs show "a disproportionate and material burden" ensures that, consistent with Section 2's text, the results test prohibits only those voting practices that actually "result[] in a denial or abridgement of the right * * * to vote" and "less opportunity" for "members" of a protected class, and not every practice that has *any* racially

disproportionate impact or burden. 52 U.S.C. 10301(a), (b).

b. Section 2(b) also requires courts to evaluate "the totality of the circumstances" to determine whether or not the "political processes" in the jurisdiction are "equally open to participation by members" of a protected group. 52 U.S.C. 10301(b). Considering all relevant circumstances is essential to accurately assessing whether a voting rule results in less opportunity to vote. Because Section 2 claims must be analyzed under the "totality of circumstances," courts have properly considered the nature and extent of the burden a challenged practice imposes in light of any other practices in the jurisdiction that mitigate or eliminate the alleged burden. See, *e.g.*, *DNC*, 904 F.3d at 714 ("If a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting, a court can reasonably conclude that the law does not impair any particular group's [electoral] opportunity."); *Lee*, 843 F.3d at 601; *Veasey*, 830 F.3d at 256. Indeed, it is only through a fact-intensive examination of a jurisdiction's electoral scheme that courts can properly determine that the challenged practice actually results in an "inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47; see also *Gonzalez*, 677 F.3d at 405-407.

Considering the totality of circumstances also enables courts to ensure that any inequality of opportunity that results from the challenged practice is "on account of race or color." 52 U.S.C. 10301(a); see also 52 U.S.C. 10301(b) (prohibiting practices that

result in "less opportunity" for "members" of a protected group). In practical terms, this showing of causation requires the plaintiff to prove that the unequal opportunity flowing from the challenged practice is attributable to the social, historical, and political effects of past or present race discrimination. See *Salt River*, 109 F.3d at 594-596. Courts frequently have relied upon the non-exhaustive list of factors often referred to as the Senate Factors to conduct this examination. These factors seek to capture the extent of racial politics and the lingering effects of past and present race discrimination in the jurisdiction. See *Gingles*, 478 U.S. at 44-45; Senate Report 28-29; see also *Gonzalez*, 677 F.3d at 405-406; *Salt River*, 109 F.3d at 594-596 & nn.6-8; *Johnson*, 405 F.3d at 1238-1239 (Tjoflat, J., concurring). Each factor's relevance will vary with "the kind of rule, practice, or procedure called into question." Senate Report 28; see also *Gonzalez*, 677 F.3d at 406 (citing *Gingles*, 478 U.S. at 45, and Senate Report 29).[3]

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[3] The factors included in the Senate Report accompanying the 1982 amendments to Section 2 are based upon circumstantial factors that the Supreme Court identified in *White* v. *Regester*, 412 U.S. 755 (1973), and *Rogers* v. *Lodge*, 458 U.S. 613 (1982), as potentially probative of unconstitutional vote dilution. There is thus considerable overlap between the factors that courts analyze in addressing whether a Section 2 results violation exists and the factors that the Supreme Court has identified as permitting a fact-finder to infer purposeful discrimination. The Supreme Court has recognized the Senate Report accompanying the 1982 amendments as "the authoritative source for legislative intent" about Section 2. See *Gingles*, 478 U.S. at 43 n.7.

A disproportionate and material burden is not "on account of race or color" where the impact complained of is not sufficiently attributable to the on-going effects of race discrimination, but is instead traceable to some other factor, such as the promotion of a non-tenuous state interest. Thus, the "tenuousness" Senate factor requires courts analyzing Section 2 claims to examine a jurisdiction's claimed interest in imposing a challenged practice and whether the practice actually advances that interest. See Senate Report 29-30 & n.117; *LULAC, Council No. 4434* v. *Clements*, 999 F.2d 831, 869-876 (5th Cir. 1993) (en banc) (citing *Houston Lawyers' Ass'n* v. *Attorney Gen. of Tex.*, 501 U.S. 419, 426-428 (1991)). This factor does not cut against a finding of Section 2 liability where a defendant jurisdiction merely asserts a substantial interest or non-tenuous justification for a category of laws, but instead examines the fit with the specific, actual provisions of the challenged law or practice. *Houston Lawyers' Ass'n*, 501 U.S. at 426-427 (state interest "is merely one factor to be considered in evaluating the 'totality of circumstances'" and "does not automatically, and in every case, outweigh proof of" a disproportionate and material burden).

B. The District Court Correctly Concluded That H.B. 2023 And Arizona's In-Precinct Voting Requirement Do Not Violate Section 2's Results Test

Proper application of these standards to the record here shows that neither challenged practice results in a disproportionate and material burden on minority voters under Section 2. Therefore, neither practice results in minority voters having "less opportunity"

than other voters "to participate in the political process and elect representatives of their choice," 52 U.S.C. 10301(b), and the Court should affirm dismissal of the Section 2 results claims.

1. The Record Fails To Establish That H.B. 2023 Imposes A Disproportionate And Material Burden On Minority Voters

a. There Are Significant Evidentiary Gaps Regarding The Nature And Extent Of The Alleged Impact Of H.B. 2023's Restrictions

Plaintiffs failed to show that H.B. 2023 imposes a disproportionate and material burden on the right to vote that results in "less opportunity" for minority voters within the meaning of Section 2. Indeed, significant evidentiary gaps regarding the nature and extent of H.B. 2023's alleged impact on minority voters foreclose plaintiffs' claim.

Plaintiffs did not provide any quantitative evidence regarding the number or percentage of Arizona voters who had relied on third-party ballot collectors prior to H.B. 2023's passage. Nor did they offer any evidence quantifying or estimating how many African-American, Hispanic, or Native-American voters in Arizona previously had used third-party ballot collectors to return their ballots. Plaintiffs also failed to present testimony from any individual minority voter showing "that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." E.R. 63. Plaintiffs did not offer any such evidence even though H.B. 2023 had been in effect for

two statewide elections (both the 2016 presidential primary and general election) prior to trial.

This evidentiary failure is particularly notable because the organizational plaintiffs in this case should have been well-positioned to provide such evidence given their professed reliance on ballot collectors pre-H.B. 2023. E.R. 16, 22, 62. While not automatically fatal, these evidentiary gaps are significant as nearly all successful Section 2 vote denial or abridgement claims will incorporate some kind of analysis of how many people are affected by the challenged practice and whether and to what degree minority voters are affected more than non-minority voters. See, *e.g.*, *Veasey*, 830 F.3d at 244 ("courts regularly utilize statistical analyses to discern whether a law has a discriminatory impact").

Instead of providing direct evidence of H.B. 2023's adverse effect on minority voters, plaintiffs relied on "two general categories of circumstantial evidence" regarding racially disparate use of ballot collectors. E.R. 58. First, plaintiffs offered testimony from "lawmakers, elections officials, and community advocates" that ballot collection tended to be used more by "communities that lack easy access to secure, outgoing mail services"—namely, "the elderly, homebound, and disabled; the poor; those who lack reliable transportation; those who work multiple jobs or lack childcare; and less educated voters who are unfamiliar with or more intimidated by the voting process." E.R. 58-59. Plaintiffs then offered data showing that such "socioeconomic circumstances are disproportionately reflected in minority communities."

E.R. 59. Second, plaintiffs offered evidence showing that "ballot collection ha[d] become a larger part of the Democratic Party's [get-out-the-vote] strategy," with a particular focus on minority voters, who "in Arizona tend to vote for Democratic candidates." E.R. 62.

The court credited both categories of circumstantial evidence in finding that "prior to H.B. 2023's enactment minorities generally were more likely than non-minorities to return their early ballots with the assistance of third parties." E.R. 62. The court further found, however, that "[a]lthough there are significant socioeconomic disparities between minorities and non-minorities in Arizona," such disparities "are an imprecise proxy for disparities in ballot collection use." E.R. 62-63. Indeed, "anecdotal estimates from individual ballot collectors indicate that a relatively small number of voters have used ballot collection services in past elections" and that "even among socioeconomically disadvantaged voters, most do not use ballot collection services." E.R. 63.

Ultimately, the court found that plaintiffs could not prove an unlawful burden merely by showing a racial disparity of an uncertain degree and by showing that H.B. 2023 "makes it slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots." E.R. 63.

b. The Only Permissible Conclusion On This Record Is That H.B. 2023 Does Not Impose A Disproportionate And Material Burden That Results In Less Opportunity For Minority Voters

Assuming the correctness and completeness of the district court's factual findings, its holding that plaintiffs failed to show that H.B. 2023 imposes a cognizable burden was the only conclusion it could have reached. Nor could plaintiffs have shown a "disproportionate and material" burden given: (a) the weaknesses in their evidence regarding a racial disparity in the use of third-party ballot collectors; and (b) the absence of evidence showing that H.B. 2023's ban on unlimited third-party ballot collection materially affects minority voters' access to the ballot box, especially where certain excepted third-persons still can return their completed ballots.

In the first place, plaintiffs failed to prove that any burden H.B. 2023 imposes on minority voters is "disproportionate" to the burden it imposes on other voters. To be sure, plaintiffs are not required as a matter of law to offer precise quantitative evidence that a challenged practice—here, a previously available voting mechanism that now is prohibited—affects a higher percentage of minority voters in order to show that the practice imposes a disproportionate and material burden on such voters. Nor do relatively small numbers of affected voters automatically preclude Section 2 liability. But plaintiffs' evidence of H.B. 2023's effects on minority voters was insubstantial and of limited probative value.

