Nos. 19-1257, 19-1258

IN THE

Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ARIZONA SECRETARY OF STATE KATIE HOBBS

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QUESTIONS PRESENTED

The court below held that Arizona's policy of refusing to count ballots, even for statewide offices, if they were cast by voters in precincts where the voters did not reside resulted in a denial or abridgement of the right to vote on account of race or language-minority status in violation of Section 2 of the Voting Rights Act. The court likewise held that an Arizona statute that criminalizes non-fraudulent collection of another person's early ballot not only violated Section 2's results test, but also was intentionally discriminatory, in violation of both Section 2 and the Fifteenth Amendment. The questions presented are:

1. Did the court below correctly interpret Section 2's plain text to find that Arizona's out-of-precinct policy and ballot-collection statute violate Section 2?

2. Did the court below correctly find that the ballot-collection statute was enacted with discriminatory intent in violation of Section 2 and the Fifteenth Amendment?

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INTRODUCTION

"[V]oting discrimination still exists; no one doubts that." *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2013). Since this Court's 2013 decision in *Shelby County*, plaintiffs seeking to redress voting discrimination have relied primarily on Section 2 of the Voting Rights Act ("VRA"). The en banc court below applied the two-step test generally used by the circuit courts to address such claims and found that both Arizona's policy of refusing to count ballots cast out of precinct (the "OOP Policy") and its law prohibiting the non-fraudulent collection of early ballots ("H.B. 2023") resulted in voting discrimination in violation of Section 2.

In a radical departure from the status quo, Petitioners argue that Section 2's results test should not even apply to supposedly facially race-neutral policies or practices like those at issue here, regardless of their actual impact on minority voters. That position finds no support in the text, structure, or purpose of the statute. The United States, in contrast, offers a more modest approach—restyling the circuits' two-step test as a three-part inquiry, but leaving largely undisturbed the substantive standard for determining the existence of unlawful voting discrimination. In the United States' formulation, Section 2 prohibits a result where (1) voters of one racial group have less ability to vote, and (2) the challenged practice is found to be a cause of that lesser ability, after (3) considering the government's justifications for the practice and all other relevant circumstances. U.S. Br. 11-12, 25. Although the en banc court articulated the Section 2 results test in different terms, it nonetheless applied each element the United

States demands. Accordingly, even if the Court adopts the United States' articulation of the results test, the decision below should be affirmed.

In line with the United States' emphasis on looking to the justifications for the challenged practice, the court below underscored that the OOP Policy lacked *any* legitimate justification. As Arizona's chief elections officer, Respondent Secretary of State Katie Hobbs is particularly well-positioned to speak to the Policy's lack of justification. Precisely because she determined—in consultation with county election officials—that there is no justification for the Policy, Respondent Hobbs chose not to appeal the decision below. Because State law explicitly charges Respondent Hobbs with that determination, and prohibits the Attorney General from appealing against her wishes, the OOP Policy is not even properly before this Court.

As to H.B. 2023, the ballot-collection statute, the court below followed the same analysis the United States recommends: It applied Section 2 to "smoke out" disparate treatment and the risk of intentional discrimination. U.S. Br. 16 (quotation marks omitted). Looking at the undisputed facts, the court found not only a risk of intentional discrimination, but also *actual* intentional discrimination, in violation of Section 2's results and intent tests and the Fifteenth Amendment.

Properly read, the decision below does exactly what the United States advocates. It applies the plain text of Section 2 to an "intensely local appraisal" of the facts before it. U.S. Br. 18 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986)). The decision should be affirmed.

STATEMENT

A. Arizona's Election-Administration Structure.

Elections in Arizona are conducted under the authority of the Secretary of State, "Arizona's chief elections officer." JA244; *accord* Ariz. Rev. Stat. § 16-142(A)(1); *see also Mi Familia Vota v. Hobbs*, 977 F.3d 948, 950-51 (9th Cir. 2020). Like most states, Arizona provides for voting either by mail or in person. Ariz. Rev. Stat. § 16-541; JA259. Since 2011, Arizona has allowed counties to choose whether to conduct in-person voting at precinct polling places or at countywide "vote centers." JA262-63. The vote-center model "allow[s] any voter in that county," regardless of home precinct, "to receive the appropriate ballot for that voter on election day" at a voting center "and to lawfully cast the ballot." Ariz. Rev. Stat. § 16-411(B)(4). In the 2020 election, the great majority of Arizona's counties—including the most populous county, Maricopa—opted to use either a vote-center model or a hybrid model in which voters could vote at either their assigned precinct or a vote center. *2020 November Election*, Arizona Citizens Clean Elections Commission.[1] As the United States acknowledges, the OOP Policy "'ha[s] no impact' in counties using the vote-center system." U.S. Br. 4 n.1 (quoting JA263).

The Arizona Legislature has charged the Secretary of State with drafting an "Elections Procedures Manual" to govern how elections are conducted in the State. The Manual must "prescribe rules" for, among other things,

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[1] URLs for online sources appear in the Table of Authorities.

"the procedures for early voting and voting," as well as for "producing, distributing, collecting, counting, tabulating and storing ballots." Ariz. Rev. Stat. § 16-452(A); *see Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) (per curiam). Though she need not follow their advice, the Secretary must consult with county election officials before prescribing these rules. Ariz. Rev. Stat. § 16-452(A).

Where Arizona's statutes do not mandate a specific policy, the Secretary may choose between permissible alternatives and enshrine her choice in the Manual.[2] *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 404 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013). The Manual "has the force and effect of law," independent of the statutes it implements and interprets. *Id.* at 397.

The current Secretary of State, Respondent Hobbs, took office in January 2019. She campaigned in 2018 on a platform that emphasized "removing barriers that can make it harder for minorities, seniors and low-income people to vote." Dustin Gardiner, *Gaynor, Hobbs Have Vastly Different Views on Access to Ballot, Dark Money in Elections*, The Republic (Oct. 26, 2018). Respondent Hobbs expressly opposed H.B. 2023 (the ballot-collection law) during her campaign, stating that it was "certainly meant to disenfranchise voters" and was

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[2] The Attorney General and Governor must approve the Manual before it is published, Ariz. Rev. Stat. § 16-452(B), but the Attorney General has described this duty as "ministerial," State Defs.' Reply in Supp. of Mot. to Dismiss Second Am. Compl. at 2, 4 n.4, *Ariz. Democratic Party v. Ariz. Sec'y of State's Office*, 2017 WL 840693 (D. Ariz. Feb. 14, 2017) (No. 2:16-CV-01065-DLR), ECF No. 262.

"unnecessary because voter fraud already is a felony" in Arizona. *Id.* Her opponent, by contrast, supported H.B. 2023 and advocated, among other things, that election materials no longer be printed in Spanish. *Id.*

Upon assuming office, Respondent Hobbs inherited this lawsuit from her predecessor. She never defended H.B. 2023 in court. *See* Notice of Substitution of Party, *DNC v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845), ECF No. 82. Following the en banc court's ruling below, she consulted with county officials and decided that she also would no longer defend the OOP Policy. Press Release, Ariz. Sec'y of State, *Hobbs Opposes AG's Appeal of* DNC v. Hobbs (Jan. 29, 2020). She engaged in "conversations with county recorders and election officials in all 15 counties" and was "confident in their ability to address the issues associated with out-of-precinct voting without needlessly extending this litigation." *Id.* The Secretary thus determined that she would not seek further review. *Id.* The Attorney General nonetheless appealed against her wishes.

B. Arizona's Policy Regarding Provisional Ballots Cast "Out of Precinct."

Arizona's OOP Policy "derives from the collective effect of" several Arizona statutes "and related rules in the Arizona Elections Procedures Manual." JA243. Statutory provisions require that voters appear on the register in the precinct in which they reside, Ariz. Rev. Stat. § 16-122, and that those not listed on a precinct's register be allowed to cast provisional ballots, *id.* §§ 16-135(B), 16-584(B)-(C).

No Arizona statute prohibits county recorders from counting provisional ballots for those offices for which out-of-precinct ("OOP") voters are eligible to vote, including all statewide offices. That directive comes from the Manual alone. JA37-38. The Manual states that county recorders may only count a provisional ballot if "the voter is eligible to vote in the precinct" and is not "in the wrong precinct/voting area." *Id.* Unless voters meet these requirements, their "ballot[s] shall remain unopened and shall not be counted." JA37.

