No. 18-15845

In the United States Court of Appeals
for the Ninth Circuit

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

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

APPELLANTS' OPENING BRIEF

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FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants the Arizona Democratic Party, the DSCC, and the Democratic National Committee, respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Arizona ("District Court") had original subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1357, because this case raises federal claims under Section 2 of the Voting Rights Act of 1965 ("VRA"), as amended, 52 U.S.C. § 10301, and for violations of the First, Fourteenth, and Fifteenth Amendments, cognizable under 42 U.S.C. § 1983. On May 8, 2018, the District Court issued Findings of Fact and Conclusions of Law. ER1464. Plaintiffs timely filed a notice of appeal the following day. *Id.* The District Court issued an amended order on May 10, ER1, and Plaintiffs filed an amended notice of appeal the same day. ER1464. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Arizona's criminalization of most ballot collection violates the United States Constitution and/or the VRA.

2. Whether Arizona's disenfranchisement of out-of-precinct voters, even in races in which the voters are otherwise eligible to vote, violates the United States Constitution and/or the VRA.

ADDENDUM OF PERTINENT AUTHORITIES

Pursuant to Ninth Circuit Rule 28-2.7, the primary authorities pertinent to this case are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. INTRODUCTION

"Voting should be easy in America. In Arizona, it is not, and the burden falls heaviest on minority voters." *Feldman v. Ariz. Sec'y of State's Office*, 842 F.3d 613, 628 (9th Cir.) ("*Feldman II*") (Thomas, C.J., dissenting), *reh'g en banc granted*, 840 F.3d 1164 (9th Cir. 2016). Indeed, "Arizona has had a long history of imposing burdens on minority voters." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 405 (9th Cir. 2016) ("*Feldman III*") (Thomas, C.J., panel dissent, attached to *en banc* opinion).[1] At issue in this case are two Arizona elections procedures that burden voting rights in general, and minority voters in particular: (1) House Bill 2023, 52nd Leg., 2d Reg. Sess. (Ariz. 2016), *codified as* A.R.S. § 16-1005(H)-(I) ("HB2023"), which, subject to certain exceptions, criminalizes the possession and collection of another person's early ballot, and (2) Arizona's refusal "to count ballots cast out-of-precinct, even for races in which the citizen is entitled, qualified, and eligible to vote" (the "OOP Policy"). *Feldman II*, 842 F.3d at 628 (Thomas, C.J., dissenting).

[1] This citation is to Chief Judge Thomas's dissenting opinion in *Feldman v. Arizona Secretary of State's Office*, 840 F.3d 1057 (9th Cir. 2016) ("*Feldman I*"), which was attached to *Feldman III*. The en banc Court in *Feldman III* noted that it was ruling in Plaintiffs' favor "essentially for the reasons provided in the dissent" in *Feldman I*. *See Feldman III*, 843 F.3d at 367. Unless otherwise noted, citations to *Feldman III* refer to Chief Judge Thomas's dissenting opinion in *Feldman I*.

The record in this case demonstrates that both HB2023 and the OOP Policy burden voters far out of proportion to any purported benefit to the State, in violation of both the Constitution and the VRA. It proves that HB2023 was enacted, at least in part, for the purpose of making voting more burdensome for minority voters in Arizona and has had the effect of disparately burdening minority voters in Arizona. And it demonstrates that minority voters in Arizona are disproportionately disenfranchised due to the OOP Policy.

II. FACTUAL BACKGROUND

A. Arizona's History of Discrimination and Its Effects

Arizona has a lengthy history of discrimination that includes the use of voting restrictions to discriminate against minority voters. *See* ER67-71 (Op.);[2] ER860-81; ER896-904; ER931-37; ER262-64; ER389-95; ER410-16; ER463-84; ER485-86; ER487-95; ER506-08; ER510-22; ER534-37; ER542-43; ER544; ER551-54; ER565-66; ER600. For example, "[f]rom 1912 to the early 1960s, election registrars applied [a] literacy test to reduce the ability of African Americans, Native Americans, and Hispanics to register to vote." *Feldman III*, 843 F.3d at 405; ER463-64; ER468-69; ER492-93; ER509-10; ER548-49. "Because of its long history of imposing burdens on minority voting, Arizona became one of

[2] "(Op.") is used herein to identify citations to the District Court's Amended Findings of Fact and Conclusions of Law. ER1-83.

nine states subject to the pre-clearance requirements of the [VRA] after it was amended in 1975 to protect language minorities." *Feldman III*, 843 F.3d at 405; ER648.

The effects of Arizona's history of discrimination are present to this day. Arizona has marked racial disparities in employment, wealth, access to transportation, health, education, and many other areas. *See infra* at 29-36.

B. Arizona's Criminalization of Ballot Collection

"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." ER12 (Op.). Arizonans have a statutory right to vote by early ballot. A.R.S. § 16-541. Arizona has strongly encouraged early voting through the creation of the Permanent Early Voting List, which voters may join to have an early ballot automatically sent to them 27 days before any election in which they are eligible to vote. ER650-51; A.R.S. §§ 16-542, 16-544. Voters may return their early ballots by mail, but, to be counted, those ballots must be received (not postmarked) by 7 p.m. on Election Day. ER13 (Op.).