Arguably the strongest evidence of a racially disparate impact came from an expert report by Dr. Jonathan Rodden, who recounted that, outside of Maricopa and Pima counties, "around 86 percent of non-Hispanic whites have home mail service," but "only 80 percent of Hispanics do, and only 18 percent of Native Americans have such access." E.R. 8. But the court reasonably found that "mail access is an imprecise proxy for determining the number and demographics of voters who use or rely on ballot collection services." E.R. 8. "Simply because a voter lacks home mail access does not necessarily mean that she uses or relies on a ballot collector to vote, let alone a ballot collector who does not fall into one of H.B. 2023's exceptions." E.R. 8. Plaintiffs failed to offer sufficient evidence showing the degree to which minority communities that lack home mail service actually relied on ballot collectors who are not excepted under H.B. 2023.

Nor did plaintiffs offer testimony from a single minority voter explaining that he or she relied on ballot collectors because of the lack of home mail service. Testimony from individual minority voters explaining how and why H.B. 2023's restrictions would make it more difficult for them to vote was not required as a matter of law. Yet the absence of such testimony may reasonably cause a court to give less weight to other, more attenuated evidence regarding the presence and magnitude of a racially discriminatory impact. See *Gonzalez*, 677 F.3d at 406-407 (affirming the district court's rejection of a Section 2 challenge where there was no evidence that the voting practice resulted in any disparate impact).

Plaintiffs' failure to offer probative evidence regarding the degree of racial disparity in the use of third-party ballot collectors is all the more significant given their failure to show that any burden that H.B. 2023 imposes is material. Arizona law provides many remaining avenues to cast a valid ballot, including an early ballot. Over the course of a 27-day period, voters may return their ballot, postage free, by taking it to "a mail box, post office, early ballot drop box, any polling place or vote center[,] * * * or an authorized election official's office, either personally or with the assistance of" an election official, postal worker, or statutorily authorized family member, household member, or caregiver. E.R. 23. On election day itself, Arizona requires that employers provide employees sufficient time to vote, irrespective of their ability to vote an early ballot. Ariz. Rev. Stat. Ann. § 16-402 (2018). And voters who are ill or who have a disability may request in-person assistance from county officials to vote at their home. Ariz. Rev. Stat. Ann. § 16-549 (2018). Given the existence of these many options for returning a ballot, and the marked absence of evidence showing that these options were insufficient to address the needs of any minority voters adversely affected by H.B. 2023, the only permissible conclusion is to reject plaintiffs' Section 2 claim.

2. The Record Fails To Show That Arizona's Longstanding In-Precinct Voting Requirement Imposes A Disproportionate And Material Burden On Minority Voters

In their challenge to Arizona's treatment of out-of-precinct provisional ballots, plaintiffs showed both the

number of voters affected in recent elections and a disproportionate likelihood that minority voters would cast an OOP ballot that would not be counted. E.R. 64-65. Notwithstanding this evidence, the district court held that plaintiffs failed to prove an unlawful burden. The court reached this conclusion for two reasons. First, it stated that plaintiffs "ha[d] not shown that Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." E.R. 67. Second, it stated that because "OOP ballots account for such a small fraction of votes cast statewide," plaintiffs cannot show that racial disparities in OOP voting "are practically significant enough to work a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." E.R. 67. Given the record before the district court, this Court should affirm the decision rejecting plaintiffs' OOP Section 2 claim but on alternative legal grounds.

a. Plaintiffs' Challenge To Arizona's Restrictions On OOP Voting Does Not Fail Merely Because The Restriction Itself Does Not Cause The Racial Disparity Or Affects Only A Small Number Of Voters

The district court's analysis went astray in presuming that plaintiffs must show that the challenged law itself *causes* an underlying racial disparity that contributes to the practice's disproportionate effect. E.R. 67 (faulting plaintiffs for failing to show that Arizona's OOP policy "causes minorities to show up to vote at the wrong precinct").

Such a circular requirement makes little practical sense. Plaintiffs challenging a voter identification law under Section 2, for example, have never been required to show that the law itself causes minority voters to possess specific forms of ID at lower rates (*e.g.*, that the law causes minority voters to possess fewer driver's licenses). Likewise, poll taxes did not adversely affect minority voters by causing them not to have sufficient money to pay the tax.

Rather, in both instances, any adverse effect on relative voting opportunities depended on preexisting socioeconomic disparities that, taken together with the challenged practice's enforcement, caused racial disparities in the voting system. See *Gingles*, 478 U.S. at 47 ("essence" of a Section 2 claim is that challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality" in voting opportunities). Indeed, the court here found as much: "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently," both groups that are disproportionately composed of minorities, who in turn "have disproportionately higher rates of residential mobility" and are "more likely to need to renew their voter registration and reeducate themselves about their new voting locations." E.R. 66. But as in this case, the mere existence of a racial disparity (even one rooted in disparate socioeconomic circumstances) is not synonymous with a disproportionate and material burden on the right to vote. Cf. *Ortiz*, 28 F.3d at 312-316.

Likewise, the district court's reasoning was not correct to the extent that it suggested that plaintiffs' Section 2 claim would fail solely because of the small number of voters affected. E.R. 67. The panel majority below repeated this error while ultimately reaching the correct conclusion. The majority reasoned that the "small" number of voters affected means that the burden imposed could not impact the minority group's ability to "elect representatives of their choice." *DNC*, 904 F.3d at 716. While a small number of affected voters may bear on whether the burden imposed is material or "on account of race or color," the panel's reasoning implies that Section 2 can be violated only if the challenged practice adversely affects a sufficiently large number of minority voters so as to potentially influence an election outcome. *Id.* at 717, 730.

That is not a proper reading of the statute. Section 2 prohibits 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) (emphasis added); see also *Frank* v. *Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."). Section 2 safeguards a personal right to equal participation opportunities. A poll worker turning away a single voter because of her race plainly results in "less opportunity * * * to participate in the political process and to elect representatives of [her] choice." 52 U.S.C. 10301(b). As the Supreme Court explained in *Chisom*, "any abridgment of the opportunity of members of a protected class to participate in the political process

inevitably impairs their ability to influence the outcome of an election." 501 U.S. at 397. A more tailored remedy may be appropriate, however, where a Section 2 results violation impacts only a limited number of voters.

b. The Only Permissible Conclusion On This Record Is That Arizona's In-Precinct Voting Requirement Does Not Impose A Disproportionate And Material Burden On Minority Voters

Applying the proper legal framework, under the "intensely local" and "functional" analysis of a jurisdiction's electoral scheme required by Section 2, plaintiffs did not show that Arizona's long-standing ban on counting OOP ballots imposes a disproportionate and material burden on minority voters' equal access to the political process. *Gingles*, 478 U.S. at 45, 79 (citations omitted). Plaintiffs failed to prove that the current system imposes significant travel burdens, or that there are systemic problems in providing the correct polling place information to minority voters. E.R. 45. Arizona has enforced its precinct rule for decades (E.R. 14), but the percentage of voters potentially affected by this rule has continued to decline both because of the use of vote centers and the dramatically increased reliance on mail ballots. Accordingly, the percentage of voters actually affected by the ban on counting OOP ballots has continued to decline (0.64% of all votes cast in the 2008 general election were uncounted OOP ballots, as compared to only 0.15% in the 2016 general election). E.R. 40. In light of these facts, and further taking into account

Arizona's expansive in-person early voting period, plaintiffs have not proven that Arizona's OOP rules constitute a disproportionate and material burden on minority voters' access to the polls.

Context matters under Section 2 of the VRA. With different surrounding facts, a similar or newly enacted restriction on counting OOP ballots could yield a different result. See *North Carolina State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204, 217 (4th Cir. 2016). However, on this record, Arizona's in-precinct voting requirement is an unremarkable, decades-old component of the State's framework of electoral rules organizing how and where Arizona voters may cast a ballot. Plaintiffs did not prove that complying with this requirement is materially burdensome for any group of voters, including the State's minority voters. They therefore failed to prove that this requirement results in "less opportunity" for minority voters.

CONCLUSION

This Court should affirm the district court's rejection of the Section 2 results claims.

Respectfully submitted,

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[*Certificates of Compliance and Service Omitted in this Appendix*]

APPENDIX H

No. 18-15845

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, et al.,
Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Arizona Secretary of State;
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendants-Appellees,

and

ARIZONA REPUBLICAN PARTY, et al.,
Intervenor Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona, No. CV-16-01065 (Rayes, J.)

DEFENDANT-APPELLEE ARIZONA ATTORNEY GENERAL MARK BRNOVICH'S MOTION TO TAKE JUDICIAL NOTICE

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Defendant-Appellee Attorney General Mark Brnovich respectfully moves for judicial notice of the North Carolina State Board of Elections' March 13, 2019 Order in *In re Investigation of Election Regularities Affecting Counties Within the 9th Congressional District*, attached as Exhibit A. Counsel for Plaintiffs-Appellants has indicated that they take no position on this motion.

Rule 201 of the Federal Rules of Evidence provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Among other things, this Court may take judicial notice of the decisions of administrative bodies, *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1186 (9th Cir. 2011), as well as "proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue," *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Further, documents that "are publicly available on

[a] … government website" may be judicially noticed where "neither party disputes the authenticity of the website nor the accuracy of the information." *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788 n.3 (9th Cir. 2018).

The North Carolina State Board of Elections (State Board) is "an independent regulatory and quasi-judicial agency." N.C. Gen. Stat. § 163A-5(a). On March 13, 2019, "[a]fter receiving testimony and other evidence submitted over a four-day hearing, and after reviewing written submissions and hearing arguments from the parties, and having weighted the representations of agency staff," the State Board entered its findings, conclusions, and orders in *In re Investigation of Election Regularities Affecting Counties Within the 9th Congressional District*. Ex. A at 1. That Order is publicly available on the State Board's website. *See* https://bit.ly/2u5JcNt.