County officials "are not empowered to count or reject ballots at their discretion." JA266. Instead, "[a]ll proceedings at the counting center … shall be conducted in accordance with the approved instructions and procedures manual." Ariz. Rev. Stat. § 16-621(A). The Manual is thus the operative source of the OOP Policy. *See* JA266 (holding that plaintiffs' injuries from the OOP Policy were redressable because the court could require the Secretary "to prescribe [plaintiffs' proffered] procedure in the Elections Procedures Manual, which county election officials then would be bound by law to follow").

Relying on the district court's factual findings but disagreeing with its ultimate conclusion, the en banc Ninth Circuit held that the OOP Policy violates Section 2. JA659. The court applied the two-step test the circuits generally use for vote-denial claims. JA612. Under that test, the court first determined whether the Policy resulted in a disparate burden on members of the protected class. *Id.* Next, the court analyzed whether the Policy "interacted with social and historical conditions" to cause that disparate burden. JA613.

At the first step, the court found that the OOP Policy clearly resulted in a disparate burden on minority voters. "Uncontested evidence in the district court established that minority voters in Arizona cast OOP ballots at twice the rate of white voters." JA617; *see* JA332-33, 594-96. This was in part because minority voters in Arizona experience 30% less polling-place stability than white voters across elections. JA111, 590. In key counties, Hispanic and Native American voters lived further from their polling places than white voters. JA592-93. The court found that "[v]oters 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." JA592. The undisputed evidence also showed that Arizona is an "extreme outlier," rejecting OOP ballots at a rate more than 11 times higher than the next highest state. JA588-89. Relying on this evidence, the en banc court concluded that "[t]he challenged practice—not counting OOP ballots [at all]—results in 'a prohibited discriminatory result'; a substantially higher percentage of minority votes than white votes are discarded." JA622 (quotation marks omitted).

At the second step, the court considered the Senate Report factors ("Senate factors") this Court embraced in *Gingles* to perform Section 2's totality-of-circumstances inquiry. JA623-24. The court gave particular weight to the "tenuousness" of the State's justification for the OOP Policy, noting "[t]here is no finding by the district court that would justify, on any ground, Arizona's policy of entirely discarding OOP ballots." JA655. The State justified the OOP Policy solely by pointing to the

importance of Arizona's precinct-based voting system. JA654-55. However, the district court made "no finding that counting or partially counting OOP ballots would threaten the integrity of" this system. JA655.

Absent the OOP Policy, Arizona would count OOP ballots for all eligible elections, including national and statewide elections. After consulting with county election officials, Respondent Hobbs determined that counties are able to implement such a system. *See* Press Release, Ariz. Sec'y of State, *supra*. The district court likewise acknowledged that properly counting OOP ballots was "administratively feasible." JA307. Indeed, in recent elections, most Arizona counties have abandoned the precinct-based model and instead used either a vote-center or a hybrid model—successfully counting votes cast outside the precincts where voters resided. *Supra* at 3. This confirms the Secretary's determination that counties can account for OOP votes without disenfranchising voters.

C. Arizona's Ballot-Collection Statute, H.B. 2023.

Arizona introduced "early" voting-by-mail in the 1990s. JA259. Since 1997, Arizona has prohibited anyone from possessing another voter's unmarked early ballot. Ariz. Rev. Stat. § 16-542(D); JA260. Arizona also "has long" criminalized fraudulent ballot-collection practices, including "knowingly mark[ing] a voted or unvoted ballot or ballot envelope with the intent to fix an election." JA293 (quoting Ariz. Rev. Stat. § 16-1005(A)) (alteration in original). However, in 2016, Arizona passed H.B. 2023, which criminalized *non*-fraudulent third-party ballot collection. JA605-06. Except for a "family member, household member or caregiver of the

voter," any "person who knowingly collects voted or unvoted early ballots from another person is guilty of a class 6 felony." Ariz. Rev. Stat. § 16-1005(H), (I)(2). Under this law, someone who helps an elderly neighbor by dropping her ballot in the mailbox can be punished by up to two years in prison and a $150,000 fine. *Id.* §§ 13-702(D), 13-801(A); *see* Press Release, Ariz. Att'y Gen. (Dec. 23, 2020).

The State provided two justifications for H.B. 2023: preventing absentee voter fraud and maintaining the reality and public perception of election integrity. JA288. However, "no evidence of any fraud in the long history of third-party ballot collection in Arizona" has been found, JA601, even after Arizona counties were subpoenaed in this case for such evidence, JA290. The district court likewise found no evidence of widespread public concern about ballot-collection fraud either in the record or before the Arizona Legislature when it passed H.B. 2023. JA290. Moreover, fraudulent ballot collection was a felony long before H.B. 2023 criminalized *non*-fraudulent collection, and, of course, fraudulent collection remains a felony.

While there is *no* record evidence of absentee voter fraud in Arizona, there is "[e]xtensive and uncontradicted evidence … that prior to the enactment of H.B. 2023, third parties collected a large and disproportionate number of early ballots from minority voters." JA659; *see* JA325-30. The district court received "direct evidence from witnesses who had themselves acted as third-party ballot collectors" or who had "personally supervised" or "witnessed" third-party ballot collection. JA661. These witnesses "established

that many thousands of early ballots were collected from minority voters by third parties" but, the district court found, white voters "did not significantly rely on third-party ballot collection." JA661.

The district court thus concluded that minority voters in Arizona are far more likely than white voters to rely on third-party ballot collection. JA329-30. Relying on these findings but disagreeing with the district court's legal conclusions, the en banc court found that H.B. 2023 had a significant, discriminatory effect on minority voters. The en banc court then examined the totality of circumstances, drawing on its analysis of the OOP Policy and citing additional record evidence. JA662-70.

First, the court noted that H.B. 2023 "grows directly out of" Arizona's history of race discrimination. JA663. Legislators abandoned their initial attempt to ban non-fraudulent ballot collection in 2011 after the Department of Justice discovered "evidence in the record that the provision intentionally targeted Hispanic voters" while reviewing Arizona's preclearance request under Section 5 of the VRA. *Id.* Legislators passed a second, similar law in 2013, but soon faced a voter referendum that would have both repealed the law and imposed a supermajority requirement on any future legislation on the topic. *Id.* To avoid that result, legislators repealed the law themselves. *Id.* Only after this Court eliminated the preclearance formula in *Shelby County* did the Arizona Legislature proceed to pass H.B. 2023, after a campaign "marked by race-based appeals." *Id.*

Second, the court recognized that "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.'" JA664 (quoting *Gingles*, 478 U.S. at 37). Most relevant, "[r]eady access to reliable and secure mail service is nonexistent in some minority communities," including on Arizona's 21 reservations. JA327. Outside of major urban centers, only 18% of Native Americans in Arizona have access to home mail service. JA124, 183. And the district court found that "[a] surprising number of voters in the Hispanic community also distrust returning their voted ballot via mail" and that "unsecure mailboxes are an impediment for urban minorities who distrust the mail service and prefer instead to give their ballots to a volunteer." *Id.*

Third, "[t]he enactment of H.B. 2023 was the direct result of racial appeals in a political campaign." JA665; *see* JA343-45. Proponents of H.B. 2023 circulated a video created by Maricopa County Republican Chair A.J. LaFaro that featured "surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots" and included commentary from LaFaro stating he "did not know if the person was an illegal alien, a [D]reamer, or citizen, but knew that he was a thug." JA344. The video played a prominent role in the debates over H.B. 2023 and was featured in campaign advertisements for Respondent Hobbs's predecessor, Michele Reagan. JA345.

Finally, the en banc court concluded that Arizona's justifications for H.B. 2023 were tenuous. JA666-70. The State justified H.B. 2023 as a fraud-prevention and election-integrity measure. JA288. But the district court found "no direct evidence that the type of ballot

collection fraud the law is intended to prevent or deter has occurred," JA347, despite bill advocates' extensive efforts to find such fraud, JA290, 347, 667-68. Nor was election integrity a justification: "[T]hird-party ballot collection has had a long and honorable history" in Arizona, and any recent distrust of it stemmed from "the fraudulent campaign mounted by proponents of H.B. 2023." JA669-70.

After holding that H.B. 2023 failed Section 2's results test, the en banc court held that H.B. 2023 was passed with discriminatory intent in violation of both Section 2 and the Fifteenth Amendment. JA681. The court canvassed the four factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977), and found that all supported the finding that racial discrimination was "*a* motivating factor" for H.B. 2023's passage and that the law would not have been enacted without race-based allegations. JA679-80, 357.