While early voting by mail is convenient for many voters, others lack ready access to outgoing mail service. Many of the voters with limited access to outgoing mail service nonetheless still rely on early voting because, for a variety of socioeconomic-related reasons, in-person voting is difficult or impossible. As a

result, thousands of voters—a disproportionate share of whom are minority voters—came to rely upon friends, neighbors, activists, and campaigns to collect and deliver their voted early ballots before the 7 p.m. Election-Day deadline. *See infra* at 4; *see also* ER900; ER709-26; ER735-38; ER742-49; ER240-46; ER292-304; ER422-23; ER452-54; ER652; A.R.S. § 16-548.

"Within the last decade, ballot collection has become a larger part of the Democratic Party's [get-out-the-vote] strategy," ER62 (Op.), and both the Democratic Party and community advocacy organizations "have focused their ballot collection efforts on low-[turnout] voters, who trend disproportionately minority" and who "tend to vote for Democratic candidates." *Id.*[3] "Individuals who have collected ballots in past elections observed that minority voters, especially Hispanics, were more interested in utilizing their services." *Id.* The converse is also true: "[i]ndividuals who have collected ballots in past elections have observed that voters in predominately non-minority areas were not as interested in ballot collection services." *Id.* In contrast to the Democratic Party, "the Republican Party has not significantly engaged in ballot collection as a GOTV strategy," and "the base of the party trends non-minority." *Id.*

[3] The phrase "low efficacy" was used by witnesses at trial and in the District Court's opinion as a synonym for "low turnout." *E.g.*, ER316-17; ER417.

Republican legislators have repeatedly attempted to restrict ballot collection. In 2011, the Legislature enacted SB1412, which banned individuals from collecting more than ten ballots. ER78 (Op.). Arizona was subject to Section 5 of the VRA at the time and submitted the bill to the United States Department of Justice ("DOJ") for preclearance. ER79 (Op.). DOJ "precleared all provisions except for the provision regulating ballot collection," with respect to which it asked Arizona to provide additional information "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.* Rather than provide the requested information to DOJ, Arizona withdrew the ballot collection restriction from preclearance and repealed the law in the next legislative session, without ever having enforced it. *Id.*

In 2013, Arizona again tried to restrict ballot collection by passing HB2305 "along nearly straight party lines in the waning hours of the legislative session." ER79 (Op.). HB2305 "banned partisan ballot collection and required other ballot collectors to complete an affidavit stating that they returned the ballot." *Id.* A violation was a misdemeanor. *Id.*

In response to HB2305, "citizen groups organized a referendum effort and collected more than 140,000 signatures to place HB2305 on the ballot for an up-or-down vote" in the 2014 general election. *Id.* "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.'" *Id.* (citing 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." *Id.* The bill's primary sponsor, then-State Senator Michele Reagan (who is now Arizona's Secretary of State), admitted that the Legislature repealed the law specifically to avoid a referendum and that "the Legislature's goal was to break the bill into smaller pieces and reintroduce individual provisions 'a la carte.'" ER79-80 (Op.). In 2015, the Legislature again considered restricting ballot collection; the legislation, which did not pass, would have limited collection to two ballots per ballot collector. ER658-61; ER918.

In February 2016, State Rep. Michelle Ugenti-Rita introduced HB2023, the ballot-collection legislation at issue here. ER653-54. Subject to limited exceptions,[4] HB2023 makes the "knowing[] collect[ion] of voted or unvoted early ballots from another person … a class 6 felony" punishable by up to a year in jail and a $150,000 fine. ER654.

"[N]umerous democratic lawmakers speaking in opposition to [HB2023] expressed concerns that it would adversely impact minority GOTV efforts." ER80

[4] The law does not apply to medical caregivers, family members, or household members. A.R.S. § 16-1005(H)-(I).

(Op.). Legislators discussed the impact the bill could have on "[the predominantly Hispanic community of] San Luis," the Tohono O'odham Nation, and the Navajo Nation, all of which are rural areas that lack home mail delivery. *See* ER737-38 (state representative describing "what it's like to live … sometimes 40 miles away from the nearest post office box," advising that "over 10,000" voters could be disenfranchised, and explaining that "[t]he fact that you can open your front door … and … leave … mail there and somebody will pick it up is not afforded to everybody").[5]

HB2023's sponsor, Rep. Ugenti-Rita, dismissed these concerns. She stated that the impact of the law on voters was "not [her] problem," ER591; ER733, that "as the government, I'm not going to baby you," ER598, and that burdened voters were not being responsible, *id.* Another supporter argued that these voters "certainly take care of themselves in other situations" and "I don't know why we have to spoon-feed and baby them over their vote." ER826-27.

The debate regarding HB2023 also included discussion of the "LaFaro Video." ER72 (Op.).[6] That video "showed surveillance footage of a man of apparent Hispanic heritage appearing to deliver early ballots" and contained

[5] *See also* ER204-16; ER316-28; ER361-67; ER377-79; ER388; ER421-23; ER433-34; ER502-03; ER533-35; ER576-99; ER691-93; ER697-705; ER736-38; ER761-63; ER766-70; ER786-88; ER834-36; ER845-46.

[6] A.J. LaFaro, who recorded and published the video, was at the time Chair of the Maricopa County Republican Party.

LaFaro's "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 []because he feared for his life." *Id.* (internal quotation marks omitted). The video was posted on Facebook and YouTube, shown at Republican district meetings, and incorporated into a television advertisement for Michele Reagan's 2014 campaign for Secretary of State. ER73 (Op.).