Based on "substantial evidence" of an "absentee ballot scheme and other irregularities," the State Board "unanimously conclude[d] that the 2018 General Election for North Carolina's 9th Congressional District was corrupted by fraud, improprieties, and irregularities so pervasive that its results [were] tainted as the fruit of an operation manifestly unfair to the voters and corrosive to our system of representative government." Ex. A at 2. The State Board found "overwhelming evidence" of "a coordinated, unlawful, and substantially resourced absentee ballot scheme" in which McCrae Dowless, a paid campaign operative, "hired workers he paid in cash to collect absentee request forms, to collect absentee ballots, and to falsify

absentee ballot witness certifications," among other things. *Id.* at 9, ¶ 19; *id.* at 12, ¶ 36. The Order details the illegal ballot-collection scheme that Dowless orchestrated, *see id.* at 18–24, ¶¶ 58–78, including the "various practices" he and his workers used "to avoid detection by election officials," *id.* at 20–21, ¶¶ 65–68. The Board concluded that this "coordinated, unlawful, and well-funded absentee ballot scheme … perpetrated fraud and corruption upon the election," "taint[ing] [its] results … and cast[ing] doubt on its fairness." *Id.* at 43–44, ¶¶ 151, 153. As a consequence, the Board unanimously ordered a new election. *Id.* at 45.

The State Board's Order is relevant here, where Plaintiffs-Appellants have challenged H.B. 2023—an Arizona law that aims to prevent early ballot fraud and strengthen public confidence in elections by allowing voters to entrust caregivers, family members, household members, mail carriers, or election officials to return their early ballots, but not other, unauthorized third parties.

The State Board's Order is a decision of a quasi-judicial administrative body; it is publicly available on the Board's website; and it is relevant to this case. The Court should take judicial notice of the Order.

Date: March 14, 2019

s/_____

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[*Certificate of Service Omitted in this Appendix*]

EXHIBIT A

STATE OF NORTH CAROLINA

BEFORE THE STATE BOARD OF ELECTIONS

COUNTY OF WAKE

[Filed March 13, 2019]

IN THE MATTER OF:	)
INVESTIGATION OF ELECTION	)
IRREGULARITIES AFFECTING	)
COUNTIES WITHIN THE 9TH	)
CONGRESSIONAL DISTRICT	)
	)

ORDER

THIS MATTER CAME BEFORE THE STATE BOARD OF ELECTIONS ("State Board") upon the State Board's own motion at a public evidentiary hearing held February 18, 2019 through February 21, 2019 in the manner prescribed by a Notice of Hearing and Amended Order of Proceedings issued February 4, 2019. At the evidentiary hearing, congressional candidate Jeff Scott appeared *pro se*; congressional candidate Dan McCready appeared through counsel, Marc E. Elias (admitted *pro hac vice*), Jonathan Berkon (admitted *pro hac vice*), and John R. Wallace; congressional candidate Dr. Mark E. Harris appeared and was represented by counsel David B. Freedman, Dudley A. Witt, Alex C. Dale, and Christopher S. Edwards; judicial candidate Vanessa Burton appeared and was represented by Sabra J. Faires and William R. Gilkeson, Jr.; and judicial candidate Jack Moody

appeared and was represented by Timothy R. Haga. The Mark Harris for Congress Committee was represented by John E. Branch, III. Additional candidates were provided notice of the evidentiary hearing, but did not appear.

After receiving testimony and other evidence submitted over a four-day hearing, and after reviewing written submissions and hearing arguments from the parties, and having weighted the representations of agency staff, the State Board finds, concludes and orders the following:

I. INTRODUCTION

A new election is the gravest remedy available to this State agency that has, for a century, supervised elections meant to ensure "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. CONST. art. I, § 2.

And yet, the substantial record before the State Board of Elections in this case lead this Board to unanimously conclude that the 2018 General Election for North Carolina's 9th Congressional District was corrupted by fraud, improprieties, and irregularities so pervasive that its results are tainted as the fruit of an operation manifestly unfair to the voters and corrosive to our system of representative government. A new election is necessary not only in the congressional contest, but also in two local contests caught in the long shadow of uncertainty caused by absentee ballot fraud funded principally by the Mark Harris for Congress

Committee. Tampering, obstruction and disguise have obscured the precise number of votes either unlawfully counted or excluded, but substantial evidence supports our conclusion that the absentee ballot scheme and other irregularities cast doubt on the outcome of each contest subject to this Order.

II. PROCEDURAL HISTORY

1. In the November 6, 2018 General Election, North Carolina's Ninth Congressional District ("CD-9") spanned eight counties along the State's central southern border. Moving west to east, CD-9 included a portion of Mecklenburg County; all of Union, Anson, Richmond, Scotland, and Robeson Counties; and substantial parts of Cumberland and Bladen Counties. In that election, the candidates seeking to represent CD-9 in the 116th Congress were Republican nominee Mark Harris, Democratic nominee Dan McCready, and Libertarian nominee Jeff Scott.

2. After counties canvassed the votes, Harris led McCready by an apparent margin of 905 votes, which constituted slightly more than one-quarter of one percent of all ballots tallied in that contest.

3. The number of returned absentee by mail ballots far exceeded the margin between Harris and McCready, with more 10,500 tallied districtwide.

4. On November 27, 2018, the date designated by statute for canvass of federal, judicial and multicounty contests, the State Board of Elections and Ethics Enforcement unanimously declined to canvass the 2018 General Election for CD-9 after a briefing from agency investigators and counsel in closed

session. The State Board of Elections and Ethics Enforcement — the predecessor to the present State Board of Elections — recessed its canvass meeting for three days to allow agency staff time to review investigatory information. Following additional briefings from agency investigators and staff, that Board on November 30, 2018, again declined to canvass results for CD-9, citing "claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters in Congressional District 9." The Board voted 7-2 to hold an evidentiary hearing "pursuant to its authority under G.S. §§ 163A-1180 and 163A-1181 to assure that the election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election" and to stay the issuance of certificates of elections in three other contests in which the apparent outcome could have been reversed by returned or non-returned absentee by mail ballots in Bladen and Robeson counties: Seat 2 on the District Court in Judicial District 16B, Bladen County Commissioner District 3, and Bladen Soil and Water Conservation District Supervisor.

5. On December 1, 2018, the Board, through Chair J. Anthony Penry, issued subpoenas to various entities, including the Mark Harris for Congress Committee ("Harris Committee"). After Mr. Penry resigned, Governor Roy Cooper appointed Joshua D. Malcolm as Chair on December 3, 2018.

6. On December 3, 2018, noting the compelling need for public disclosure in the stay of certification, Chair Malcolm instructed the State Board's executive

director to "undertake a review of materials that may be produced on a rolling basis in a manner reasonably calculated to serve the public interest without compromising the investigation." The State Board began posting materials through a website portal that provided public access to thousands of pages of evidentiary documents, investigative reports, and election records, including a substantial number of records regarding alleged absentee ballot fraud in Bladen County referred to state and federal prosecutors after the 2016 General Election. The referral was made by the State Board at a public hearing in December 2016 subsequent to a staff investigation.

7. On December 17, 2018, Chair Malcolm issued an Order of Proceedings that prescribed procedures for the evidentiary hearing, established a briefing schedule, and noticed a hearing date of January 11, 2019, among other things.

8. In the fall of 2018, a three-judge panel of the Superior Court of Wake County held that creating the State Board of Elections and Ethics Enforcement violated the constitutional separation of powers, but acted on December 11, 2018, to allow that Board to remain in place until noon on December 28, 2018. *See* Order Extending Stay, *Cooper v. Berger et al.*, 18 CVS 3348 (N.C. Super. Ct. Wake County, December 11, 2018).

9. On December 27, 2018, the General Assembly enacted Session Law 2018-146, establishing a State Board of Elections composed of five gubernatorial appointees. The enactment included a provision

directing that the new State Board would be appointed effective January 31, 2019.

10. At noon on December 28, 2018, the State Board of Elections and Ethics Enforcement was dissolved by Court order, and Governor Cooper transmitted a letter to chairs of the North Carolina Democratic Party and the Republican Party of North Carolina requesting their recommendations for interim members to avoid a month in which the Board would lack seated members. *See* Letter from the Office of the Governor to State Democratic Party Chair Wayne Goodwin and State Republican Party Chair Robin Hayes (Dec. 28, 2019). Appointment of an interim State Board would have allowed for the evidentiary hearing to proceed as scheduled on January 11, 2019.

11. On December 30, 2019, however, the State Republican Party notified the Governor of its intent to initiate legal action to block any interim appointments made to the State Board, contending that the Board must remain vacant until January 31, 2019. *See* Letter from John M. Lewis, State Republican Party's General Counsel, to William C. McKinney, Office of the Governor's General Counsel (Dec. 30, 2019).

12. On January 3, 2019, citing the absence of a seated State Board, candidate Mark Harris initiated legal proceedings to compel the issuance of a certificate of election. *See* Petition for Writ of Mandamus and Appeal from the Failure of the State Board to Act, *Harris v. Bipartisan State Board of Elections and Ethics Enforcement*, 19 CVS 0025 (N.C. Super. Ct. Wake County).

13. On January 11, 2019, the United States House of Representatives' Committee on House Administration, by and through its Chair, Zoe Lofgren, transmitted a letter to the State Board's executive director, stressing the Committee's duty under Clause 1(k) of House Rule X to review the election returns and qualification of each member and specifying that a state's "certificate is not ultimately determinative of the House's course of action as . . . the final arbiter of who is the rightful claimant to its seats." *See* Letter from Rep. Zoe Lofgren, Chair of the Committee on House Administration, to Kim Westbrook Strach, Executive Director of the State Board of Elections (Jan. 11, 2019).