SUMMARY OF ARGUMENT

I. Under Section 2, a state may not impose or apply any policy or 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 [or language-minority status]." 52 U.S.C. § 10301(a). A Section 2 violation is established by showing, "based on the totality of circumstances, … 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 [protected] class of citizens … 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." *Id.* § 10301(b).

A. The plain text of the statute dictates its application. Whether that text is styled as the two-step test the circuits use or the three-part test the United States proposes, the text recognizes one core principle: To prevail on a vote-denial claim, plaintiffs must show that—based on the totality of circumstances and with particular attention to the government's justification—the challenged practice results in minority voters' having less ability to vote than other citizens. While Respondent Hobbs largely agrees with the United States' reading of Section 2, the United States' arguments that Section 2 requires proximate rather than but-for causation, that only state action is relevant to causation, and that theoretical alternative voting methods can excuse discriminatory policies misread the statute and misunderstand its purpose.

B. Petitioners depart radically from both the established circuit test and the United States' standard by proposing limits on Section 2 that have no basis in text, purpose, or precedent. Petitioners wrongly assert that Congress's 1982 amendments to Section 2 targeted only vote dilution (not vote denial) and that any purportedly race-neutral "time, place, and manner" voting restriction is immune from scrutiny under Section 2. A review of text and precedent easily disposes of both arguments. And, tellingly, the United States embraces neither. The United States likewise disavows Petitioners' textually baseless arguments that the size of a disparity under Section 2 must be quantified to

prove liability and that the Senate factors do not apply to vote-denial claims.

C. Properly read, Section 2 raises no constitutional issues. Under the statute's plain language, a violation can never be proven merely by showing a statistical disparity in voting; the government's policy must be a but-for cause of that disparity. Governments thus cannot be liable for racial disparities they did not help create. And Section 2's totality-of-circumstances inquiry gives governments the opportunity to justify their policies. Section 2 fully recognizes that states bear primary responsibility for administering elections—including by establishing various time, place, and manner restrictions. It simply prohibits racial discrimination in election administration, even when caused by facially race-neutral policies.

II. The OOP Policy is not properly before this Court; and, in any event, it violates Section 2's results test under either the en banc court's or the United States' formulation.

A. No Petitioner has standing to appeal the decision on the OOP Policy. This Court looks to Arizona law to determine who has standing to represent the State's interests in court. For the OOP Policy—a policy the Secretary of State promulgated, not a statute the Legislature enacted—that person is the Respondent, Secretary of State Hobbs. Arizona's Attorney General cannot appeal against Respondent Hobbs's wishes, and the Arizona Republican Party ("ARP") Petitioners also lack standing.

B. Even if any Petitioner had standing, the decision below was correct in finding that the OOP Policy violates Section 2. As the United States agrees, the district court was wrong to uphold the Policy based on the ground that it affected only a "small" number of voters. Moreover, Petitioners cannot justify the Policy. Indeed, Respondent Hobbs chose not to appeal the decision below precisely because the Policy is unjustified. This lack of justification is even more apparent today, when the great majority of Arizona's counties use vote-center or hybrid models that belie any interest in protecting a precinct-based system.

III. The ballot-collection statute, H.B. 2023, violates Section 2's results and intent tests, and likewise violates the Fifteenth Amendment.

A. Undisputed evidence demonstrated that minority voters rely on ballot collection at higher rates than white voters, and that being unable to rely on anyone other than family/household members or caregivers to assist with ballot delivery would disproportionately burden minority voters. H.B. 2023 thus led minority voters to have less ability to vote than other voters. None of Arizona's proffered justifications explains how criminalizing *non*-fraudulent ballot collection prevents *fraudulent* ballot collection—which Arizona outlawed long before H.B. 2023.

B. In finding that H.B. 2023 was enacted with discriminatory intent, the en banc court did not transgress the limits of clear-error review. It simply applied the *Arlington Heights* factors to a record replete with evidence of racially motivated appeals.

ARGUMENT

I. Section 2 Prohibits Any Voting Practice that Results in a Denial of the Right to Vote on Account of Race.

For the reasons explained by DNC Respondents, the court below properly articulated and applied the two-part test used by the circuits for vote-denial claims. Although the United States restates the test as a three-part analysis, U.S. Br. 14-25, its elements are largely the same as those applied by the en banc court. Petitioners, by contrast, invent from whole cloth various restrictions or additional elements they want this Court to graft onto Section 2. Free of the caricature drawn by Petitioners, Section 2's results test does not implicate any constitutional concerns.

A. Section 2's Results Test Follows the Plain Text.

As with any statute, interpreting Section 2 requires "a careful examination of the ordinary meaning and structure of the law itself. Where … that examination yields a clear answer, judges must stop." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

Section 2 begins with an express prohibition: "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 language-minority status]." 52 U.S.C. § 10301(a). The statute then details what violates that prohibition—a showing that, "based on the totality of

circumstances, … the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens … 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." *Id.* § 10301(b). Congress further defined the terms "vote" and "voting" to encompass "all action necessary to make a vote effective," including "registration, … casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." *Id.* § 10310(c)(1).

1. The United States translates this text into a three-part test: "[F]irst, members of a protected group must have less ability to vote than other voters in light of the burdens imposed by the challenged practice and readily available alternative voting methods; second, the challenged practice must be responsible for that lesser ability, rather than other external factors not fairly attributed to the practice; and third, courts must take account of the totality of circumstances, including, among other things, the specific justifications for the challenged practice." U.S. Br. 18.

Respondent Hobbs concurs with much of this interpretation. *First*, because Section 2's language "refers to the consequences of actions and not just to the mindset of actors," Section 2 imposes disparate-impact liability. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015); *see Chisom v. Roemer*, 501 U.S. 380, 394-95 (1991). Both the court below and the United States agree. JA610; U.S. Br. 16-17. *Second*, because Section 2 includes a causation

requirement, a plaintiff cannot prevail merely by showing a statistical disparity. *Inclusive Cmtys. Project*, 576 U.S. at 542. Both the court below and the United States agree. JA613; U.S. Br. 17. *Third*, Section 2 guarantees equality of "opportunity" but does not guarantee particular electoral outcomes. Both the court below and the United States agree. JA 613; U.S. Br. 18-19. *Fourth*, Section 2 protects "the right of *any* citizen of the United States to vote" and thus its "focus should be on individuals" rather than solely on the broader electorate. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020); *see Holder v. Hall*, 512 U.S. 874, 918 (1994) (Thomas, J., concurring in the judgment). Both the court below and the United States agree. JA619-21; U.S. Br. 29. *Finally*, Congress expressly mandated that courts consider the *totality* of circumstances—not merely some subset of circumstances. Both the court below and the United States agree. JA613; U.S. Br. 24.

The United States and Respondent Hobbs differ on just three aspects of the United States' standard. *First*, the United States claims that the statute requires proximate, not but-for, causation.[3] U.S. Br. 22. That is wrong. It is the "ancient and simple 'but for' common law causation test," not proximate causation, that "supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action." *Comcast Corp. v. Nat'l Ass'n of Af. Am.-Owned Media*, 140 S. Ct. 1009,

[3] Although ARP Petitioners also advocate for proximate causation, Brnovich Petitioners appear to accept that the statute requires only "actual causality." Brnovich Br. 23 (quotation marks omitted).

1014 (2020). Here, Section 2's plain text confirms that Congress intended this lesser, default causation standard to apply: The statute uses the phrases "results in" and "on account of race" to describe its causation elements. 52 U.S.C. § 10301(a). Both indicate but-for causation.

As an initial matter, "[a] thing 'results' when it '[a]rise[s] as an effect, issue, or outcome *from* some action, process, or design.'" *Burrage v. United States*, 571 U.S. 204, 210 (2014) (alterations in original). This Court has therefore held that the phrase "'[r]esults from' imposes … a requirement of actual causality." *Id.* at 211; *see also People v. Wood*, 741 N.W.2d 574, 576 (Mich. Ct. App. 2007) ("by using the word 'result' instead of 'cause' in the statute, the Legislature specifically directed that only factual causation need be established") (cited by *Burrage*, 571 U.S. at 214). Thus, "'the ordinary meaning of "result[s in]" imposes a requirement of actual or but-for causation,' and not proximate causation." *United States v. Burkholder*, 816 F.3d 607, 614 (10th Cir. 2016) (first alteration in original).

Meanwhile, the phrase "on account of race" is synonymous with "because of race." *See Bostock*, 140 S. Ct. at 1739. And this Court has repeatedly held that a statutory "'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* (quoting cases). Likewise, the Fifteenth Amendment—which also uses "on account of race," U.S. Const. amend. XV—is "best understood to forbid any voter qualification that makes race … a but-for cause of the denial of the right to vote." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1042 (11th Cir. 2020) (opinion of W. Pryor, C.J.).