Although some claimed HB2023 was needed to combat fraud, "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." ER34 (Op.); *see also* ER750-52; ER754-55; ER757; ER759-66; ER779-84; ER834-36.[7] Indeed, "there has never been a case of voter fraud associated with ballot collection charged in Arizona." ER34 (Op.). Ultimately,

[7] Arizona had already long since criminalized ballot collection fraud. *See* A.R.S. §§ 16-1005(a)-(f); *see also* A.R.S. § 16-545; ER781 ("[HB2023] doesn't directly address fraud…. [B]allot fraud, electoral fraud, is already addressed all over [the elections code]") (Ugenti-Rita). And several such violations are classified as misdemeanors, not felonies. *See, e.g.*, A.R.S. §§ 16-1018, 16-1017 (classifying as misdemeanor the intentional disabling or removal of a voting machine or voting record from a polling place, or hindering the voting of others).

Rep. Ugenti-Rita admitted that HB2023 "doesn't … tackle" "fraud": it "is about an activity that *could potentially lead to* [fraud]." ER704 (emphasis added).[8]

Several amendments that could have addressed concerns of fraud by less burdensome means were rejected. One such amendment would have permitted collection if the voter and collector signed an affidavit stating that the ballot was collected with permission, the ballot was voted and sealed when collected, and the collector would deliver the ballot by Election Day—thereby creating a chain of custody. ER919-20, ER668-87, ER708-09 (rejecting amendments to permit collection with tracking receipt, to permit counting ballots postmarked by Election Day, and to reduce penalty to misdemeanor); ER214-16; ER380-82; ER385-86; ER388; ER574-75; ER585-88. "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." ER37 (Op.).

Nor did the legislative record contains any evidence "of widespread public concern that ballot collectors were engaging in voter fraud." ER79 (Op.). And "H.B. 2023's sponsor, Rep. Ugenti-Rita, was not aware of any polling data indicating that Arizonans lacked confidence in the State's election system at the

[8] Arizona also has safeguards that make fraud difficult to commit. ER36-37 (Op.); ER646-47; ER652-53. Voters can confirm ballot delivery online; hand-delivered ballots are verified, ER764; and many collectors implemented additional security measures. ER337-38; ER424; ER430-32.

time she introduced the bill," ER35 (Op.), nor was there any evidence presented to suggest that HB2023 would actually have boosted confidence in Arizona's elections.

On February 4, 2016, the House passed HB2023 by a 34-23 vote. ER688. Every Democratic member of the House opposed it and, with one exception, all of the Republican members supported it. The bill passed the Senate on party lines on March 9, 2016, and was signed into law hours later. ER667, ER689.

Although the ban on most ballot collection is now law (and was in place for the 2016 presidential election), Arizona is not enforcing that criminal law. ER555-57; ER605-06. Further, "county recorders will accept all ballots, even those returned by prohibited possessors under H.B. 2023." ER37 (Op.). Organizations that collected ballots have been forced to stop doing so, however, in order to comply with the law. ER541.

C. Arizona's Disenfranchisement of Out-of-Precinct Voters

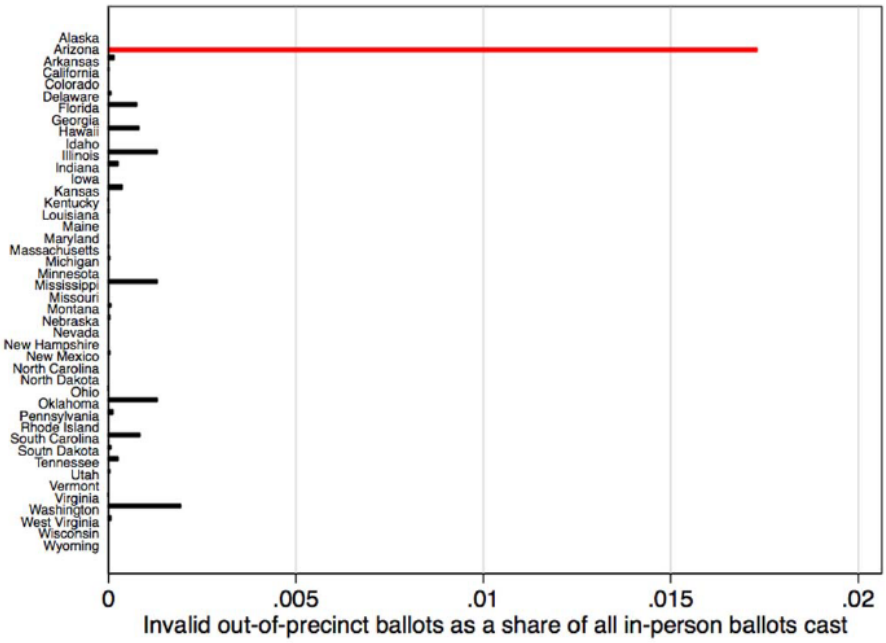
Between 2006 and 2015, Arizona rejected over 121,000 provisional ballots, consistently leading or nearly leading the country in the number of provisional ballots rejected. ER1153-55; *see also* ER39 (Op.). In 2012, "'[m]ore than one in every five [in-person] voters … was asked to cast a provisional ballot, 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.'" ER39 (Op.)

(quoting ER1156-59). One of Arizona's top reasons for rejecting provisional ballots is that the ballots were cast OOP—that is, in a precinct other than the one to which a voter is assigned. ER39 (Op.); ER1156-59.