14. On January 22, 2019, Senior Resident Superior Court Judge Paul C. Ridgeway held a hearing on the Petition for Mandamus and the Appeal in *Harris*. Following arguments by the parties, Judge Ridgeway ruled in open court that the State Board of Elections and Ethics Enforcement possessed statutory authority to initiate proceedings necessary to ensure the election was without fraud or corruption; that the Board had acted within its lawful authority to delay certification during the pendency of those proceedings; and that Harris had failed to establish any clear legal right to certification before the Board concluded its review. The Court, therefore, denied the Petition and the Appeal. *See* Order, *Harris*, 19 CVS 0025 (N.C. Super. Ct. Wake County, January 25, 2019).

15. On January 31, 2019, Governor Cooper appointed all members of the new State Board of Elections, who held an organizational meeting that

afternoon to select Robert B. Cordle to serve as Chair and Dr. Stella E. Anderson to serve as Secretary.

16. On February 4, 2019, Chair Cordle issued a Notice of Hearing and Amended Order of Proceedings that prescribed the procedures and evidentiary standards that would govern the hearing announced for February 18, 2019. The Order also established a process by which affected candidates could request to compel the attendance of individuals who they may wish to call as witnesses. On February 8, 2019, Chair Cordle granted all requests for witness subpoenas and issued additional investigative subpoenas to a selection of entities, including the Harris Committee, requiring productions identical to those required under subpoenas issued by the predecessor State Board of Elections and Ethics Enforcement.

17. The Board held a public evidentiary hearing between February 18 and February 21, 2019, in the courtroom of the North Carolina State Bar in Raleigh.

18. At the end of the hearing, the Board voted unanimously to order a new election for CD-9, Bladen County Commissioner District 3, and Bladen Soil and Water Conservation District Supervisor. The Board continued its hearing as to Seat 2 on the District Court in Judicial District 16B to allow agency staff additional time to review a number of factors distinctively relevant to that contest, and a separate Order will be entered as to that matter. The Board further allowed affected candidates to submit proposed findings of fact and conclusions of law by February 27, 2019.

II. FINDINGS OF FACT

A. In the months after the State Board declined to certify a winner in the contest for CD-9, and before the Board held its evidentiary hearing, the Board staff conducted a investigation into the irregularities and improprieties affecting elections in certain counties within that congressional district.

19. The Board employs an executive director, in-house investigations team, data analysts, and counsel who carry out the work of Board investigations. During their investigation into election irregularities affecting counties within CD-9, Board staff uncovered overwhelming evidence that a coordinated, unlawful, and substantially resourced absentee ballot scheme operated during the 2018 General Election in Bladen and Robeson Counties.

20. In the absence of seated Board members, between December 28, 2018, and January 31, 2019, agency staff continued their collection and review of communications, financial records, and other documents produced under more than a dozen subpoenas.

21. As part of the Board staff's thorough review, Board investigators attempted to interview 401 voters, successfully interviewed 142 voters, and also interviewed 30 subjects and other witnesses.

22. Subpoenas issued by the predecessor Board and by the present State Board yielded records in excess of one hundred thousand pages, including

communications, financial information and phone records.

23. Three distinct categories of irregularities occurred in Bladen and Robeson Counties during the 2018 General Election: (1) absentee by mail irregularities in Bladen and Robeson Counties; (2) disclosure of early voting results in Bladen County; and (3) a lack of office security in the Bladen County Board of Elections Office ("Bladen CBE").

24. The absentee by mail irregularities were enabled by a well-funded and highly organized criminal operation, coordinated by Leslie McCrae Dowless Jr. and others, and funded principally by the Harris Committee through its consulting firm Red Dome Group. Bladen County Sheriff James McVicker and other candidates also paid Dowless.

B. The number of absentee ballots in some manner affected by the operation run by Dowless, exceeded the apparent margin between Harris and McCready based on unofficial results.

25. After the 2018 General Election, districtwide, the apparent results of CD-9 were as follows: Harris 139,246, McCready 138,341, and Scott 5,130. Accordingly, Harris led by a margin of 905 votes, or 0.3% of the total number of votes tallied.

26. Districtwide, the apparent absentee by mail votes were as follows: Harris 4,027, McCready 6,471, and Scott 153.

27. In Bladen County, where Dowless and his workers were found to have concentrated their activity, the apparent absentee by mail votes were as follows: Harris 420, McCready 258 , and Scott 6.

28. In Robeson County, where Dowless and his workers were also active, the apparent absentee by mail votes were as follows: Harris 259, McCready 403, and Scott 18.

29. In the 2018 General Election, Bladen CBE received 1,369 requests for absentee by mail ballots purportedly submitted by or on behalf of voters residing in the portion of Bladen County within CD-9. Some portion of these requests were fraudulently submitted under forged signatures, including a deceased voter. Bladen CBE sent absentee by mail ballots to 1,323 voters and did not send absentee by mail ballots to 46 voters for whom or by whom request forms were purportedly submitted.

30. Of the 1,323 absentee by mail ballots sent to Bladen County voters within CD-9, 728 (55.03%) were returned, and 595 (44.97%) were not returned.

31. In the 2018 General Election, the Robeson County Board of Elections ("Robeson CBE") received 2,321 requests for absentee by mail ballots purportedly submitted by or on behalf of voters in Robeson County, the entirety of which is located within CD-9. Robeson CBE sent absentee by mail ballots to 2,269 voters and did not send absentee by mail ballots to 52 voters for whom or by whom request forms were purportedly submitted.

32. Of the 2,269 absentee by mail ballots sent to Robeson County voters, 776 (34.20%) ballots were returned, and 1,493 (65.80%) were not returned.

C. Board Investigators found significant absentee by mail irregularities in Bladen and Robeson Counties.

33. In April 2017, Harris personally hired McCrae Dowless to conduct an absentee ballot operation leading up to and during the 2018 elections.

34. In June 2017, Harris hired the consulting firm Red Dome Group. Thereafter, McCrae Dowless was paid by Harris Committee through Red Dome. Red Dome would bill the Harris Committee for these expenses.

35. Other candidates and organizations, including but not limited to Bladen County Sheriff candidate James McVicker, paid Dowless for absentee ballot operations during the 2018 elections.

36. Dowless hired workers he paid in cash to collect absentee request forms, to collect absentee ballots, and to falsify absentee ballot witness certifications.

37. Initially, Dowless told workers he would pay them $150.00 per 50 absentee ballot request forms collected and $125.00 per 50 absentee ballots collected, but he also sometimes paid other amounts per ballot or a flat weekly rate.

38. Dowless's absentee ballot operation was arranged into two phases: (1) the collection of absentee

by mail request forms; and (2) the collection of absentee ballots.

1. Phase One of Dowless's operation involved paying individuals to collect and submit absentee by mail request forms, some of which were fraudulent.

39. In addition to using blank forms to solicit voters to request to vote absentee by mail, Dowless and his workers prepared request forms utilizing forms obtained from previous elections to "pre-fill" the form so that workers could return to those voters and have the voters sign the request form. The pre-filled section would sometimes include voters' Social Security numbers, driver's license numbers, and dates of birth.

40. "Phase One" of Dowless's operation was arranged into four known components. First, Dowless's workers obtained absentee by mail request forms from voters. Second, Dowless's workers returned absentee by mail request forms to Dowless for payment. Third, Dowless would photocopy and retain copies of all absentee by mail request forms for later use in subsequent elections or for other purposes. Fourth, Dowless or his workers would deliver absentee by mail request forms to the appropriate CBE Office.

41. In the 2018 General Election, at least 788 absentee by mail request forms in Bladen County were submitted by McCrae Dowless or his workers.

42. In the 2018 General Election, at least 231 absentee by mail request forms in Robeson County were submitted by McCrae Dowless's workers, though an email suggests the number may have been at least

449. The records logs maintained by Robeson CBE did not appear complete, so a correct count could not be made. In the 2018 General Election, county boards of elections were not required by law or rule to maintain logs of absentee request forms.

43. Red Dome Group principal Andy Yates testified that Dowless called him regularly to provide updates on the number of absentee by mail requests he had collected, and that another Red Dome contractor provided Dowless lists of voters who had been sent ballots.

44. On September 24, 2018, at 10:10:25 a.m., Andy Yates emailed Beth Harris the following:

> Of the absentees that have been sent out in Robeson so far, after reviewing them with McCrare [sic], we believe that 181 of them are from his list. They have more yet to turn into the BofE in Robeson. McCrae's team has generated a total of 449 requests in Robeson and will be generating more.

Ex. 30.

45. Lisa Britt worked for Dowless during the 2018 General Election. She testified that Dowless's operation included efforts to "pre-fill" absentee by mail request forms based on information previously obtained and retained by Dowless, who developed the practice of saving photocopies of absentee by mail request forms that he and his workers collected during past elections. Absentee by mail request forms were copied at an office used by Dowless and his workers. Copies were maintained without redactions, such that Dowless

possessed sensitive voter data, including voters' Social Security numbers, driver's license numbers, dates of birth, and signatures. Lola Wooten previously worked in an absentee ballot operation distinct from the operation conducted by Dowless. However, Wooten and Dowless communicated frequently by phone during the 2018 general election and Britt, along with others, assisted and/or observed Wooten making photocopies of absentee by mail request forms brought by Wooten to Dowless's Office.

46. Because Dowless maintained photocopies of completed absentee by mail request forms from prior elections—including voters' signatures and other information used to verify the authenticity of a request—Dowless possessed the capability to submit forged absentee by mail request forms without voters' knowledge and without detection by elections officials.

47. Dowless's workers were deployed primarily in Bladen and Robeson Counties, though additional activities were carried out in other counties.