The text leaves no doubt about either causation element, as Section 2's context and purpose confirm. Nothing in the provision's "context" indicates a higher causation standard; but-for causation would not, for instance, "cannibalize" other language in the statute. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1842-43 (2018). Quite the opposite. Section 2 requires courts to evaluate a challenged policy in "the totality of circumstances." 52 U.S.C. § 10301(b). Imposing a proximate-cause requirement would unduly restrict the scope of this congressionally mandated inquiry. "It would be unacceptable to adopt a causal standard so strict that it would undermine congressional intent where neither the plain text of the statute nor legal tradition demands such an approach." *Paroline v. United States*, 572 U.S. 434, 458 (2014).

Second and relatedly, the United States asserts that Section 2 requires plaintiffs to prove that *state* action caused the racial disparity. U.S. Br. 21-24; *see also* ARP Br. 29-30; Brnovich Br. 24, 32. If the United States means that governmental policy must be the vehicle by which societal disparities are channeled into the electoral realm, it is correct—and the court below already required as much. But a claim that a court may consider *only* state-sponsored discrimination in its analysis runs headlong into precedent. This Court has long held that "Section 2 … prohibits any practice or procedure that, '*interact[ing] with social and historical conditions*,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (emphasis added) (alterations in original). Thus, though

the challenged practice must be a but-for cause of minority voters' unequal opportunity to participate and elect, Section 2 allows courts to consider private activity and societal and historical discrimination, as well.[4]

This does not make governments liable for discrimination they did not cause or caused only in the past. *See* U.S. Br. 22-23; ARP Br. 30. Nor does it force courts to impose Section 2 remedies that would require the government to eliminate private discrimination. *See Inclusive Cmtys.*, 576 U.S. at 544; S. Rep. No. 97-417, at 31 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 208 ("the remedy fashioned must be commensurate with the right that has been violated"). Rather, it recognizes that electoral laws do not exist in a vacuum and that certain election practices, interacting with preexisting inequities, can create predictably unequal electoral opportunities. Thus, a government policy violates Section 2 if it "combines with other factors to produce the [prohibited] result, so long as the other factors alone would not have done so." *Burrage*, 571 U.S. at 211. If the challenged policy is a cause of a disparity in opportunity,

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[4] *See, e.g.*, *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 438-40 (2006) (finding districting change violated Section 2 because local Hispanics "were becoming more politically active," and "the 'political, social, and economic legacy of past discrimination'" against "Latinos in Texas … may well 'hinder their ability to participate effectively in the political process'"); *Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (holding multimember-districting scheme in violation of Section 2 based on its interaction with "racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice").

and if that disparity would not exist but for voters' race, that is the causation Section 2 requires.

Third and finally, the United States argues that "courts considering limitations on one voting method must account for available alternative methods." U.S. Br. 20-21.[5] To be sure, no voting practice exists in isolation. And courts should consider the challenged practice's *interaction* with other election laws as part of the totality-of-circumstances inquiry—for other laws, while "neither in themselves improper nor invidious," may "enhance[] the opportunity for racial discrimination" resulting from the challenged practice. *White v. Regester*, 412 U.S. 755, 766 (1973).

But just as a plaintiff cannot establish liability merely by pointing to statistical disparities in voting practices, so, too, a defendant cannot escape liability merely by pointing to the availability of alternative voting practices. Minority voters *always* will have some theoretical other means to vote. Simply claiming that whatever other practices the government has are equally open will not do. Section 2 does not give defendants a get-out-of-jail-free card for one policy with discriminatory results just because they have other non-discriminatory policies. The *entire* political process must be "*equally* open" to voters of all races. 52 U.S.C. § 10301(b) (emphasis added). If the government gives voters of one race more opportunity to vote than voters

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[5] Brnovich Petitioners advance a more extreme version of this argument, asserting that states can absolve themselves of Section 2 liability for a discriminatory policy if other aspects of their election systems are sufficiently "accommodating." Brnovich Br. 22.

of other races, it is no answer to say the process is open *enough* for the disadvantaged voters.[6]

This standard does not prevent states from "eliminat[ing] a [voting] method some prefer" if the resulting process remains equally open, nor does it force states to "adopt" a new voting method that "members of one race would prefer" if the status quo already provides equal opportunity. U.S. Br. 21. Section 2 does not mandate "maximiz[ing]" minority voters' opportunities. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). Instead, when considering the availability of alternative methods, courts must undertake an "'intensely local appraisal of the design and impact' of the *contested* electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (emphasis added). And they must bear in mind that deliberate elimination of a voting practice known to be used disproportionately by minority voters creates exactly the "risk of purposeful discrimination" that the United States warns against. U.S. Br. 16 (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)); *cf. League of United Latin Am. Citizens v. Perry* (*LULAC)*, 548 U.S. 399, 440 (2006).

2. This reading of Section 2 is bolstered "in light of the purpose underlying" the statute. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 487 (1997). This Court has

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[6] ARP Petitioners' example illustrates this. They note that, "[i]f a state sends unsolicited ballot applications to residents of white neighborhoods, … but not to residents of black neighborhoods, that would amount to giving the latter less 'opportunity' to participate." ARP Br. 27. But that is of course true even though black voters could vote in other ways.

long recognized that "[t]he Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969). Consistent with that tenet, Section 2 "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom*, 501 U.S. at 403.

Congress passed this sweeping law to address a sweeping problem. For a century after the Fifteenth Amendment formally guaranteed minorities the right to vote, "[m]anipulative devices and practices were … employed to deny the vote to blacks." *Rice v. Cayetano*, 528 U.S. 495, 513 (2000). "Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place." *Shelby Cnty.*, 570 U.S. at 560 (Ginsburg, J., dissenting). Indeed, when pre-VRA adjudication "produced favorable results, affected jurisdictions often 'merely switched to discriminatory devices not covered by the federal decrees.'" *City of Rome v. United States*, 446 U.S. 156, 174 (1980).

Congress devised an intentionally expansive solution. In 1982, it overruled this Court's decision in *City of Mobile v. Bolden* that Section 2 forbade only intentional discrimination. *Gingles*, 478 U.S. at 43-44. In so doing, Congress reinstated the pre-*Bolden* standards from *White v. Regester* with the "specific intent" of allowing liability based on "discriminatory results without proving any kind of discriminatory purpose." S. Rep. No. 97-417, at 27-28, 1982 U.S.C.C.A.N. at 205-06.

The *Regester* Court struck down a multimember district, based in part on its interaction with other unchallenged election laws that were "neither in themselves improper nor invidious," but potentially "enhanced the opportunity for racial discrimination." 412 U.S. at 766. Crucial to the decision were the discriminatory practices of a private "white-dominated organization" that controlled the area's political life. *Id.* And the *Regester* Court affirmed elimination of another multimember district because of how it "overlaid … on the cultural and economic realities of the Mexican-American community in Bexar County." *Id.* at 769.

In restoring the standards from *Regester*, and directing consideration of the "totality of circumstances," Congress affirmed courts' ability to consider evidence of private discrimination—or the lingering effects of past public discrimination—that interact with the challenged practice to cause the complained-of disparity. Indeed, the Senate factors "were derived from the analytical framework of *White* [*v. Regester*] … as refined and developed by the lower courts." *Gingles*, 478 U.S. at 36 n.4. Thus, Congress adopted the *Regester* Court's view that "whether the political processes are 'equally open' depends upon a searching practical evaluation of the [state's] 'past and present reality.'" *De Grandy*, 512 U.S. at 1018.

B. Petitioners Depart from Section 2's Text by Inventing Restrictions.

In contrast to the United States, Petitioners suggest radical departures from the statute that have no basis in text, purpose, or precedent. The United States either

fails to embrace or expressly disavows each of Petitioners' positions.