For in-person voting on Election Day, each county in Arizona may operate under a precinct-based or vote-center model. ER15 (Op.). In counties that use vote centers, voters "may cast their ballot at any vote center in the county and receive an appropriate ballot." *Id.* In counties that use a precinct-based system, voters may only cast their ballots at their assigned polling location. ER649. A voter who arrives at a polling place and does not appear on the rolls may cast a provisional ballot, *id.*; but if the voter casts the provisional ballot at a precinct other than the one to which the voter is assigned, the ballot is not counted in *any* race, including those in which the voter is otherwise eligible to vote. ER14 (Op.). Thus, a voter who inadvertently casts a ballot in a neighboring precinct does not merely have her votes invalidated for any local races in which she is ineligible to vote because she does not live within that precinct; Arizona *also* invalidates her votes for offices for which she is eligible to vote, such as President, U.S. Senate, or Governor.

Over the last decade, and in general elections alone, Arizona has discarded 38,335 ballots—all of which were cast by registered, eligible voters who showed up to vote on Election Day—because they were cast in the wrong precinct. *See* ER40 (Op.) (since 2008, Arizona has rejected 29,834 ballots in presidential general elections, and another 8,501 in midterm elections). With almost 11,000 rejected OOP ballots in 2012, Arizona far exceeded any other state in the rate at which in-person voters were disenfranchised for casting such ballots.

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



ER1156. In 2016, the rate at which Arizona rejected OOP ballots declined, but it still led the nation in the number of OOP ballots rejected as a percentage of in-person votes cast. ER1157.

Minority voters are "vastly over-represented among those casting out-of-precinct ballots" and thus far more likely than white voters to be disenfranchised as a result of Arizona's policy of not counting OOP ballots. *See* ER315; ER1167-70. "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." ER64 (Op.).

III. PROCEDURAL HISTORY

Plaintiffs initiated this action on April 15, 2016, and then filed an amended complaint on April 19, 2016. ER1419-20. Following preliminary injunction proceedings in the district court, a divided three-judge panel of this Court denied Plaintiffs' motion for an injunction of HB2023 pending appeal on September 23, 2016; this Court granted *en banc* review and issued an injunction pending appeal on November 4; and the Supreme Court stayed that decision on November 5. *Feldman III*, 843 F.3d at 367 (en banc), *stayed*, *Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016). A divided three-judge panel of this Court also denied Plaintiffs' motion for an injunction pending appeal of Arizona's rule disenfranchising OOP voters on October 11, *Feldman II*, 842 F.3d at 613, and, after granting *en banc* review on November 4, this Court "decline[d] to issue any order that would potentially disrupt procedures in the upcoming election."

Feldman v. Ariz. Sec'y of State's Office, 840 F.3d 1165, 1166 (9th Cir. 2016) (per curiam).

The parties litigated the merits of this case following the 2016 election. In December 2016, three of the original Plaintiffs filed a Second Amended Complaint. ER1447. A bench trial was held in October 2017. ER1459-60. On May 8, 2018, the District Court rejected Plaintiffs' arguments and upheld HB2023 and Arizona's policy of disenfranchising OOP voters. ER1.

SUMMARY OF THE ARGUMENT

Arizona, which has a lengthy history of discrimination in voting, discards ballots cast at the wrong precinct on Election Day, a practice that disenfranchised minority voters at approximately *twice* the rate at which it disenfranchised nonminority voters in 2016. With HB2023, Arizona has also criminalized most ballot collection, a practice that was disparately used by minority voters. The State's interests in these policies are outweighed by the burdens they impose on voters. Further, the record establishes that HB2023 was enacted in part for the purpose of suppressing minority voting in Arizona. This Court should therefore hold that HB2023 and the OOP Policy violate the United States Constitution and the VRA.

ARGUMENT

I. STANDARD OF REVIEW

A district court's ruling on the constitutionality of a state statute is reviewed *de novo*. *Neal v. Shimoda*, 131 F.3d 818, 823 (9th Cir. 1997); *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996). Mixed questions of law and fact that implicate constitutional rights are also reviewed *de novo*. *Nordstrom v. Ryan*, 856 F.3d 1265, 1269 (9th Cir. 2017); *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). Findings of fact are reviewed for clear error, *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013), but the court nevertheless "retains the 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." *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (citation omitted).

II. HB2023 SHOULD BE INVALIDATED

A. HB2023 Was Intended to Discriminate Against Minority Voters

HB2023 was intended, at least in part, to suppress minority voting in violation of the VRA and the Fourteenth and Fifteenth Amendments. *See generally N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Rogers v. Lodge*, 458 U.S. 613, 617-19 (1982); *Lane v. Wilson*, 307 U.S. 268, 275 (1939). To establish intentional discrimination, a plaintiff need not show that a law

was motivated solely by discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one"; "legislators and administrators are properly concerned with balancing numerous competing considerations." *Id.* But discrimination cannot be one of them. *Id.*

"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). The *Arlington Height*s Court articulated a non-exhaustive list of factors courts should consider when determining whether a law was enacted with impermissible intent. The "*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).

Here, the record conclusively demonstrates that HB2023 was intended to discriminate against minority voters. As discussed above and below, Arizona has a lengthy history of discrimination, including voting-related discrimination.[9] Arizona was a covered jurisdiction under Section 5 of the VRA, and election laws were subject to pre-clearance by the DOJ until the coverage formula was struck down in 2013. ER68 (Op.). HB2023 disproportionately burdens minority voters; and the State's justifications for restricting ballot collection are weak. *See supra* at 4-11 and *infra* at 23-35, 40-44; *see also* ER77 (Op.) (efforts of Sen. Shooter, SB1412's sponsor, "to limit ballot collection were marked by unfounded and often farfetched allegations of ballot collection fraud" that were "demonstrably false").

