APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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.

No. 18-15845

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

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

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

counting, OOP 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 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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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."

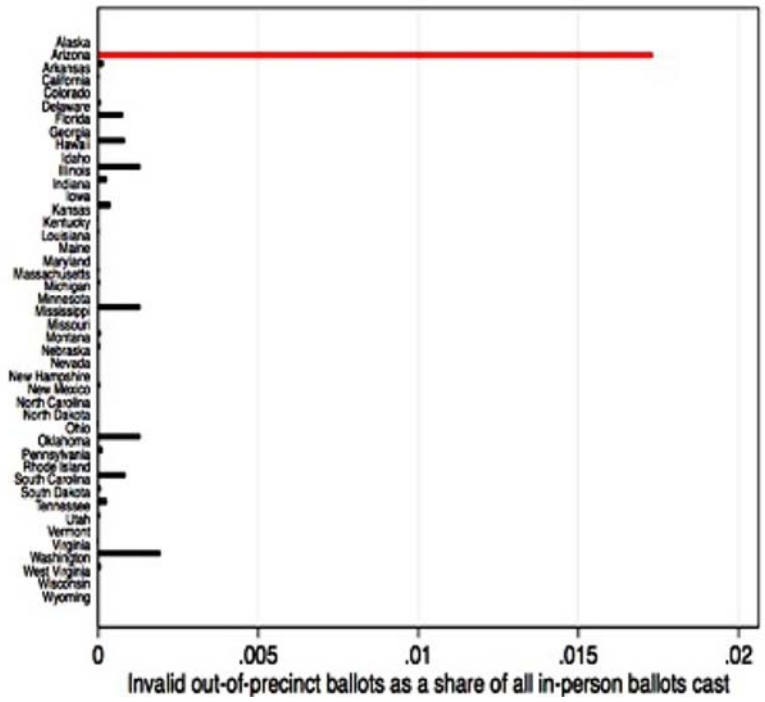
Reagan, 329 F. Supp. 3d at 856 (alterations in original) (quoting Rodden at 24–25).

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

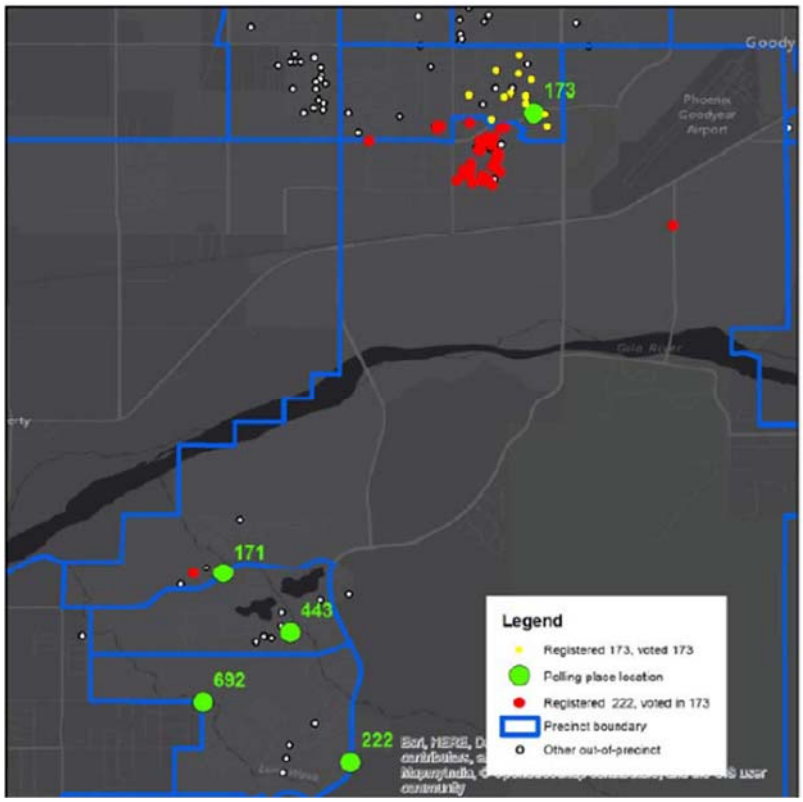
Some polling places are located so counterintuitively that voters easily make mistakes. In Maricopa and Pima Counties, many polling places are located at or near the edge of precincts. *Id.* at 50. An example is the polling place for precinct 222 in Maricopa County during the 2012 election. Dr. Rodden 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/d041041r.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 Tucson 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 Circuit precedent, the answer to such question is clear: they do not. The majority,

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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.