First, Petitioners claim that Section 2 is aimed "principally" at combating vote dilution, not vote denial. ARP Br. 18, 36-38. Not true. Section 2 "refer[s] to any methods for conducting a part of the voting process that might … be used to interfere with a citizen's ability to cast his vote" and have it properly counted. *Holder*, 512 U.S. at 917-18. Thus, the amended "Section 2 prohibits *all* forms of voting discrimination, not just vote dilution." *Gingles*, 478 U.S. at 45 n.10 (emphasis added). The "unusually extensive legislative history of the 1982 amendment" belies Petitioners' claims. *Chisom*, 501 U.S. at 396. The Senate Report acknowledged that Congress borrowed its standard from cases that "dealt with [dilutive] electoral system features" but reiterated that "Section 2 remains the major statutory prohibition of *all* voting rights discrimination." S. Rep. No. 97-417, at 30, 1982 U.S.C.C.A.N. at 207 (emphasis added). No matter what the claim, "the ultimate test would be the *White* [*v. Regester*] standard codified by this amendment of Section 2." *Id.*

To be sure, most post-1982 Section 2 claims have involved vote dilution rather than vote denial. But that is only because the "effectiveness of the now-defunct Section 5 preclearance requirements … stopped would-be vote denial from occurring in covered jurisdictions." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014). Since this Court struck down the preclearance formula in *Shelby County*, Section 2 has become the principal bulwark against policies and practices that disenfranchise minority

voters. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 Harv. C.R.-C.L. L. Rev. 439, 440 (2015). But Section 2 claims are expensive to litigate, place the burden of proof on plaintiffs, and generally cannot stop laws prior to implementation. So it is unsurprising that pre-*Shelby County*, Section 5 was plaintiffs' primary tool for combating vote denial.

Second, Petitioners wrongly claim that "[r]ace-neutral time, place, or manner regulations" cannot implicate Section 2. ARP Br. 19; *see* Brnovich Br. 20. As discussed above, Congress intentionally drafted Section 2 broadly to apply to *any* policy—even those that are facially race-neutral—so long as the policy results in reduced electoral opportunity for minority voters on account of race.

Indeed, many of the policies that inspired the VRA were facially neutral. Some states sought to prevent minorities from voting by "ma[king] the ability to read and write a registration qualification." *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). They also imposed "property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matter." *Id.* at 311. These facially neutral laws caused racially disparate outcomes through discriminatory application, *id.* at 311-12, and because of their predictable interactions with other societal inequalities like racially disparate literacy rates, *id.* at 310-11, or education rates, *see Gaston Cnty. v. United States*, 395 U.S. 285, 289, 293 (1969).

Members of this Court have therefore recognized that Section 2 "covers all manner of registration requirements," as well as "the locations of polling places,

the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted." *Holder*, 512 U.S. at 922. Section 2's broad coverage means that "[i]f, for example, 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." *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting).

The vast majority of this Court's Section 2 cases involved practices that were, under Petitioners' view, race-neutral time, place, and manner regulations: multimember districts, *see Gingles*, 478 U.S. at 46, "at-large voting schemes," *id.* at 47, and "anti-single-shot voting rule[s]," *Holder*, 512 U.S. at 880 (plurality opinion), to name a few.[7] This Court thus has already recognized that Section 2 reaches practices that regulate

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[7] Petitioners' own examples undermine their position. For instance, ARP Petitioners posit that Section 2 would prohibit leaving polling places open longer in white neighborhoods than in minority neighborhoods. ARP Br. 24-25. They also concede that Section 2 prohibits laws such as "[l]imiting the franchise to people who own a home or hold a college degree … if minority voters have lower home ownership or graduation rates." *Id.* at 19; *accord id.* at 27. ARP Petitioners try to distinguish this last example by claiming that a race-neutral education test can violate Section 2 because it involves voter qualifications rather than time, place, and manner regulations. *Id.* at 19. But nothing in Section 2 suggests that race-neutral voter qualifications can violate the statute but race-neutral time, place, and manner regulations cannot.

only "*how* citizens vote," ARP Br. 19, even if the laws are uniform and race-neutral.

Ultimately, Petitioners ask this Court to carve a huge swath of election laws out of Section 2's domain. But such "[a]n inflexible rule would run counter to the textual command of § 2" to examine "'the totality of circumstances.'" *De Grandy*, 512 U.S. at 1018. Creating safe harbors for entire categories of voting practices would be particularly nonsensical when the very "need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power." *Id.*

Third, Petitioners contend that the decision below "diverges from § 2's textual requirements" because it "does not require a *substantial* disparate impact" to trigger liability. Brnovich Br. 31; *see id.* at 21, 30-31. But it is Petitioners' "substantial" disparity requirement that floats free of the text. What is more, because Petitioners never explain what qualifies as "substantial" disparity, this requirement remains hopelessly vague.

In any event, this Court already rejected Petitioners' contention in *Chisom*, when it ruled that Section 2 requires plaintiffs to prove inequality in both opportunity to participate *and* opportunity to elect. 501 U.S. at 397. Justice Scalia argued that "a small minority" would have "no protection against infringements of its right 'to participate in the political process'" under the majority's reading of Section 2, because the small minority "will always lack the numbers necessary 'to elect its candidate.'" *Id.* at 397 n.24. But the Court dismissed this concern, stating that it "rests on the

erroneous assumption that a small group of voters can never influence the outcome of an election." *Id.*

That reading hews to Section 2's text, which addresses "the right of *any* citizen of the United States to vote." 52 U.S.C. § 10301(a) (emphasis added). Thus, as the United States correctly explains, "a practice can violate Section 2 even if it affects only a small number of voters." U.S. Br. 29; *accord* JA522. The percentage disparity between racial groups need not reach some (undefined) threshold to affect the opportunity to vote: Vote-denial cases involve inequalities in the voting process itself, and "*[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." *Chisom*, 501 U.S. at 397 (emphasis added).

To be sure, the size of a disparity may bear on whether causation can be established, or whether the totality of circumstances shows a discriminatory result. But, as the United States recognizes (U.S. Br. 29), the number of voters affected cannot limit threshold liability under Section 2.

Finally, Petitioners seek to restrict the congressionally mandated review of the "totality of circumstances" to something less than a "totality." They begin by asserting that Section 2 guarantees only equality of *opportunity*, not equality of *outcomes*. ARP Br. 22; Brnovich Br. 20. Nobody quarrels with this standard. The text of Section 2 requires it, both by asking whether voters of one race "have less opportunity" than others and by expressly disclaiming that Section 2 mandates proportional representation. 52

U.S.C. § 10301(b). But Petitioners go further in claiming that Section 2 does not apply to laws when minority voters simply take less advantage of them. *See* ARP Br. 22, 28; Brnovich Br. 20.

To read Section 2 as Petitioners ask would make mincemeat of its totality-of-circumstances inquiry. What may seem like individual choices in a vacuum can be the result of unequal underlying conditions' interaction with the challenged policy. That is precisely why the 1982 amendments "ma[d]e clear that an application of the results test requires an inquiry into 'the totality of the circumstances.'" *Chisom*, 501 U.S. at 394. The text "requires courts to consider 'the whole picture.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018). When considering the "choices" made by minority voters, courts must ask if the challenged policy "interacts with social and historical conditions to cause an inequality." *Gingles*, 478 U.S. at 47.

Attempting an analogy, ARP Petitioners claim that every person has an equal opportunity to attend free high school, even if some choose to drop out. ARP Br. 28. But if a county refuses to bus students to school, and minority students in the county are far more likely to lack the means to get to school without busing, then the county's policies have interacted with social factors to result in minorities lacking an "equal opportunity" to graduate. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 30 (1971) (affirming use of busing as court-ordered remedy because "[d]esegregation plans cannot be limited to the walk-in school"). Similarly, voters' own choices can lead to disparities in voting, but if those disparities would not have occurred but for the

state's policy—and but for the voters' race—Section 2 applies.

Petitioners further mount a wholesale attack on the circuits' consideration of the Senate factors, arguing wrongly that they are relevant only to vote-dilution claims. ARP Br. 20, 33; Brnovich Br. 32-33. But, as the United States recognizes, courts may consider the Senate factors whenever they "bear on the proper Section 2 inquiry in a particular case." U.S. Br. 31.

The Senate Report, as discussed, adopted those factors from *Regester* and its progeny. *Gingles*, 478 U.S. at 36 n.4. As ARP Petitioners note, these factors are "indicative of intentional discrimination." ARP Br. 36. The Senate factors thus serve a similar function as the indicia of intentional discrimination this Court articulated in *Arlington Heights*. Indeed, several Senate factors directly parallel the *Arlington Heights* factors. For instance, Senate factors 1 and 5, on the history and effects of discrimination, *see Gingles*, 478 U.S. at 36-37, mirror *Arlington Heights*' focus on "[t]he historical background of the decision," 429 U.S. at 267. And Senate factor 9, on the government's justification for the policy, *see Gingles*, 478 U.S. at 37, plays a role similar to *Arlington Heights*' examination of the "specific sequence of events leading up to the challenged decision" and "[t]he legislative or administrative history" of the act, 429 U.S. at 267-68.