[9] Remarkably, in a deposition, the sponsor of SB1412 (one of the predecessor bills) disputed this history. ER613-14. Moreover, the State attempted to minimize this history through expert witness Donald Critchlow, though the District Court properly determined that his opinions merited little weight. ER9 (Op.) (State's expert Dr. Critchlow "offered one-sided opinions," "ignored incidents of discrimination," and "attributed past racial discrimination in Arizona only to the Democratic Party and claims that discrimination has not existed since the 1960s (in the Republican era)").

The sequence of events preceding the enactment of HB2023 and Arizona's departures from the normal procedural sequence strongly support a finding of discriminatory intent. "H.B. 2023 emerged in the context of racially polarized voting" and "increased use of ballot collection as a Democratic GOTV strategy in low-[turnout] minority communities," and "[t]he legislature was aware that [HB2023] could impact GOTV efforts in low-[turnout] minority communities." ER77, 80 (Op.); ER587-88; ER590-93. Then-State Rep. Ruben Gallego (now a member of Congress) told DOJ in 2011 that "[t]he percentage of Latinos who vote by mail exploded" in 2010 as "municipalities … reduced their number of polling places and physical early voting locations." ER847-48. "This sudden increase in the Hispanic community's use" of vote by mail "caused Republicans to raise accusations of voter fraud," he said. ER848. Rep. Gallego described "the atmosphere in Arizona [as] scary" and said "[a]nti-immigrant and anti-Latino sentiment [wa]s stronger than ever." ER847-48.

The restriction on ballot collection in one of the predecessors to HB2023—SB1412—was "targeted at voting practices … in predominantly Hispanic areas" near the border, according to a statement made to DOJ by the State Elections Director at the time, who was involved in drafting SB1412, and "[m]any in the Secretary of State's office were worried about the Section 5 review." ER849-50; *see also* ER399-404; ER567-69; ER912-17**;** ER999-1003; ER1109-11; *cf.* ER847-

48 (Rep. Gallego said to DOJ in 2011 that SB1412 was "meant to target Hispanic voters who are less familiar with the vote by mail process and are more easily intimidated due to the anti-Latino climate in the state"). Indeed, the District Court found that, "[d]ue 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." ER77 (Op.); *see also id.* ("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.").

Prior to the passage of HB2023, Arizona twice enacted *and then repealed* restrictions on ballot collection. In 2011, SB1412's restriction on ballot collection was submitted for preclearance but withdrawn from the preclearance process after DOJ asked Arizona for additional information regarding that aspect of the law. *See* ER79 (Op.); *supra* at 6. "Of 773 preclearance submissions this was one of only 6 that were fully or partially withdrawn in Arizona." ER79 (Op.); *accord* ER914. In 2014, HB2305 was repealed by the Legislature after it was put on the ballot for a referendum. *See* ER78-79 (Op.); ER917-20; ER1111; ER523-30; *supra* at 6-7.

The District Court found "the circumstances surrounding" these bills "somewhat suspicious," ER80 (Op.), but that understates the significance of this history. As this Court (sitting en banc) previously explained:

> In 2012, Arizona submitted a previous iteration of H.B. 2023 for preclearance. The Department of Justice expressed concern and

> refused to preclear the bill, S.B. 1412, without more information about its impact on minority voters. Rather than address this concern, Arizona withdrew S.B. 1412 from preclearance and repealed it the following session. Now, unhindered by the obstacle of preclearance, Arizona has again enacted this law—a mere seven months before the general election—with nothing standing in its way except this court.

Feldman III, 843 F.3d at 369; *see also id.* ("[I]t is quite doubtful that [DOJ] would have granted preclearance."). This sequence of events is not simply "suspicious"; it provides powerful evidence of discriminatory intent. *Cf. McCrory*, 831 at 227 ("[I]mmediately after *Shelby County*, the General Assembly vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive voting legislation seen in North Carolina since enactment of the Voting Rights Act of 1965"; "[t]he district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent").

HB2023's legislative history weighs heavily in favor of a finding of discriminatory intent as well. Pointing to the LaFaro Video, which "became quite prominent in the debates over H.B. 2023" and contained "racially tinged and inaccurate commentary," the District Court found that "racial appeals have been made in the specific context of legislative efforts to limit ballot collection." ER72 (Op.) (internal quotation marks omitted); *see supra* at 8-9. In addition, HB2023's sponsor, Rep. Ugenti-Rita, repeatedly dismissed concerns about the impact of the law on voters, saying they were "not [her] problem" and that burdened voters were seeking to be "bab[ied]." *See supra* at 8.

Based on this evidence, the District Court correctly found that "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." ER76 (Op.); *see also* ER 81 (Op.) ("[A] proponent of the bill and a 2014 Republican candidate … claimed that he lost his election because of 'ballot harvesting.'"); *id.* ("Democratic Senator Steve Farley stated '[t]he problem we're solving is that one party is better at collecting ballots than the other one.'").