48. Dowless paid Britt and other workers based on the number of voters for whom they secured absentee by mail request forms: for every 50 request forms, the amount was between $150.00 and $175.00, plus additional money for gas and food, Britt testified. We find her testimony credible.

49. Dowless would pay Britt and other workers in cash once they had submitted 50 absentee by mail request forms to him.

50. Harris testified he was aware that Dowless paid his workers based on the number of absentee by

mail request forms each worker collected and returned to Dowless. Harris explained that his Committee would pay Dowless around $4 or $4.50 per request form. Harris further testified that he had asked Dowless during their initial meeting, "'don't you pay [your workers] hourly?' [to which Dowless responded], '[n]o, if you pay people hourly down here they'll just sit under a tree." We find Harris' testimony on this issue credible.

51. Andy Yates testified, and the Board finds it credible, that he was aware Dowless "wouldn't always turn [absentee by mail request forms] in as soon as he got them." There is substantial evidence that Dowless engaged in the practice of collecting then withholding absentee by mail request forms, submitting them to the elections office at times strategically advantageous to his ballot operation. Dowless would track which ballots had been mailed by elections officials using publicly available data.

52. Some portion of the absentee by mail request forms submitted by Dowless and his workers were forged. Britt admitted that she had completed the top portion of an absentee by mail request form submitted on behalf of a deceased individual, James Spurgeon Shipman. Britt denied having forged Shipman's purported signature at the bottom of the request form, which was signed months after Shipman had died, and Britt claimed not to know who had forged Shipman's signature on the bottom of the form.

53. Dowless and his workers engaged in a systematic effort to avoid detection of their unlawful activities.

54. Britt forged the signature of her mother, Sandra Dowless, on a number of witness certifications on the absentee by mail container envelopes. Dowless told Britt that she had witnessed too many absentee by mail container envelopes under her signature, and Britt began forging her mother's signature.

55. Dowless and his workers discussed and enacted strategies designed to avoid raising any "red flags" with elections officials. Dowless was aware that Britt was forging Sandra Dowless's signature at the time the forgeries occurred.

56. During the general election, some voters discovered that absentee by mail request forms were submitted on their behalf, but without their knowledge, consent, or signature, to the Bladen CBE. At least two of these forms were submitted by Dowless employee Jessica Dowless along with other forms she was directed to deliver by Dowless.

57. In October 2018, the State Board of Elections Office sent a mailing to every voter who had requested an absentee ballot in Bladen County for the general election. The letter informed voters of their rights and warned voters that ballot collection efforts were unlawful. The mailing stated elections officials would never come to a voter's home to collect their absentee by mail ballot. Of the letters sent, 184 were returned as undeliverable. It is unknown whether some portion of the 184 associated absentee by mail requests may have been fraudulent or undeliverable due to hurricane damage.

2. Phase Two of Dowless's operation involved paying workers to collect absentee by mail ballots, some of which were unsealed and unvoted, and deliver then to Dowless.

58. Dowless and his workers sought and obtained information from local county board of elections staff to determine when individual voters had been sent absentee by mail ballots in response to their request forms, so that Dowless or his workers could return to voters' homes shortly after absentee by mail ballots were received.

59. Some absentee by mail ballots unlawfully collected by Dowless and his workers were not properly witnessed by two witnesses or a notary public. Dowless's workers would sign the witness certification when they had not witnessed the voter mark his or her ballot in their presence.

60. Dowless and his workers collected at least some of the absentee by mail ballots unsealed and unvoted.

61. After Dowless's workers collected absentee by mail ballots from voters, they would deliver the absentee by mail ballots to Dowless in order to collect their payment in cash.

62. Dowless frequently instructed his workers to falsely sign absentee by mail ballot container envelopes as witnesses, even though they had not witnessed the voter mark the ballot in their presence. During the 2018 General Election, the Witness' Certification section printed on the absentee return envelope reads as follows:

> I certify that: • I am at least 18 years old • I am not disqualified from witnessing the ballot as described in the WARNING on the flap of this envelope • The Voter marked the enclosed ballot in my presence, or caused it to be marked in the Voter's presence according to his/her instruction • The Voter signed this Absentee Application and Certificate, or caused it to be signed • I respected the secrecy of the ballot and the Voter's privacy, unless I assisted the Voter at his/her request

The following was printed on the flap of the absentee ballot envelope in the 2018 General election: "Fraudulently or Falsely completing this form is a Class I felony under Chapter 163 of the N.C. General Statutes."

63. In some cases, Dowless's workers fraudulently voted blank or incomplete absentee by mail ballots at Dowless's home or in his office. Kimberly Robinson testified that she turned over her unmarked ballot to Lisa Britt and Ginger Eason, workers paid by Dowless. We find her testimony credible.

64. In some cases, ballots that had been collected unsealed and unvoted were returned to the county board of elections bearing fraudulent witness signatures and were accepted and counted.

65. Dowless and his workers engaged in various practices to avoid detection by election officials. Those practices included: (1) delivering small batches of ballots to the post office; (2) ensuring that ballots were

mailed from a post office that was geographically close to where the voter lived; (3) ensuring that witnesses signed and dated absentee by mail container envelopes with the same date as the voter; (4) ensuring that witnesses signed in the same color ink as the voter, which included tracing over existing signatures to ensure conformity; (5) ensuring that stamps were not placed in such a way as to raise a red flag for local elections administrators; (6) taking some collected ballots back to the voter for hand-delivery to the local Board of Elections; and (7) limiting the number of times a witness's signature appeared on the ballot; and (8) forging witness signatures on ballot envelopes.

66. From past experience, Dowless considered certain practices to be "red flags" that could trigger suspicion by elections officials. Dowless was careful to keep an arms' length distance from certain actions he directed his workers to do, such as falsely witnessing ballots, filling out ballots, and tracing over signatures of witnesses to match the ink color of the voter. Dowless had publicly made false statements to conceal his ballot collection activities by denying he "ever touched a ballot" or instructed any of his workers to collect. Ex. 35. Both Mark Harris and Andy Yates testified that Dowless specifically told that neither he nor his workers ever collected ballots. Lisa Britt and Kelly Hendrix both testified that ballot collection was a part of Phase Two as directed by Dowless.

67. Lisa Britt testified, and we find it credible, that Dowless once scolded her for placing stamps on absentee by mail container envelopes in an idiosyncratic way that might alert local elections

officials to Dowless's unlawful operation (i.e. affixing the stamp upside-down). Britt understood Dowless's warning to mean that placing the stamps in a particular way might alert elections officials that someone was unlawfully handling and mailing absentee by mail ballots on behalf of voters.

68. In order to avoid detection of Dowless's operation, Britt and Dowless's other workers would sign the witness certifications on absentee by mail container envelopes using the same color ink that the voter had used, and copying the same date that appeared next to the voter's signature, even if the witness certification was completed on some other date. Britt testified, and we find it credible, that the strategy was instituted to "throw off the elections board." At times when a certification was signed in a different color ink than the voter's, Dowless's workers would, at his direction, trace over the witness signature and date using ink similar in color to the ink used by the voter.

69. Britt explained the ballot collection and witnessing process as follows. If a voter did not have the witnesses for the ballot, the workers would take the ballots back to Dowless. They were paid to collect the ballots, but were not paid as much for collecting ballots as for request forms.

70. Britt testified regarding her payment arrangement with Dowless for the collection of absentee by mail ballots. She said she believed they had been paid $125 for 50 ballots, and that she worked about two or three weeks picking up ballots at that rate. Once they realized it was harder to convince voters to turn over their absentee by mail ballots than

request forms, they were just paid a flat weekly rate of about $200 per week. We find her testimony credible.

71. Ginger Eason and Cheryl Kinlaw similarly admitted in videotaped interviews that they were paid by Dowless to push votes for Harris, and to return collected ballots to Dowless, who had stacks of ballots on his desk throughout the 2018 General Election. Exs. 103, 104.

72. Britt testified the workers were sent back out to voters' homes once their ballots came back in the mail, to explain to the voters, that if the ballot wasn't correctly witnessed by two voters that the board of elections would reject and the vote would not count. If the voter had two witnesses available when she arrived, the voter would use his or her two witnesses. But in the event that they didn't have someone available to witness their signature on the ballot container envelope, the workers would explain to the voter they could witness it for the voter, or have it witnessed and mail it for the voter. We find her testimony credible.

73. Britt claimed that she did not fill in or vote any of the absentee by mail ballots that she personally collected, but she admitted, and we find, that she had filled in races on ballots that were collected by Dowless's other workers.

74. Affected voter Kimberly Robinson's testimony corroborated Britt's admission that Dowless and his associates had collected unsealed and unvoted absentee by mail ballots. Robinson testified that, after she received an absentee by mail ballot in the mail in the

fall of 2018, Britt and Ginger Eason came to her home in a van and took her unsealed, unvoted ballot. Robinson explained that she signed the ballot container envelope, and that Ginger Eason signed the ballot container envelope as a witness in front of her, but that no one signed as the second witness. Robinson explained that she gave Britt and Eason her blank absentee by mail ballot because "McCrae usually helped me out," by voting her ballot, since she "didn't know who to vote for" or "much about politics." We find her testimony credible.

75. Multiple affiants and other witnesses similarly reported that Dowless and his associates collected or attempted to collect absentee by mail ballots, including unsealed and/or unvoted ballots. *See* Ex. 107 (C. Eason Aff.); Ex. 10 (D. Montgomery Aff.); Ex. 8 (E. Shipman Aff.); Ex. 9 (E. Shipman Suppl. Aff.); Ex. 84 (press reports of statements by affected voters Kirby Wright and Doris Hammonds).

76. We find that Dowless and his workers collected absentee ballots in violation of North Carolina law.

77. We find that Dowless and/or his workers marked the ballots of other individuals in violation of North Carolina and federal law.