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 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

[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.

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 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.).

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[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.

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.

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[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 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.

Op. 8–9. The 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 § 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] Although the majority would like us to believe that the increasing percentage of in-person ballots cast

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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 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.

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 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*

[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.

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 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.

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

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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.

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 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,

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[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).

"[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.

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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.

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 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).

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[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.

> "[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 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]

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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

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 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

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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).

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 diaphanous 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

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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

secure the 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

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> 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, 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

rule 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

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provisional ballot. It does provide that states must create a toll-free number 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.

Northeast (Maine, Massachusetts, 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).

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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.

B

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

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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

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

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law, no voter should inadvertently vote at the wrong precinct without some indication that something is amiss.

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

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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).

person is guilty of a class 6 felony." Ariz. Rev. Stat. Ann. § 16-1005(H) (codifying H.B. 2023). The law does 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.

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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).

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

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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.

> 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.

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 B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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.

No. 18-15845

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

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.

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

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

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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Dominic E. Draye (argued), Joseph E. La Rue, Karen J. Hartman-Tellez, Kara M. Karlson, and Andrew G. Pappas, Office of the Attorney General, Phoenix, Arizona, for Defendants-Appellees.

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 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).

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

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, 287–88 (1982). And in a VRA challenge, we defer to "the district court's superior fact-finding 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, 16584 (codified in 1979); 1970 Ariz. Sess. Laws, ch. 151, § 64 (amending Ariz. Rev. Stat. § 16-895); Ariz. Rev. Stat. § 16102 (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.* §§ 16135(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

[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).

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. § 16544(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 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 161005, 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

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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.

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 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

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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.

witnesses, in addition to the testimony of 11 witnesses by deposition. *Reagan*, 2018 WL 2191664, at *2–7. The 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."

[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*. 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"

[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*.

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 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

[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.

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 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

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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).

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 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

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[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.

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.'" 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*,

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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").

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]

[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.

These 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.

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 DNC was not unfairly surprised, given that counsel indicated at trial that he was well acquainted with it and its contents.

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 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

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[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.

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]

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

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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 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.

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 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]

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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

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 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

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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.

[17] The VRA itself states that "nothing in this section establishes a right to have members of a protected class elected

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 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]

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in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b).

[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

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 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

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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.").

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]

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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.

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 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

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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.

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

[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.

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 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

[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.

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) (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

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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.

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 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

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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.

advantage of." Senator Steve Smith testified that ballot fraud is "certainly happening," and Michael Johnson, an African 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

[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

recognized 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

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individual decisionmakers, but that case is not on point. In holding 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.

minorities, this is incorrect. 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] Therefore, the historical and legislative history factors support the district court's conclusion.

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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

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

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minority voters, not because of it. *Reagan*, 2018 WL 2191664, at *41.

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.

4

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

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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.

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;

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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

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.

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

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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.

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]

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

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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 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.

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 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*.

[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.

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.

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[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.

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 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

[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.

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 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

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

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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 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,

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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.

the district court was faithful to the language of § 2. 52 U.S.C. § 10301 (b).[34]

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.

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[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.

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.