But that finding cannot be reconciled with the District Court's holding that HB2023 was not enacted with racially discriminatory intent. Given that there is no concrete evidence of fraud in connection with ballot collection,[10] HB2023 serves partisan interests in significant part because its burdens disparately fall on minority voters. *Cf. McCrory*, 831 F.3d at 214 (district court "ignored critical facts bearing on legislative intent, including the inextricable link between race and politics"). Nor is a finding of partisan motives, but not racially discriminatory intent, consistent with the facts set forth above. *E.g.*, ER77 (Op.) ("*Due to the high degree*

[10] Even if HB2023's supporters believed that the law would reduce the risk of fraud, that does not preclude finding that the law was also motivated by discriminatory intent. *See Arlington Heights*, 429 U.S. at 265 (plaintiff need not "prove that the challenged action rested solely on racially discriminatory purposes," because "racial discrimination is not just another competing consideration").

of racial polarization in his district, Shooter was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy.") (emphasis added); ER72 (Op.) ("[R]acial appeals have been made in the specific context of legislative efforts to limit ballot collection."). In short, the District Court's conclusion that HB2023 was enacted "in spite" of concerns about the effect the bill would have on minority voters is inconsistent with the record, other findings of the District Court, and the conclusion that is compelled from proper application of the *Arlington Heights* factors. The District Court should have found that HB2023 was enacted with racially discriminatory intent.

B. HB2023 Violates the VRA

Plaintiffs also proved that HB2023 violates Section 2 of the VRA. 52 U.S.C. § 10301(a). Under Section 2, "[n]o voting … standard, practice, or procedure shall be imposed or applied … in a matter 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). To establish a violation of Section 2, a plaintiff must show that (1) the challenged law "impose[s] a discriminatory burden on members of a protected class" and (2) 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." *Feldman III*, 843 F.3d at 378-79; *League of*

Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) ("*LOWV*").

"In assessing both elements, courts should consider 'the totality of the circumstances.'" *LOWV*, 769 F.3d at 240 (quoting 52 U.S.C. § 10301(b)); *see also Veasey v. Abbott*, 830 F.3d 216, 248 (5th Cir. 2016). To do so, courts typically look to the factors found in the Senate Report accompanying the 1982 amendments to the VRA (the "Senate Factors"). *See Farrakhan v. Washington*, 338 F.3d 1009, 1015 (9th Cir. 2003).

In determining whether a law violates the VRA, the question is not whether the law makes it *impossible* for minorities to vote but instead "whether the challenged practice, viewed in the totality of the circumstances, places a disproportionate *burden* on the *opportunities* of minorities to vote." *Feldman III*, 843 F.3d at 401. Further, the VRA must be read to "provide[] the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quotation marks omitted). Applying these principles to the facts of this case, the District Court below should have found that HB2023 violates the VRA.

Disparate burdens. The evidence presented at trial plainly demonstrates that HB2023 disparately burdens minority voters. There is extensive evidence in the record about ballot collection in minority communities, and some witnesses testified about the lack of ballot collection in nonminority communities. *See*, *e.g.*,

ER209-10 (Tohono O'odham postmaster told witness that "people would bring … groups of ballots in and drop them off."); ER696 (in the Cocopah Nation, "mailbox service is very far away" and "many community members help each other" by collecting ballots); ER317-19 ("overwhelming majority" of voters who used ballot collection were Latino or African-American); ER364; ER371 ("The large majority of [ballot collection] requests came from the lower income and the neighborhoods that were a larger percentage Latino[.]"); ER418-23 ("significant differences" in interest in ballot collection between Latino and white neighborhoods); ER433-34 ("Majority-minority districts are the vast majority of the ballot pickups that [the Maricopa County Democratic Party] do[es][.]"); ER447 ("Q. And were you more likely to collect ballots from Hispanic voters? A. Yes."); ER534 ("ballot pickups in [predominantly white areas] were significantly less there than they were in the [primarily Latino] west valley or southwest Phoenix"); ER596 (Q: "you never heard any [legislative] testimony from community groups about predominately white areas that lacked home mail delivery service? A. No."); *see also* ER58-62 (Op.); ER196-98; ER200-02; ER240-46; ER292-304; ER329-30; ER342; ER361-62, ER382-83; ER446, ER452-54; ER502-03; ER709-26; ER735-38; ER742-44; ER745-49; ER900. "Helen Purcell, who served as the Maricopa County Recorder for 28 years from 1988 to 2016"—and is a Republican—"observed that ballot collection was disproportionately used by Hispanic voters." ER62 (Op.). And there

was no evidence presented indicating that nonminority voters were as likely as minority voters to utilize ballot collection.

The record shows that the ban on most forms of ballot collection makes early voting particularly difficult for Arizona's Native-American voters. *See* ER61 (Op.). Dr. Jonathan Rodden found that, outside of Maricopa and Pima Counties, 86% of non-Hispanic whites, 80% of Hispanics, and only 18% of Native Americans have access to home mail service. ER7-8 (Op.); *see also* ER60-61; ER207 (no home mail delivery on Cocopah or Tohono O'odham Nations); ER208-09 (1,150 P.O. boxes on Gila Bend Reservation); ER209-10; ER241-46 (no home mail delivery on the Navajo Nation); ER696; *cf.* ER409-10 (home mail delivery is much less common on the four Native American reservations in Maricopa County). Compounding this problem, between a quarter and a half of all households on Native American reservations in Arizona lack access to a vehicle, and rates of disability among Native Americans in Arizona are high. ER59-61 (Op.); *see also* ER294.