Although the Senate Report derived its factors from vote-dilution cases, the Report's authors emphasized that the same standards apply to *all* Section 2 claims. S. Rep. No. 97-417, at 30, 1982 U.S.C.C.A.N. at 207. The Report recognized that "[t]o establish a violation,

plaintiffs could show a variety of factors, depending upon the kind of rule … called into question." *Id.* at 28, 1982 U.S.C.C.A.N. at 206. This does not mean that *all* the Senate factors *always* apply. *See Gingles*, 478 U.S. at 45 ("this list of typical factors is neither comprehensive nor exclusive" and "there is no requirement that any particular number of factors be proved" (quoting S. Rep. No. 97-417, at 29, 1982 U.S.C.C.A.N. at 206)). Section 2's text mandates examination of "the totality of circumstances," 52 U.S.C. § 10301(b), and the Senate factors simply enumerate possibly relevant circumstances.[8]

C. Properly Read, Section 2 Raises No Constitutional Issues.

Properly read, Section 2 raises none of the constitutional issues Petitioners attempt to inject into this case. Though the Fifteenth Amendment prohibits only intentional discrimination, this Court's decisions "foreclose any argument that Congress may not, pursuant to [the Amendment], outlaw voting practices that are discriminatory in effect." *City of Rome*, 446 U.S. at 173. That is exactly what Section 2 does. It does not impose liability "based solely on a showing of a statistical disparity." *Inclusive Cmtys.*, 576 U.S. at 540. Rather, the plaintiff must "point to a defendant's policy or policies causing that disparity." *Id.* at 542.

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[8] Given Section 2's totality-of-circumstances element, the Senate factors' nonexclusive nature, and their basis in precedent, the factors' provenance as legislative history matters little. *Contra* Brnovich Br. 33. This Court regularly applies the Senate factors in Section 2 cases. *See, e.g.*, *LULAC*, 548 U.S. at 426.

Socioeconomic or other inequalities may interact with the policy, but the challenged election policy *itself* must help transform those differences into disparate opportunities to participate in the political process. Defendants are responsible not for preexisting societal discrimination, but for their decisions to superimpose laws that erect barriers to minority voting by exacerbating existing discrimination. Section 2 thus "protects defendants from being held liable for racial disparities they did not create." *Id.*

By requiring courts to consider the totality of circumstances, Section 2 also gives defendants "leeway to state and explain the valid interest served by their policies." *Id.* at 541. This leeway, combined with the statute's causation requirement, ensures that governments need not use race "in a pervasive way" or adopt quotas. *Id.* at 542.[9] However, the Constitution does not mandate that governments be given the benefit of *all* doubt. It requires only that they "be allowed to maintain a policy if *they can prove* it is *necessary* to achieve a valid interest." *Id.* at 541 (emphasis added).

Petitioners nevertheless insist that any reading of Section 2 other than theirs substantively expands the Fifteenth Amendment's meaning, in violation of *City of Boerne v. Flores*, 521 U.S. 507 (1997). ARP Br. 39-41; Brnovich Br. 26-28. That is wrong. While Fourteenth Amendment legislation must exhibit "congruence and proportionality" between injury and remedy, *City of*

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[9] With these safeguards in place, Section 2 does not "prioritize race" and so does not raise Fourteenth Amendment concerns, either. ARP Br. 41; *see* Brnovich Br. 26-27.

Boerne, 521 U.S. at 520, this Court recognizes that Congress may pass prohibitions under the *Fifteenth* Amendment as long as they are "rational means [of] effectuat[ing]" the Amendment under *McCulloch v. Maryland*. *Katzenbach*, 383 U.S. at 324; *see City of Rome*, 446 U.S. at 177; *Shelby Cnty.*, 570 U.S. at 550-51, 556. In any event, even if *City of Boerne*'s standard applied, *but see Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting) (noting the standard's lack of any "demonstrable basis in the text of the Constitution"), Section 2 is a congruent and proportional mechanism for enforcing the Fifteenth Amendment's broad mandate. Section 2 places the burden of proof on plaintiffs, focuses on local conditions, and tailors liability to laws that cause discriminatory results. Given these safeguards, Section 2 raises none of the constitutional issues invented by Petitioners.

Petitioners also invoke the Elections Clause and states' role in regulating the times, places, and manner of federal elections. ARP Br. 22-23, 35; Brnovich Br. 28-29. But, again, the VRA "was passed pursuant to Congress' authority under the Fifteenth Amendment," and "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999). In any event, the same Elections Clause that giveth to the states may taketh away when Congress acts. The Clause "embrace[s] authority to provide a complete code for congressional elections." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013) (quotation marks omitted). Congress has the authority not only to regulate OOP voting and ballot

collection directly, but also to prohibit discrimination in these practices through the VRA.

II. No Petitioner Has Standing to Appeal the Decision on the OOP Policy, Which the Court Below Correctly Held Violates Section 2.

Because the OOP Policy is just that—a *policy*, promulgated under Arizona law by the Secretary of State—whether to continue to defend it in court is up to *her*. Under Arizona law, the Attorney General cannot appeal the decision below against her wishes. Nor do ARP Petitioners have standing.

Even if any Petitioner had standing, the court below correctly found that the OOP Policy violates Section 2. The Policy results in minority voters having less opportunity to vote, without justification. As the State's chief elections officer, the Secretary is empowered to determine if any legitimate interest justifies the Policy, and she has determined there is none.

A. Petitioners Lack Standing to Appeal the Decision Below on the OOP Policy.

Petitioners lack standing to appeal the en banc court's ruling on the OOP Policy. Arizona law provides that Attorney General Brnovich may not pursue this appeal against the wishes of the Secretary—either in his capacity as Attorney General or on behalf of the State. ARP Petitioners also lack standing because they have failed to demonstrate any particularized stake in the outcome of the dispute.

1. The OOP Policy is not a legislative enactment; it is a creature of the Elections Procedure Manual. That

Manual is promulgated by the Secretary, who is charged under Arizona law with using her discretion to implement rules for counting ballots in the Manual. *See supra* at 6. Although her predecessor supported the OOP Policy, Respondent Hobbs ran for office in 2018 on a platform of removing barriers that made it harder for Arizona's minority citizens to have their votes counted. *See supra* at 4-5. The voters of Arizona elected Respondent Hobbs to do just that, and her decision not to appeal the decision on the OOP Policy reflects her mandate from the voters.

This Court looks to state law to determine who has standing to represent Arizona and its officials in federal court. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951-52 (2019). And under clearly established Arizona law, Brnovich Petitioners have no authority to appeal the decision on the OOP Policy. In fact, the Arizona Supreme Court has held that the Attorney General is *prohibited* from appealing on behalf of another state official who does not wish to appeal.

In *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360, 363 (Ariz. 1975), the Arizona Supreme Court held that the Attorney General could not appeal a tax suit when the Director of Property Valuation did not wish to appeal. The court acknowledged that Arizona law "contemplates that the Attorney General act as the legal representative of the people; so that, whenever the State is a party to a law[s]uit, it is the Attorney General who must act as its lawyer." *Id.* at 362. However, the Attorney General lacked authority "to exercise the power of discretion placed by the Constitution and applicable statutes in

other executive and administrative officers." *Id.* The court therefore concluded that "the Attorney General is not the proper person to decide the course of action which should be pursued by another public officer, *nor should he be allowed to maintain a lawsuit at his own instigation under the cloak and in the guise that the action is by the State of Arizona in order to accomplish the same result*." *Id.* (quotation marks omitted) (emphasis added). Thus, Attorney General Brnovich lacks authority to appeal the decision below against the wishes of Respondent Hobbs—either in his own right or "in the guise that the action is by the State of Arizona." *Id.*

2. ARP Petitioners also lack standing. They do not represent the State in any capacity. *See Karcher v. May*, 484 U.S. 72, 77-78, 81 (1987). Nor do they have any role in formulating or enforcing the OOP Policy. *See Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013). Like the *Hollingsworth* petitioners, ARP Petitioners have no particularized stake in the appeal because the decision below "ha[s] not ordered them to do or refrain from doing anything." *Id.* at 705. And like the *Wittman* petitioners, ARP Petitioners have failed to present evidence that they have suffered an injury-in-fact from the ruling. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016). ARP Petitioners are quintessential "concerned bystanders," whose interest in this litigation is indistinguishable from the general interest of every citizen in Arizona. *See Hollingsworth*, 570 U.S. at 707.

The Court therefore must dismiss the petition for lack of standing on the OOP Policy.