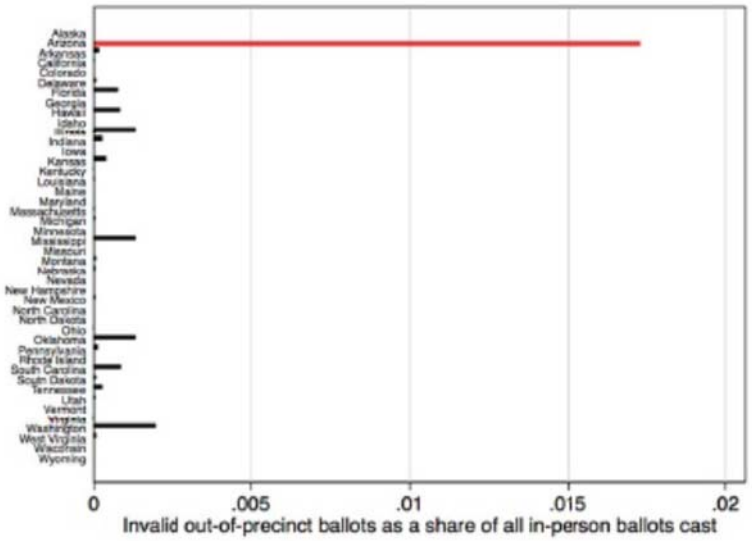
H.B. 2023, which criminalizes most ballot collection, serves no purpose aside from making voting more difficult, and keeping more African American, Hispanic, and Native American voters from the polls than white voters.

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 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*

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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.").

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 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

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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).

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

[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)).

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 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. 97417, 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. 97417, 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. 97417, 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

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[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."

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 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.

8

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

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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

voting in the correct precinct, the district court determined that Arizona's voters are themselves 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)).

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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.

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

[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.

DOJ for preclearance, and the DOJ "precleared all provisions except for the provision regulating ballot 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 discriminatory interests). Indeed, if that were the case, consideration for racially polarized voting patterns—a constant in VRA and constitutional voting

[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. 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.

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 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.

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[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 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.

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' 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 nonmetropolitan 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*,

[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.

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," 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

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Democratic National Committee, DSCC, and Arizona Democratic Party, Plaintiffs, v. Michele Reagan and Mark Brnovich, Defendants.	No. CV-16-01065-PHX-DLR **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

[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.

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 4–7.)[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,

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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.

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 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

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[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.)

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

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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.

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 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 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

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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.

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. 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

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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 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 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).

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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).

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]

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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

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.

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

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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.

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 . . . 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

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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.

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

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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.

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 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

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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.

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 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; *see 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] 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

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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 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.

provisional voting are complicated, however, because states use provisional ballots in different ways, and some states do not utilize provisional voting in any 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 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.

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.)

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

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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.

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]

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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.

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:

> [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

[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.

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 Act*, 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 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*

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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." O*hio 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

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 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

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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.

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

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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.

and anecdotal evidence is insufficient to establish a cognizable disparity under § 2.

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-person votes. In contrast, African American and

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[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.)

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 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.)

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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.)

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.)

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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.

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.)

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

[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.

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,

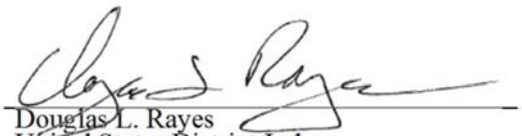
IT IS ORDERED as follows:

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.



Douglas L. Rayes
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DEMOCRATIC NATIONAL COMMITTEE; et al.,

Plaintiff-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.

FILED

FEB 11 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 18-15845

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

District of Arizona, Phoenix

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 E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DEMOCRATIC NATIONAL COMMITTEE; DSCC, AKA Democratic Senatorial Campaign Committee; THE ARIZONA DEOCRATIC 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.,

FILED

JAN 2 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 18-15845

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

District of Arizona, Phoenix

ORDER

Intervenor-Defendants-Appellees.

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges Kozinski and McKeown did not participate in the deliberations or vote in this case.

APPENDIX F

A.R.S. § 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.

A.R.S. § 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.

A.R.S. § 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.

A.R.S. § 16-1005. Ballot abuse; violation; classification

A. Any 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 or for that of another person is guilty of a class 5 felony.

B. It is unlawful to offer or provide any consideration to acquire a voted or unvoted early ballot. A person

who violates this subsection is guilty of a class 5 felony.

C. It is unlawful to receive or agree to receive any consideration in exchange for a voted or unvoted ballot. A person who violates this subsection is guilty of a class 5 felony.

D. It is unlawful to possess a voted or unvoted ballot with the intent to sell the voted or unvoted ballot of another person. A person who violates this subsection is guilty of a class 5 felony.

E. A person or entity that knowingly solicits the collection of voted or unvoted ballots by misrepresenting itself as an election official or as an official ballot repository or is found to be serving as a ballot drop off site, other than those established and staffed by election officials, is guilty of a class 5 felony.