Similarly, "the rural communities of Somerton and San Luis, which are comprised of 95.9% and 98.7% Hispanic voters, respectively, [a]re without home mail delivery and reliable transportation." *Feldman III*, 843 F.3d at 404; *accord* ER60 (Op.); ER196-98, ER201-03; ER205-08; ER842-44; ER927. And the elimination of most forms of ballot collection is burdensome for minority voters in

urban areas as well. The evidence shows that apartment complexes in predominantly minority neighborhoods often lack outgoing mail service, and some voters—particularly those in communities in which mail theft is common—distrust returning their voted early ballot by mail. ER60 (Op.) (citing ER221; ER258-59; ER419-20; ER534; ER634; ER611); ER365-66 (one of "main reasons" voters requested ballot collection is because they lacked outgoing mailboxes at apartment complexes in heavily Latino Phoenix neighborhood); ER445 (voters in South Phoenix neighborhood "often very happy" to hand ballot to a collector and "not [to] have to worry about leaving it out in the mailbox where something might happen … mail gets lost fairly frequently").

Despite this clear evidence that HB2023 disparately burdens minority voters, the District Court incorrectly found the evidence "insufficient to establish a cognizable disparity under § 2." ER58 (Op.). To be sure, the court found that "prior to H.B. 2023's enactment minorities []were more likely than non-minorities to return their early ballots with the assistance of third parties." ER62 (Op.). But the court made three significant errors that led it to its mistaken conclusion with respect to HB2023's disparate burdens.

First, the District Court's conclusion rests on an error of law. "[T]he total number of votes affected is not the relevant inquiry; the proper test is whether minority votes are burdened." *Feldman II*, 842 F.3d at 635 (Thomas, C.J.,

dissenting); *see also Chisom*, 501 U.S. at 407-08 (Scalia, J., dissenting) (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") (quotation marks and citation omitted); *LOWV*, 769 F.3d at 244 ("[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.").

Second, the record evidence is contrary to the District Court's conclusion that only a "relatively small" number of voters used ballot collection. ER63 (Op.). *See, e.g.*, ER637-38 (in the 2012 Maricopa County Sherriff's election, advocacy organization collected approximately nine thousand ballots, typically delivering thousands of ballots to the recorder's office at a time); ER424 (Maricopa County Democratic Party organizer personally witnessed 1,200 to 1,500 ballots collected, which was only part of the total collected by the organization); ER422-23 (in 2010, Maricopa County Democratic Party collected hundreds of ballots in a heavily Latino neighborhood in one state legislative district); ER22 (Op.) (ADP collected a couple thousand ballots in 2014); ER448-49 (city council candidate personally

collected 90 ballots in 2013 election, and ten other campaign volunteers each collected about the same number); ER617-20 (campaign volunteer personally collected approximately 50 ballots in a single legislative district).

Third, the District Court incorrectly found that Plaintiffs failed to demonstrate a discriminatory burden because the evidence of disparities in the use of ballot collection was insufficiently precise. ER62-63 (Op.); *see also id.* at 56-58. Although the court did not expressly hold that Plaintiffs were required to provide quantitative evidence, as it did in the preliminary-injunction phase of this case, its holding that the disparate burden must be established with a certain level of precision is not meaningfully different from its prior holding. The legal standard the District Court applied was therefore incorrect. *See* ER58 (Op.); *see also Feldman III*, 843 F.3d 400-01, 406 (courts applying the VRA must consider the totality of the circumstances). Had the District Court properly considered the totality of the evidence, it would have found that HB2023 disparately burdens minority voters.

Link to Arizona's history of discrimination. The evidence at trial also clearly proved that these disparate burdens are caused by or linked to Arizona's history of discrimination. *See generally Feldman III*, 843 F.3d at 404-05 (finding likelihood of success on second prong of Section 2 analysis). As noted, courts "assess the impact of the contested structure or practice on minority electoral opportunities on

the basis of objective factors," known as the "Senate Factors." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986). The Senate 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;

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.

Farrakhan, 338 F.3d at 1015. These factors are not intended to be comprehensive or exclusive, nor must every one—or even a majority—weigh in favor of finding a Section 2 violation. *See id*. at 1015-16; *United States v. Blaine Cty., Mont*., 363 F.3d 897, 914 n.26 (9th Cir. 2004).

Here, the Senate Factors weigh strongly in favor of a finding of a violation of the VRA:

Factors 1 and 3. Arizona's extensive history of racial discrimination, which has continued into recent decades, has clearly impacted political and economic life in the state. *See* ER67-70 (Op.); ER860-81; ER895-907; ER931-37; ER912; ER1010-13; ER1118-19; *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970); *Gonzalez v. Arizona*, 677 F.3d 383, 406-07 (9th Cir. 2012).

Factor 5. Perhaps most significantly, "[r]acial disparities … in socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation have persisted in Arizona." ER71 (Op.); *see also* ER58-61 (Op.); ER935; ER947 (compared to white Arizonans, black Arizonans are over twice as likely to live in poverty, Hispanics are nearly three times as likely, and Native Americans are almost four times as likely); *id.* (median household income for white Arizonans is $54,129; no minority group's median household income is higher than $38,033); ER949 (nearly 70% of white Arizonans own a home, compared with 57% of Native Americans,

51% of Hispanics, and just 34% of black Arizonans); *id.* (compared to white Arizonans, Hispanics are 35% less likely to have access to a vehicle, while black Arizonans and Native Americans are approximately three times less likely); *see also* ER946-50; ER1023; ER1040; ER1054-55; ER237-39 (Navajo Nation lacks access to bank services, transportation, and adequate road and infrastructure maintenance).