78. Other absentee by mail ballots voted in the General Election were otherwise unlawful. For example, Lisa Britt, who testified that she currently is and was at all relevant times on probation for a felony offense involving the sale of "pills" and was therefore ineligible to vote, voted in the November 2018 General

Election. Britt claimed that Dowless told her that, because her probation was not out of Bladen County, that she was still eligible to vote in Bladen County.

79. Dowless appeared at the evidentiary hearing on this matter but refused to testify when called as a witness by the State Board's staff. Through counsel, Dowless stated that he would not testify unless granted immunity in the manner allowed under Chapter 163. The State Board declined to grant immunity, and Dowless did not testify. As provided in its Amended Order of Proceedings, the State Board may draw, and does now draw, an adverse inference from Dowless's refusal to testify or to be interviewed by the State Board's investigators throughout the duration of its investigation. Dowless's refusal to testify supports our findings otherwise supported by other testimony heard by Dowless on February 18, 2019, including that Dowless or those working at his direction engaged in unlawful activities during the 2018 General Election, including witness tampering and intimidation, absentee ballot harvesting, forgery, and a scheme to obstruct the conduct of the 2018 General Election.

D. Harris personally hired McCrae Dowless to conduct an absentee ballot operation leading up to and during the 2018 elections.

80. Prior to hiring Dowless to work for his 2018 campaign, Mark Harris was aware of the absentee by mail voting results in Bladen County in the 2016 Republican Primary Election. In Bladen County during the 2016 Republican Primary Election, Todd Johnson received 221 absentee by mail votes, Mark Harris

received 4 absentee by mail votes, and incumbent Robert Pittenger received 1 absentee by mail vote.

81. In an email bearing the subject line "Anomalous Voting in Bladen County" sent to Mark Harris and Beth Harris on June 7, 2016, John Harris, their son, explained why the available data from the 2016 Republican Primary led him to conclude that "absentee by mail votes look very strange." *See* Ex. 53. John Harris's email pointed out to Mark Harris and Beth Harris three anomalies in Bladen absentee mail voting. First, Todd Johnson received a significantly disproportionate share of absentee by mail votes in comparison to Johnson's share of one-stop and Election Day votes. Second, Bladen County featured an unusually high number of absentee by mail votes overall—approximately 22% of all absentee by mail votes cast in CD-9, compared to only 2% of Election Day and one-stop votes cast in CD-9. Third, there was a disproportionately large share of African American voters among Bladen County absentee by mail voters relative to other counties. *See id.*

82. In an interview conducted after the Board had declined to certify the CD-9 election, Mark Harris stated that he learned that Dowless conducted Todd Johnson's absentee mail ballot program in Bladen County a couple weeks after the June 6, 2016 Republican primary election from a friend, Judge Marion Warren. Harris stated that according to Judge Warren, "McCrae was a guy from Bladen County. He was a good old boy that knew Bladen County politics, that he, you know, did things right, and that he knew

election law as better -- better than just about anybody he knew of." Ex. 38, Tr. 3:7-3:11.

83. On March 8, 2017, Mark Harris sent a text message to former Judge Marion Warren. The text message followed up on a previous conversation regarding a proposed trip to Bladen County during which Judge Warren would connect Mark Harris to the key people that could help him carry that part of the county in a future U.S. House CD-9 race. Mark Harris specifically referenced McCrae Dowless in this text message, describing him as "the guy whose absentee ballot project for Johnson could have put me in the U.S. House this term, had I known, and he had been helping us." Ex. 61.

84. On April 6, 2017, Mark Harris met Dowless at Bladen County Commissioner Ray Britt's furniture store in Bladen County and discussed Dowless's absentee ballot program.

85. Prior to hiring Dowless, Mark Harris was warned by his son that Dowless may have engaged in the unlawful collection of ballots during the 2016 Republican primary election.

86. On April 6, 2017 or April 7, 2017, Mark Harris and Beth Harris spoke with John Harris over the telephone about Dowless's absentee ballot program, at which time John Harris stated his concerns about Dowless to Mark Harris, including that Dowless had engaged in collecting ballots in 2016 and John Harris testified that his general sense that Dowless was "kind of a shady character." John Harris also reminded Mark Harris about the analysis that John Harris had set

forth in his June 7, 2016, email regarding absentee ballot results for Johnson in Bladen County in 2016, including that ballots had popped up in "batches," strongly suggesting that Dowless and his affiliates were collecting bundles of ballots and mailing them *en masse*.

87. John Harris testified that McCrae Dowless told Mark Harris that he never touched absentee ballots, but that John Harris did not believe Dowless because the numbers did not add up and relayed this information to Mark Harris during the April 6, 2017 or April 7, 2017 phone call. We find this testimony credible.

88. On April 7, 2017, John Harris, Mark Harris and Beth Harris exchanged a series of emails following the April 6, 2017 or April 7, 2017 phone call between the three regarding Dowless. In those emails, John Harris specifically informed Mark Harris and Beth Harris that he was "fairly certain" Dowless's operation was involved in illegal activities, namely "that they collect the completed absentee ballots and mail them all at once." John Harris provided the text of and citation to the relevant North Carolina law that makes such practice illegal. Ex. 55. John Harris's conclusion was based, at least in part, on evidence in public voting data showing that ballots had been returned in batches to the Bladen County Board of Elections office, leading John Harris to believe that Dowless and his affiliates had been mailing stacks of ballots at a time. *See id.*

89. Mark Harris was aware that Dowless had a prior criminal conviction before he hired Dowless. He

denied knowledge of any convictions related to perjury or fraud.

90. Mark Harris hired Dowless on or around April 20, 2017.

91. John Harris provided credible testimony that Dowless offered his father, Mark Harris, the choice between "a gold plan, a bronze plan, and a silver plan," with the different plans being tethered to the amount of people that Dowless would be able to employ or put "on the ground."

92. On April 20, 2017, Mark Harris wrote a check for $450.00, drawn on Harris's personal checking account, and made payable to the terminated North Carolina independent expenditure political committee Patriots for Progress. Ex. 60. Mark Harris testified that Dowless directed him to write a check to Patriots for Progress in order to retain Dowless's services. We find his testimony on this issue credible.

93. On May 4, 2017, Mark Harris wrote a second check for $2,890.00, drawn on Harris's personal checking account, and made payable to Patriots for Progress. *See* Ex. 60. Mark Harris testified that the second check to Patriots for Progress was to fund start-up costs for Dowless's operation, including workers and office space. We find his testimony on this issue credible.

E. Dowless's Operation was Well-Funded. The Harris Committee Funded Dowless's Operation Through Payments to Red Dome.

94. Andy Yates testified that he and Red Dome officially started with the Harris Committee at the beginning of July 2017, but that Dowless had already been hired by the Harris campaign began earlier in 2017 in that Harris and Dowless had already agreed upon Dowless's fees. We find this testimony credible.

95. Beginning in July 2017, all fees and payments to Dowless were made through Red Dome.

96. During both the primary and the general election, Red Dome submitted invoices to the Harris Committee and was reimbursed for payments made to Dowless.

97. All members of the Harris Committee's staff, except for Mark and Beth Harris, were paid by the Harris Committee through Red Dome.

98. In total, the Harris Committee paid Red Dome $525,088.95 between August 1, 2017, and November 26, 2018. Ex. 142.

99. For the 2018 General Election, the Harris Committee paid Red Dome $289,980.50 between May 3, 2018, and November 26, 2018. *See id.*

100. Andy Yates testified, and we find it credible, that as of the date of his testimony, the Harris Committee still had outstanding invoices from Red Dome that were unpaid or partially unpaid, which totaled approximately $51,515.50. *See* Ex. 28 at 24

(Yates testified that $11,000 was still owed on this partially paid invoice); *id.* at 27 ($7,881.50); *id.* at 28 ($32,634.00).

101. In total, Red Dome paid Dowless $131,375.57 between July 3, 2017, and November 7, 2018. *See* Board's Preview of Evidence at slide 15.

102. For the 2018 General Election, Red Dome paid Dowless $83,693.57 between June 8, 2018, and November 7, 2018. *Id.*

103. Approximately $15,000 of the $131,375.57 that was paid to Dowless by Red Dome was for work performed by Dowless for other clients of Red Dome.

104. Yates testified the Harris Committee paid Dowless a flat fee of $1,625 per month for the general election, plus additional sums to fund payments made to Dowless's workers and other expenses Dowless incurred on behalf of the Harris Committee. This was an increase from the $1200 per month that the Harris Committee paid Dowless for the primary election. The total sum paid by the Harris Camapign to Dowless exceeded the sum paid to other significant individuals, including the campaign manager.

105. Additional sums paid to Dowless were based on verbal representations made by Dowless of his expenses.

106. Red Dome and the Harris Committee relied on Dowless's representations of his expenses and took Dowless's verbal representations at face value.

107. Andy Yates testified that no documentation was required of Dowless for payment of his expenses or for proof of activities regarding his absentee ballot program, and no documents were sent or received by Red Dome to verify Dowless's activity.

108. In addition to the absentee ballot activities already described, Dowless paid individuals to put out and take up yard signs and to work at local festivals and parades. He also paid individuals to work the polls in Bladen, Robeson and Cumberland Counties during early voting, on the day of the primary, and on the day of the general election. An unknown portion of the payments from Red Dome to Dowless funded this activity. Red Dome also paid and/or reimbursed Dowless for the cost of office space, as well as associated costs for utilities, internet, office supplies, office staff and paper copies or office copier expenses.

109. John Harris testified that he spoke with Andy Yates about general concerns that John Harris had about Mark Harris's decision to hire Dowless, including that Dowless was a "shady character." John Harris also testified that he did not describe his concerns regarding Dowless to Yates in as stark of terms as he had described his concerns about Dowless to Mark Harris. We find his testimony credible.