F. A person who knowingly collects voted or unvoted ballots and who does not turn those ballots in to an election official, the United States postal service or any other entity permitted by law to transmit post is guilty of a class 5 felony.

G. A person who engages or participates in a pattern of ballot fraud is guilty of a class 4 felony. For the purposes of this subsection, "pattern of ballot fraud" means the person has offered or provided any consideration to three or more persons to acquire the voted or unvoted ballot of a person.

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

2019 ELECTIONS PROCEDURES MANUAL

December 2019

www.azsos.gov

1700 W. Washington St.
Phoenix, AZ 85007

1-877-THE-VOTE
(843-8683)

* * *

ARIZONA SECRETARY OF STATE
1029 ELECTIONS PROCEDURES MANUAL

Chapter 9, Section IV. The County Recorder must disqualify the ballot if the voter does not provide sufficient identification by the deadline.

1. County Recorder Responsibilities

a. Verification of Provisional Ballots

All provisional ballots must be verified for proper registration within 10 calendar days after a general election that includes an election for federal office, and within five business days for all other elections. A.R.S. § 16-135(D). The provisional ballot shall be counted if:

1. The voter's registration is verified and the voter is eligible to vote in the precinct, and
2. The voter's signature does not appear on any other signature roster for that election, and
3. There is no record that the voter voted early in that election.

For a provisional ballot to be counted, the County Recorder shall confirm that all of the following requirements are met:

1. Confirm that the provisional ballot affidavit is signed;
2. Confirm that the voter was registered to vote and was eligible to vote in the election;
3. Confirm that the voter voted in the correct polling place or voting location or cast the ballot for the correct precinct;
4. Confirm that there is no record that the voter voted early for that election;

5. If the voter moved without updating their address and voted in the precinct for the new address, confirm that the voter did not vote in the prior precinct by confirming that the voter did not sign the signature roster for the prior precinct;
6. For a partisan primary election, confirm that the voter received and voted the correct party ballot based on the voter's party affiliation;
7. If the voter is registered as a "federal-only" voter, confirm that the voter received a "federal-only" ballot or clearly mark or stamp the outside of the provisional ballot envelope to indicate that the voter is a "federal-only" voter and only races for federal candidates should be duplicated and tabulated.

The County Recorder shall deliver only provisional ballot envelopes and/or affidavits of qualified voters who meet the above requirements to the Board of Supervisors or officer in charge of elections for counting. Rejected provisional ballot envelopes and/or affidavits should be separately retained and delivered to the officer in charge of elections for retention in accordance with A.R.S. § 16-624.

b. *Rejection Reason Code*

The rejection code reason is determined by the County Recorder. The rejection reasons include:

1. Not registered;
2. No ballot in envelope;
3. Registered after 29-day cut-off;
4. No signature;
5. Insufficient/illegible information;

6. Voter did not provide adequate identification and signature does not match;
7. Wrong party;
8. Outside jurisdiction ballot;
9. Voter challenge upheld;
10. Voted in wrong precinct;
11. Voted and returned an early ballot;
12. Proper identification not provided by deadline;
13. Not eligible; and
14. Other (please specify).

c. Updating Voter Registration Records

The County Recorder shall update the appropriate county register or registration database with the names of all provisional voters whose registration was verified to indicate that those voters are qualified to vote in future elections.

The County Recorder may also use the information from a provisional ballot envelope or affidavit to update a voter's name and address. A provisional ballot envelope or affidavit may also be used to register a voter for the first time for future elections (not the current election the provisional ballot was used for) if the form substantially complies with A.R.S. § 16-152. Additionally, a "federal-only" voter may use the provisional ballot process to provide a driver license number as DPOC for future elections (although not for the current election the provisional ballot was used in).

d. *Voter Verification of Provisional Ballot Status*

The County Recorder shall create a provisional ballot record for the voter that contains the following information:

1. Provisional ballot receipt number;
2. Name of the voter;
3. Precinct/polling location where the provisional ballot was cast;
4. Provisional ballot status;
5. Provisional ballot status reason;
6. Address (optional)

* * *