B. The OOP Policy Violates Section 2.

Even if any Petitioner had standing to defend the OOP Policy on appeal, that defense fails on the merits. Plaintiffs easily met their burden to show that the OOP Policy "results in a denial or abridgment of the right of any citizen of the United States to vote." 52 U.S.C. § 10301(a). Under either the circuits' test or the United States' proposed test, plaintiffs demonstrated that minority voters had less ability to vote; the OOP Policy was a but-for cause of that lesser ability; and the Policy was unjustified. Respondent Hobbs focuses here on the United States' test. *See* U.S. Br. 14-25.

1. On the first prong of the test, plaintiffs demonstrated that they had less ability to vote. There was "[e]xtensive and uncontradicted" evidence that minority voters in Arizona were disproportionately subject to vote denial by the OOP Policy. JA618. Across Arizona, minority voters were twice as likely as white voters to have their ballots thrown out under the OOP Policy. JA594-95; *see* JA 332-33, 617. In Pima County, Hispanic voters' rate of OOP ballots was 250% of white voters' rate, and the comparable figures were 180% for African-Americans and 174% for Native American voters. JA595; *see id.* (similar disparities in Maricopa County).

In arguing that no disparity in ability to vote exists, the United States misapplies its own standard to the facts. The United States faults plaintiffs for failing to "demonstrate that minority voters are less able to identify and appear at the proper precinct … let alone that they are less able to vote once the multiple other

accessible (and much more popular) voting methods Arizona affords are considered." U.S. Br. 26.

As to the first charge, plaintiffs *did* show that minority voters were less able to identify and appear at the proper precinct due to unusually frequent and confusing changes to polling-place locations in minority neighborhoods. JA590-93. Indeed, African-American and Hispanic voters in Arizona experienced 30% more instability in their polling-place sites than white voters. JA590. Chief Judge Thomas described Arizona's polling-place locations as "like the changing stairways at Hogwarts, constantly moving and sending everyone to the wrong place." JA590 (quotation marks omitted).

As to the second charge, the availability of other voting methods cannot excuse a method that causes discriminatory results. For one thing, voting methods are not necessarily equal substitutes. To wit, "[m]ail-in voting involves a complex procedure that cannot be done at the last minute" and "deprives voters of the help they would normally receive in filling out ballots at the polls"—particularly when considered in light of the ballot-collection statute also at issue here. *Veasey v. Abbott*, 830 F.3d 216, 255 (5th Cir. 2016) (en banc).

But regardless of whether Arizona offers other voting methods, the United States' argument ignores that any voter who appears at the wrong precinct on Election Day and casts a provisional ballot is guaranteed at that point to have her vote denied. Under the OOP Policy, when voters cast ballots outside their assigned precinct, their ballots are discarded—even when voters' assigned precincts have nothing to do with their eligibility to vote, like in contests for nearly all federal

officers, "all statewide officers … and statewide propositions," and many county and local officers and propositions. JA586.

This Court has long recognized that "the right to have one's vote counted has the same dignity" under the Constitution as "the right to put a ballot in a box." *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (quotation marks omitted). The right to have one's ballot counted is guaranteed by the VRA's text and is foundational to this Court's vote-dilution jurisprudence. *See* 52 U.S.C. § 10310(c)(1). If anything, it applies even more strongly to vote-denial cases: Refusing to count ballots *at all* is a more direct means of infringing the right to vote than refusing to give votes their *full weight*. *See Reynolds v. Sims*, 377 U.S. 533, 554-55 & n.29 (1964).

The United States agrees that the district court erred by concluding that the OOP Policy's impact was simply too small to sustain a Section 2 claim. *See* U.S. Br. 29. Like Petitioners, the district court fixated on the declining number of OOP ballots cast in Arizona from 2008 to 2016, and the declining percentage of OOP ballots as a share of all ballots. JA297-300; Brnovich Br. 34-35; ARP Br. 7-8, 25. But as the en banc court correctly determined (and the United States agrees, *see* U.S. Br. 29), the district court's focus on the "small" number of voters affected was wrong. JA619-21. Section 2 protects "the right of *any* citizen of the United States to vote," 52 U.S.C. § 10301(a) (emphasis added). Thus, "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." JA619; *accord Holder*, 512 U.S. at 918 (Thomas, J., concurring in the judgment). For

vote-denial claims, "[t]he number of minority voters adversely affected, and the mechanism by which they are affected, may vary considerably." JA619.[10]

2. On the second prong, the court below correctly held that requiring plaintiffs to show that the OOP Policy itself caused minority voters to cast ballots at the wrong precincts was error. JA622. Obviously, a policy instructing election officials to throw out a class of ballots will never be the cause of citizens casting that type of ballot. No voter would go to the polls *knowing* that her ballot would not be counted. Yet this absurdity is precisely what the United States' proposed proximate-cause requirement invites. Suppose, for example, that the policy at issue was to throw out the OOP ballots of minority but not white voters. Clearly that would be unlawful, but no plaintiff could ever show that the policy itself *caused* any minority voter to vote OOP. The same would be true of any restrictive rules governing ballot counting. The United States' proposed proximate-cause standard would impose an impossibly high burden.

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[10] Even if it were appropriate to apply some *de minimis* threshold to a Section 2 claim, Arizona's OOP Policy clears that bar. Arizona threw out 38,335 OOP ballots from 2008 to 2016. JA588. That includes 3,709 OOP ballots in 2016 alone. JA619-20. Minority votes are overrepresented in those discarded ballots by two-to-one. JA19; *see* JA332-33, 594-96, 617. Petitioners try to downplay the denial of thousands of votes by comparing the OOP ballot number to the number of all ballots cast statewide. Brnovich Br. 34-35; ARP Br. 7-8, 25. But the 3,709 rejected OOP ballots from Arizona's 2016 general election far exceeds the 537 votes that famously decided the 2000 presidential election in Florida. JA621.

Section 2's but-for causation requirement is the proper standard and, as the court below found, is clearly met here. "The challenged practice—not counting OOP ballots [at all]—results in 'a prohibited discriminatory result'; a substantially higher percentage of minority votes than white votes are discarded." JA622 (quotation marks omitted). These disparities would not have occurred but for the OOP Policy and but for the voters' race.

3. On the third prong, the en banc court relied heavily—as the United States suggests, *see* U.S. Br. 24-25—on the State's justification for the OOP Policy. The court observed that "[t]here 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." JA655. "The only plausible justification for Arizona's OOP [P]olicy," the en banc court found, "would be the delay and expense entailed in counting OOP ballots." JA656. But the district court never made any findings to that effect. In fact, the district court expressly found that "[c]ounting OOP ballots is administratively feasible." *Id.* (quotation marks omitted).

Although the United States attempts to manufacture new justifications for the OOP Policy, U.S. Br. 27, Respondent Hobbs has refused to defend the Policy precisely because it has no legitimate justification. *See supra* at 5. As she has determined through consultation with election officials from every Arizona county, ballots

cast OOP do not present any issue for election administration; they can and should be counted. That the great majority of Arizona counties have transitioned to vote-center or hybrid models, in which votes routinely are cast outside voters' assigned precincts and then counted, likewise demonstrates that there is no legitimate interest in keeping the precinct-based system.

Thus, even applying the United States' reformulation of the results test, the en banc court correctly determined that Arizona's OOP Policy violates Section 2. Accordingly, if the Court concludes that any Petitioner has standing on the OOP Policy, it should affirm.

III. The Court Below Correctly Held that Arizona's Statute Criminalizing Non-Fraudulent Ballot Collection Violates Section 2 and the Fifteenth Amendment.

The court below also correctly held that H.B. 2023—which makes mere knowing possession of a ballot by a person who is not a family or household member or a caregiver a felony punishable by up to two years in prison and a $150,000 fine—violates both Section 2 and the Fifteenth Amendment.

A. H.B. 2023 Violates Section 2's Results Test.

Again, even under the United States' reformulated Section 2 test, plaintiffs demonstrated that H.B. 2023 resulted in less ability for minorities to vote than other voters, was a but-for cause of that lesser ability, and was unjustified.

1. On the test's first prong, uncontested evidence showed that H.B. 2023 resulted in minority voters' having less ability to vote than others. JA659-60. The United States ignores record evidence of H.B. 2023's discriminatory results and faults plaintiffs for not proffering evidence that Section 2 does not require.