110. Andy Yates was aware that Dowless had a prior criminal conviction before he began making payments to Dowless. He denied knowledge of any convictions related to perjury or fraud.

111. Between July 3, 2017, and November 7, 2018, Bladen County Sheriff Jim McVicker paid Dowless

$5,000 for what is alleged to have been get-out-the-vote activity. *See* Board's Preview of Evidence at slide 16.

112. The McVicker Committee also contracted with Red Dome for services related to phone services, robocalls, and ring-less voicemail. In total, McVicker paid Red Dome a total of $8,000 in the 2018 election cycle.

F. The Harris Committee failed to comply fully with subpoenas lawfully issued by this State Board and its predecessor.

113. The Harris Committee failed to comply fully with subpoenas issued by the State Board of Elections and Ethics Enforcement on December 1, 2018, and identical subpoenas by the State Board of Elections on February 6, 2019, despite repeated invitations to supplement its production.

114. Each subpoena was identical in scope, and required production of "emails, text messages" and other records in the possession of the Harris Committee regarding absentee voting efforts and Dowless, among other items. The covered period ran from January 2016 through December 1, 2018.

115. On December 4, 2018, agency counsel assisted the Harris Committee, at the Committee's request, by suggesting preliminary search terms, but counsel "emphasized . . . that the initial list of search terms would not, and could not, limit the scope of the subpoena." Ex. 56.

116. The Harris Committee, through counsel, initially produced certain records running from July

2017 forward. On January 15, 2019, agency counsel transmitted correspondence challenging the legal basis on which the Harris Committee refused to produce records dated before July 2017. *Id.* On February 8, 2019, the Harris Committee supplemented its production with additional responsive records that predated July 2017.

117. On February 17, 2019, agency counsel requested written confirmation that the Committee had "provided any documents related to absentee ballot activity, Dowless, or planning related to future absentee ballot activities, dated on or after March 1, 2017," and cited the subpoena. *Id.* The Harris Committee, through its counsel John Branch, confirmed the same:

> [T]his will confirm that we produced all responsive, non-objectionable (per the attorney-client privilege, the attorney work product doctrine, or the spousal privilege) documents related to absentee ballot activity, Dowless, or planning related to future absentee ballot activities from March 1, 2017 to December 1, 2018 which we found using the agreed-to methods of searching for the documents (i.e. the State Board's queries) and the quality control efforts we undertook to make sure, to the best
>
> extent we reasonably could, that all responsive documents were found.

Id.

118. At no time before the evidentiary hearing, however, did the Committee produce responsive communications between John Harris and Mark Harris regarding the nature and legality of Dowless's operation (Exs. 54 and 55) or communications between Mark Harris and Judge Marion Warren in which Harris sought to secure a connection to "the guy whose absentee ballot project . . . could have put me in the US House this term, had I known, and he had been helping us" (Ex. 61). Indeed, the Committee only attempted to supplement its production to include communications with John Harris after it became clear that John would testify, and mere minutes before the State called John as its witness.

119. Late in the evening after John Harris testified, the Committee supplemented its production with more than 800 pages, including communications with Judge Warren (Ex. 61).

120. Among other reasons cited for the Committee's failure to make a complete production, counsel John Branch indicates that the Committee had operated under a mistaken understanding of its obligations under the subpoenas. We find the explanation unpersuasive, as the productions were clearly responsive. The Harris Committee failed to comply fully with the lawful subpoenas by this Board, and that such non-compliance contributes to cumulative doubt cast on the congressional election.

121. This Board cannot allow parties or their counsel to behave in this manner, and the Board will take further action as it deems appropriate separate from this Order.

G. Expert Findings

122. Dr. Stephen Ansolabehere, a professor of Government at Harvard University, explained in his report that patterns of absentee by mail voting in the 2018 General Election in Bladen and Robeson Counties differed significantly from the remainder of CD-9 and from elsewhere in the State. *See* Ex. 73. We find this information credible.

123. Dr. Michael Herron, a professor of Government at Dartmouth University, explained in his report that Harris's mail-in absentee support in Bladen County was greater than the absentee by mail support for any other comparable Congressional candidate in any general election since 2012 in both North Carolina and three comparable states. *See* Ex. 74 at 26-28, 27 t.8. We find this information credible.

124. We find Dr. Stephen Ansolabehere credible in his conclusion that the rates at which voters who requested absentee by mail ballots in Bladen and Robeson counties but did not return their absentee ballots are statistical outliers compared to CD-9 and the rest of the state. Elsewhere in CD-9, of voters who requested an absentee ballot, 10% did not vote at all. But in Bladen County, 337 voters requested an absentee ballot but did not vote at all (approximately 26% of people who requested absentee ballots). In Robeson County, 832 voters requested an absentee ballot but did not vote at all (approximately 36% of people who requested absentee ballots). These were the two highest rates of nonvoting in both CD9 and the state as a whole. *See* Ex. 73, at 63.

125. We also find Dr. Stephen Ansolabehere credible in his conclusion that both frequent voters and occasional voters in Bladen and Robeson had much higher non-return rates than similar voters elsewhere in the state. Elsewhere in CD-9, 9.7% of frequent voters (i.e. voters who voted in more than four of the last six elections) did not return their absentee ballots or otherwise vote. Elsewhere in CD-9, brand new voters who requested an absentee ballot are a little bit less likely to vote than experienced voters: about 14%. However, in Bladen and Robeson Counties in CD-9, 41.7% of frequent voters did not return their absentee ballots or otherwise vote. A similarly high proportion of new voters (48%) did not return their absentee ballots or otherwise vote. Ex. 73, at 67, 67 t.7. We find this information credible.

H. Dowless Engaged in Efforts to Obstruct the Board's Investigation and Tamper with Witnesses.

126. Efforts were made to obstruct the Board's investigation and the testimony to be provided at the hearing.

127. Lisa Britt testified that Dowless blindsided her with a videotaped interview with WBTV reporter Nick Ochsner, which was first aired on or around December 12, 2018. Britt claimed that when she arrived at Dowless's house after work one afternoon, Dowless told her that a friend of his that he had spoken with a few times was coming to take a videotaped statement from Britt regarding the allegations that Dowless and his workers had been collecting ballots. Britt testified that what she said in that interview with

Ochsner was not truthful, and it was revealed during the hearing that Britt had previously provided contradictory statements to Board Investigator, Joan Fleming, by the time the interview was filmed. We find her testimony credible.

128. Lisa Britt further testified that on or around February 14, 2019, just one week before the hearing, Dowless asked her to come to his residence where he provided her a slip of paper coaching her on how she should testify at the hearing. Britt took a picture of the slip of paper and provided that picture by text to Board Investigator, Joan Fleming. That text message, which was moved into evidence, reads:

> I can tell you that I haven't done anything wrong in the election and McCrae Dowless has never told me to do anything wrong, and to my knowledge he has never done anything wrong, but I am taking the 5th Amendment because I don't have an attorney and I feel like you will try to trip me up. I am taking the 5th.

Ex. 7. We find her testimony credible, and Britt later produced the original copy of the slip of paper.

129. Britt testified that there was also a meeting at Dowless's house sometime after reports began circulating that Dowless was involved in the absentee by mail irregularities in CD-9, and after the Board declined to certify the results of the CD-9 race, during which Dowless told a group of his workers, including Britt, that, "as long as we stick together, we will be fine." We find Britt's testimony credible. At the same

meeting, Dowless stated that there were no films or videos of their activities.

I. Bladen County Early Voting Results Were Improperly Tabulated on November 3, 2018

130. Bladen County one-stop early voting results were improperly and unlawfully tabulated at 1:44 p.m. on November 3, 2018. *See* Ex. 18.

131. The physical tape that was printed when early voting results were tabulated displayed early voting results for United States House District 9, Bladen County Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor. *See* Ex. 18.

132. Early voting judges Michele Maultsby, Coy Mitchell Edwards and Agnes Willis signed the tape on November 3, 2018. *See* Ex. 18.

133. Michele Maultsby, Coy Mitchell Edwards and Agnes Willis testified that they were unaware that it is unlawful to tabulate early voting results before Election Day, stating that they had been incorrectly trained to always tabulate results at the end of early voting. We find their testimony credible.

134. Coy Mitchell Edwards and Agnes Willis viewed early voting results for Bladen County Sheriff on November 3, 2018.

135. At least four other first shift poll workers were present at the one-stop site when results were tabulated and had access to early voting results for United States House District 9, Bladen County

Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor. *See* Ex. 19

136. Testimony at hearing described a meeting held between the early voting worker, Agnes Willis, and the director of elections in Bladen CBE, Cynthia Shaw, in which Director Shaw inquired how the early voting results had gotten out into the community. Testimony indicated that the conversation occurred when the early voting worker returned the early voting equipment to the Bladen CBE office shortly after early voting ended on Saturday, November 3, 2019.

137. During the last day of one-stop early voting in the 2018 Primary Election, and before early voting results could be lawfully tabulated, Dowless represented that Harris had "988 of the votes in Bladen." Ex. 70. The final sum of absentee by mail votes and one-stop votes canvassed by the Bladen CBE was 889 votes for Harris.

J. Bladen County Board of Elections Office Security Concerns

138. The Bladen County Board of Elections shares office space with the Bladen County Veterans Affairs Administration. Non-elections personnel had access to Board of Elections office space. Ex. 65.

139. The room in the Bladen County Board of Elections office where the results tabulation computer is located is directly across a common hallway from an office occupied by Veterans Affairs staff. *See* Ex. 65.

140. A photo taken by a county board member and sent to investigators on November 6, 2018, shows that

the key to the ballot room, which is labeled with a keychain marked "Ballot Rm," hung on a wall in an area of the Board of Elections Office accessible to non-elections personnel. The photo was sent by text message with the message: "Same spot they have always been." Ex. 63.

141. Another picture of those same keys, which was taken by a Board investigator on November 29, 2018, shows the keys hung on the same wall Ex. 64.

142. A photo taken by Board investigators shows the ballot room left open, with the keys to the room left unattended in the door. Ex. 66.

143. The Bladen County Board of Elections unanimously voted to update security by resolution passed on June 12, 2018, but the Board's request for funding was inexplicably denied by the Bladen County Board of Commissioners and no updates were made. *See* Ex. 68.

144. In October of 2018 the United States Department of Homeland Security conducted a review of the physical security at the Bladen County Board of Elections office in 2018 and provided a list of options to mitigate existing vulnerabilities, increase resilience and implement protective measures. *See* Ex. 67.

K. Fraud, improprieties, and irregularities occurred to such an extent that they taint the results and cast doubt on the fairness of contests held for Congressional District 9, Bladen Soil and Water Conservation District Supervisor, and Bladen County Commissioner, District 3 in the 2018 General Election.

145. The fraud, improprieties, and irregularities identified in Paragraphs 1 through 144, *supra*, operate cumulatively under the unique circumstances of this case to taint the results and cast doubt on the fairness of contests held for Congressional District 9, Bladen Soil and Water Conservation District Supervisor, and Bladen County Commissioner, District 3 in the 2018 General Election.

146. Indeed, Harris himself testified as follows near the conclusion of the State Board's evidentiary hearing on this matter:

> Through the testimony I have listened to over the past three days, I believe a new election should be called. It has become clear to me that the public's confidence in the Ninth District seat [in the] general election has been undermined to an extent that a new election is warranted.

We find his assessment of public confidence credible.

III. CONCLUSIONS OF LAW

147. Sufficient notice of the evidentiary hearing and of other procedural rights was provided to all candidates who competed for election to the U.S.

Representative for North Carolina's Ninth Congressional District; Seat 2 on the District Court in Judicial District 16B; Bladen County Commissioner District 3; and the Bladen Soil and Water Conservation District Supervisor. All candidates were afforded due process and the opportunity to present and cross-examine witnesses at the evidentiary hearing.

148. The State Board has general supervisory authority over the primaries and elections in the State and the authority to promulgate reasonable rules and regulations for the conduct of such primaries and elections as it may deem advisable. G.S. § 163A-741(a). This includes the authority to "investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county municipality or special district." G.S. § 163A-741(d).

149. The State Board has the authority to "initiate and consider complaints on its own motion" and "take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election." G.S. § 163A-1180.

150. That authority includes the power to order a new election when: (1) ineligible voters sufficient in number to change the outcome of the election were allowed to vote in the election, and it is not possible from examination of the official ballots to determine how those ineligible voters voted and to correct the totals; (2) eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting; (3) other irregularities affected a sufficient

number of votes to change the outcome of the election; or (4) irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness. G.S. § 163A-1181(a).

151. The findings of fact set forth above reflect numerous irregularities that occurred in the November 6, 2018, general election in Bladen and Robeson Counties, and many of those irregularities occurred as a result of a coordinated, unlawful, and well-funded absentee ballot scheme operated by McCrae Dowless on behalf of Mark Harris. The scheme perpetrated fraud and corruption upon the election and denied the voters in affected contests "the opportunity to participate in a free and fair election . . . the purity and validity of said election being suspect and doubtful." *See Appeal of Judicial Review by Republican Candidates for Election in Clay Cty.*, 45 N.C. App. 556, 569 (1980) (hereinafter *Clay County*) (affirming State Board's order of a new election after absentee ballots were illegally collected, certain ballots showed evidence of having not been sealed, vote buying occurred, and other administrative misconduct occurred).

152. It is neither required nor possible for the State Board to determine the precise number of ballots affected in circumstances such as this. *See Clay County*, 45 N.C. App. at 573 (holding that the State Board would have been "derelict" had it failed to call for a new election when there was no showing that the violations that occurred were sufficient to change the outcome of the election but "a cloud of suspicion ha[d]

been cast on all the absentee ballots cast in the election").

153. As set out in the Findings of Fact, and in light of the unique circumstances set forth therein, including the pervasive, wrongful, and fraudulent scheme undertaken by Dowless and his workers on behalf of Mark Harris and the Harris Committee, this Board concludes unanimously that irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness.

It is, therefore, ORDERED:

A new election shall be conducted in Congressional District 9 under the following schedule:

a. Primary election: May 14, 2019;

b. Second primary (if necessary): September 10, 2019;

c. General election (if no second primary): September 10, 2019; and

d. General election (if second primary): November 5, 2019.

And a new general election for Bladen Soil and Water Conservation District Supervisor and for Bladen County Commissioner, District 3, shall be held on May 14, 2019 as indicated above.

This the 13th day of March, 2019.

s/_____
Robert B. Cordle
Chair

[*Certificate of Service Omitted for this Appendix*]

APPENDIX I

ARIZONA ELECTION PROCEDURES MANUAL

June 2014

Excerpts pp.185-186

Verification of Provisional Ballots

Time for Verification

Verify all provisional ballots for proper registration within 10 calendar days after a general election that includes an election for a federal office and within five business days for all other elections.

The provisional ballot shall be counted if:

- the registration of the voter is verified and the voter is eligible to vote in the precinct, *and*
- the voter's signature does not appear on any other signature roster for that election, *and*
- there is no record that the voter voted early for that election.

If a signature roster or early ballot information indicates that the person already voted in that election the provisional ballot for that person shall:

- remain unopened,
- not be counted, *and*

- be retained in the same manner as voted ballots.

The ballot shall remain unopened and shall **not be counted** if:

- the voter is not registered to vote, or
- the voter is in the wrong precinct/voting area, or
- the voter has not produced sufficient identification, or
- the voter's signature does not match the signature on his/her voter registration form, or
- the voter voted their early ballot.

The County Recorder's office shall create a provisional ballot record for the voter that contains the following information:

- provisional ballot receipt number
- name of voter
- precinct where provisional ballot was voted
- provisional ballot status
- provisional ballot status reason
- address (optional)
- date of birth (optional)
- political party (optional)

This information will be used for online verification of a voter's provisional ballot. All provisional ballots for the election must be processed before posting this data

on the Internet. The information shall be available to the public online for one month after posting.

Rejection Reason Code

The rejection reason code is determined at the County Recorder's office. The rejection reasons are:

- not registered
- no ballot in envelope
- registered after 29-day cut-off
- no signature
- insufficient/illegible information
- signature does not match
- wrong party
- outside jurisdiction ballot
- voter challenge upheld
- voted in wrong precinct
- voted and returned an early ballot
- proper identification not provided by deadline
- administrative error
- not eligible
- other (please specify)

[ARS § 16-584(E)]

Excerpts p.221

Additional Reporting

In addition to the general election canvass, the county shall submit additional reports to the Secretary of State at the time they are certifying their general election results. Each report shall include statistics for the federal primary and general elections. The reports are the Provisional Ballot Reporting, Accessibility Report, Voter Education Report, and Poll Worker Training Report.

Provisional Ballot Reporting

With respect to the voter registration of each county, the following information will be collected to measure compliance performance and reported to the Secretary of State (see Provisional Ballot Report on pg. 368):

- The number of provisional ballots in each precinct
- The number of voters in each precinct
- The number of provisional ballots that were verified and counted in each precinct
- The number of provisional ballots not counted in each precinct and the reason for not counting, such as:
    1. Not registered
    2. Wrong precinct
    3. Not eligible to vote

- Whether the uniform procedures were followed for determining whether a provisional ballot is counted or not counted

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15845
D.C. No. 2:16-cv-01065-DLR
District of Arizona, Phoenix

[Filed February 11, 2020]

THE DEMOCRATIC NATIONAL COMMITTEE; et al.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,

Defendants-Appellees,

THE ARIZONA REPUBLICAN PARTY; et al.,

Intervenor-Defendants-Appellees.

ORDER

Before: THOMAS, Chief Judge, and O'SCANNLAIN, W. FLETCHER, BERZON, RAWLINSON, CLIFTON, BYBEE, CALLAHAN, MURGUIA, WATFORD and OWENS, Circuit Judges.

Defendant-Appellee Arizona Attorney General Mark Brnovich's motion to stay the issuance of this Court's mandate pending application for writ of certiorari (Dkt. 124), filed January 31, 2020, is **GRANTED.** Fed. R. App. P. 41(b).

The mandate is stayed for a period not to exceed 90 days pending the filing of the petition for writ of certiorari in the Supreme Court. Should Defendant-Appellee file for a writ of certiorari, the stay shall continue until final disposition by the Supreme Court.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-15845
D.C. No. 2:16-cv-01065-DLR
District of Arizona, Phoenix

[Filed April 9, 2020]

THE DEMOCRATIC NATIONAL COMMITTEE; et al.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Secretary of State of Arizona; MARK BRNOVICH, Attorney General, in his official capacity as Arizona Attorney General,

Defendants-Appellees,

THE ARIZONA REPUBLICAN PARTY; et al.,

Intervenor-Defendants-Appellees.

STATE OF ARIZONA,)
)
Intervenor-Pending.)
)

ORDER

Before: THOMAS, Chief Judge, and O'SCANNLAIN, W. FLETCHER, BERZON, RAWLINSON, CLIFTON, BYBEE, CALLAHAN, MURGUIA, WATFORD and OWENS, Circuit Judges.

The State of Arizona's motion to intervene [D.E. 128] is GRANTED.

Judge Owens dissents from this order.