The United States argues that plaintiffs offered only "circumstantial and anecdotal evidence" that minorities were more likely to use ballot collection to vote. U.S. Br. 27 (quotation marks omitted). In fact, plaintiffs presented extensive—and uncontested—evidence that third parties collected thousands of early ballots from minority voters and, as the district court found, that white voters did not similarly rely on third-party ballot collection. JA329-30, 659-60. This evidence was not "selective anecdotes," *contra* Brnovich Br. 41, but direct, credible testimony from third-party ballot collectors and witnesses who personally supervised or observed third-party ballot collection. JA661. Plaintiffs also showed that minority voters in Arizona lack access to home mail services at dramatically higher rates than white voters—for instance, outside of Maricopa and Pima Counties, 86% of non-Hispanic whites and 80% of Hispanics, *but only 18%* of Native Americans, have access to home mail service. JA124, 183.

2. On the second prong, plaintiffs showed that H.B. 2023 caused minorities to have less ability to vote. Individual voters were not required to testify that H.B. 2023 "would make it significantly more difficult to vote." *Contra* U.S. Br. 28 (quoting JA331). Nothing in Section 2 requires testimony from individual voters that a challenged law will make voting "significantly more

difficult." The United States ignores the aforementioned evidence of minority voters' disproportionate reliance on third-party ballot collection—*i.e.*, undisputed evidence that minority voters used ballot collectors more frequently than white voters out of practical necessity. And because those minority voters were using third-party ballot collection for wholly legitimate reasons, H.B. 2023's extension of the criminal code to encompass non-fraudulent ballot collection was entirely responsible for their lesser ability to vote.

3. On the third prong, the en banc court used the totality-of-circumstances analysis both to evaluate the State's justifications for the law and to smoke out discriminatory intent—exactly as the United States proposes. U.S. Br. 16.

The evidence showed that Arizona lawmakers were well aware that H.B. 2023 would hinder minorities' ability to vote: Proponents of H.B. 2023 made explicit racial appeals in promoting the bill; Senator Shooter, who introduced the bill, had previously introduced a similar law limiting, but not criminalizing or otherwise banning, third-party ballot collection that was "motivated by the high degree of racial polarization" in his district; and Arizona later withdrew a preclearance request for that prior version of the law because of evidence that it "intentionally targeted Hispanic voters." JA663-64 (quotation marks omitted).

By contrast, no evidence supported the State's "justifications" for the law. Though the Carter-Baker Commission recommended limits on third-party ballot collection, these recommendations were meant to "reduce the risks of fraud and abuse in absentee voting,"

JA669 (quotation marks omitted)—a purpose that Arizona's existing criminal prohibition of *fraudulent* third-party ballot collection already fulfilled, and that H.B. 2023, which prohibits *non*-fraudulent third-party ballot collection, does not advance. Nor was there any reason to conclude that non-fraudulent third-party ballot collection in Arizona presents a "risk of fraud or abuse," when despite the "unique" and "long-standing" role of third-party ballot collection in Arizona, "[e]vidence in the record show[ed] that Arizona has never, in its long history of third-party ballot collection, found a single case of fraud." JA689.

For the same reasons, other states' restrictions on third-party ballot collection, and incidents of ballot-collection fraud in North Carolina, Brnovich Br. 44, or other states, ARP Br. 9-10, are not persuasive (which may explain why the United States does not advance those arguments). In any event, comparison to other states is irrelevant. By making the mere possession of a single ballot by persons other than family or household members or caregivers a felony punishable by up to two years in prison and a $150,000 fine, H.B. 2023 is an extreme outlier.[11]

B. H.B. 2023 Violates Section 2's Intent Test and the Fifteenth Amendment.

The en banc court also held that "racial discrimination was a motivating factor in enacting H.B.

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[11] North Carolina is the only other state that criminalizes third-party possession of a single absentee ballot as a felony punishable by up to two years' imprisonment. *See* N.C. Gen. Stat. Ann. §§ 163-226.3(a)(5), 15A-1340.17(c)-(d).

2023" and that Arizona did not offer evidence showing "that H.B. 2023 would have been enacted without the motivating factor of racial discrimination," in violation of Section 2 and the Fifteenth Amendment. JA679-80. This decision correctly rested on application of the *Arlington Heights* framework to the district court's findings that Arizona has a "long history of race-based voting discrimination"; "the Arizona legislature [made] unsuccessful efforts to enact less restrictive versions of [H.B. 2023] when preclearance was a threat"; "false, race-based claims of ballot collection fraud [were] used to convince Arizona legislators to pass H.B. 2023"; H.B. 2023 targeted "the substantial increase in American Indian and Hispanic voting attributable to ballot collection"; and "racially polarized voting" exists in Arizona. JA679.

Petitioners fixate on the en banc court's reference to the "cat's paw" theory of liability. JA673; *see* Brnovich Br. 45-47; ARP Br. 46-47; JA677. But the roots of "cat's paw" liability in agency law (and whether it applies to "independent, co-equal" legislators, Brnovich Br. 46) are irrelevant because "[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. H.B. 2023's legislative history was just one of *many* reasons the en banc court deemed the law racially motivated.[12] *See id.* at 266-68.

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[12] For instance, the en banc court cited the district court's findings on Arizona's prior legislative efforts to restrict third-party ballot collection, as well as the "Arizona legislature['s] … long history of race-based discrimination, disenfranchisement, and voter

ARP Petitioners insist that some legislators' "sincere belief" in nonexistent fraud must be credited, and evidence showing the racial animus that created that "sincere belief" ignored. ARP 45-47. But ignoring this evidence would run counter to *Arlington Heights*' instruction that discriminatory purpose need not be the "sole[]" or even "primary" motive for a law to run afoul of Section 2 and the Fifteenth Amendment, 429 U.S. at 265-66, as well as Congress's recognition that "[d]iscrimination today is more subtle than the visible methods used in 1965," H.R. Rep. No. 109-478, at 6 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 620.

Petitioners also argue that the court's analysis of H.B. 2023 violated this Court's decision in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Brnovich Br. 47-49; ARP Br. 48-49. Not so. *Crawford* is not a Section 2 or Fifteenth Amendment case, and its controlling opinion does not address the standards for discriminatory motive at issue here. *See Crawford*, 553 U.S. at 189-91 (plurality opinion). *Crawford* does not hold that racial animus can never be inferred from a law enacted to combat non-existent fraud, or that a state's purported interest in prophylactically preventing fraud displaces the "intensely local appraisal" Section 2 mandates. And *Crawford*'s consideration of evidence of out-of-state fraud has no bearing on H.B. 2023, which outlaws *non*-fraudulent ballot collection. The incident of

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suppression." JA600-08, 674-75. ARP Petitioners' claim that the latter evidence is too old to be probative, ARP Br. 49, ignores the en banc court's reliance on evidence (*see* JA635-43) that was "reasonably contemporaneous" with H.B. 2023, *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987).

third-party ballot-collection fraud in North Carolina, for instance, would have been illegal under Arizona laws independent of H.B. 2023. JA690. The court below did not question the legitimacy of these laws, nor did it question Arizona's interest in prohibiting *fraudulent* ballot collection, even given the absence of *any* evidence of third-party ballot-collection fraud in Arizona.

Although Petitioners accuse the court of "improperly conflat[ing] *partisan* motivations with *racial* ones," Brnovich Br. 42 (citing JA329), "racial identification is highly correlated with political affiliation," *Easley v. Cromartie*, 532 U.S. 234, 243 (2001). The mere invocation of partisanship in defense of H.B. 2023 does not inoculate Arizona against VRA liability when the weight of the evidence shows that the law was racially motivated. *See Cooper v. Harris*, 137 S. Ct. 1455, 1473 & n.7 (2017); *cf. LULAC*, 548 U.S. at 440 (on vote-dilution claim under Section 2, finding violation "[e]ven if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons").

Finally, Petitioners and the United States maintain that the en banc court exceeded the scope of clear-error review. Brnovich Br. 49-50; ARP Br. 43-45; U.S. Br. 32-35. But the court neither set aside any of the district court's findings on discriminatory intent, Brnovich Br. 49, nor "weighed the evidence" of discriminatory intent "differently," *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985). Instead, the en banc court concluded that the district court clearly erred by "discounting the importance" of undisputed evidence on the historical background of racial discrimination and voter suppression in Arizona (both generally and through

restrictions on third-party ballot collection), the specific legislative history of H.B. 2023, and the law's disparate impact on minority voters in Arizona. JA678. The en banc court thus found that "on the entire evidence" of H.B. 2023's racial motivations, it was "left with the definite and firm conviction that a mistake" had been committed by the district court. *Anderson*, 470 U.S. at 573 (quotation marks omitted); *see* JA678. That decision was correct.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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