Factors 2 and 6. "Arizona has a history of racially polarized voting, which continues today[,]" and has had "racial appeals in campaigns." ER71-72 (Op.); ER937-40 ("On average, whites voted 59 percent for Republican candidates, whereas the largest minority group in Arizona—Hispanics—voted only 35 percent for Republican candidates"; evidence shows "sharp polarization"); ER951-52 (recent overt racial appeals included a gubernatorial candidate's television ad featuring a Mexican flag with a red strikeout line through it); *see also* ER946; ER1013-15; ER1023. *See generally Gingles*, 478 U.S. at 40 (effect of racial appeals "is to lessen to some degree the opportunity of [the State's minority populations] to participate effectively in the political processes and to elect candidates of their choice"). Indeed, as noted above, "racial appeals have been made in the specific context of legislative efforts to limit ballot collection." ER72 (Op.).

Factor 7. While "the disparity in the number of minority elected officials in Arizona has declined," minorities in Arizona are clearly underrepresented in public office. *See* ER73-74 (Op.); *see also* ER952 (only two minorities elected to statewide positions in last 50 years; no minorities currently hold statewide office); *id.* (minorities comprise nearly a third of the citizen voting age population in Arizona, but hold only 22% of congressional seats and 9% of judgeships); ER1023-24.

Factor 8. The District Court held that "Plaintiffs' evidence on this factor … is insufficient to establish a lack of responsiveness on the part of elected officials to particularized needs of minority groups." ER74 (Op.). But the District Court also noted "Arizona's history of advancing partisan objectives with the unintended consequence of ignoring minority interests," ER81 (Op.), and the record shows that Arizona has frequently been unresponsive to minority residents, ER1024-25; ER1064-66; ER1123-25. The debate regarding HB2023 illustrates the point: Despite extensive testimony to the Legislature about the disparate impact that would result from a ban on most ballot collection, *see supra* at 7-9, the bill's sponsor asserted that this was "not [her] problem" and that voters were asking to be "bab[ied]." ER590-91; ER753; ER826-27; *see also* ER598 (Rep. Ugenti-Rita: "You want to participate in the electoral process, you be responsible for it. You want to get [the ballot] back in the mail, [then] get it back in the mail. You don't

want to do that, go to the poll [sic]. You don't want to do either of those, don't vote.").

Factor 9. The District Court wrote that Arizona "has a constitutionally adequate justification for" HB 2023, without reaching a specific conclusion as to whether the law is tenuous. ER74-75 (Op.). For the reasons set forth below, the law is tenuous (and not supported by a constitutionally adequate justification). *See infra* at 15.

A review of the Senate Factors therefore shows that nearly all are present in Arizona and conclusively demonstrates that HB2023's disparate burdens are linked to Arizona's history of discrimination.[11] Put another way, ballot collection helped to alleviate the disparities in the costs of voting that have resulted from Arizona's history of discrimination; and its elimination has increased the costs of voting generally and for minority voters in particular.

There is a straightforward link between certain ongoing effects of Arizona's history of discrimination and the disparate burdens imposed by HB2023. For example, the elimination of most forms of ballot collection clearly imposes disparate burdens on the disproportionately minority voters without access to a vehicle (some of whom can now only vote early if they can find transportation to a

[11] Factor 4 is not relevant because "slating" is not a contemporary practice in Arizona. ER910.

post office). HB2023's burdens also fall disparately on the disproportionately minority voters with health and mobility issues. *See generally* ER58-62 (Op.).

In holding that the "causation" prong of the inquiry required it to reject the VRA claim, or else "potentially sweep away any aspect of a state's election regime in which there is not perfect racial parity," ER75 (Op.), the District Court erred as a matter of law. Section 2 is specifically meant for practices that are *not* "per se" impermissible, *Blaine County*, 363 F.3d at 909, and a court must conduct a "searching practical evaluation" of the law before it, with a "functional view of the process." *Gingles*, 478 U.S. at 45. Instead of assessing the impact of *this* law and how *it* accommodates and amplifies the present-day effects of Arizona's history of discrimination, however, the District Court made conclusory and overbroad assertions about the *potential* effect that a finding of a VRA violation would have on other practices. *Cf. LOWV*, 769 F.3d at 243-44 (similar analysis was "grave error").

Applying the correct legal standard, Plaintiffs clearly established "causation." The Senate Factors overwhelmingly support that conclusion. Further, the disparate burdens imposed by HB2023 are a *direct* result of Arizona's ongoing racial disparities. Indeed, the District Court noted that "disparities in transportation, housing, and education are most pertinent to the specific burdens imposed by the challenged laws." ER71-72 (Op.). The link between disparities in transportation

and home mail delivery and the burdens that HB2023 imposes on minority voters is plain. The District Court therefore erred in holding that Plaintiffs had not met their burden as to prong 2 of the Section 2 inquiry. HB2023 violates the VRA.

C. HB2023 Violates the First and Fourteenth Amendments

The district court also should have invalidated HB2023 under the *Anderson-Burdick* test. That balancing test, which is used to assess whether election laws are unduly burdensome in violation of the First and Fourteenth Amendments, requires a court to "weigh 'the character and magnitude of the asserted injury to the rights … that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This approach applies a "flexible" sliding scale, in which "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which [the challenged law] burdens [voting rights]." *Id.*; *accord Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592-93 (6th Cir. 2012) (courts calibrate the standard in each case to "[t]he precise character of the state's action and the nature of the burden on voters") (quotation marks omitted). The test does not, however, permit rational basis review or burden shifting. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d

1019, 1025 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1331 (2017). "A court may not avoid application of a means-end fit framework in favor of rational basis review simply by concluding that the state's regulatory interests justify the voting burden imposed." *Feldman III*, 843 F.3d at 396 n.2. Further, in evaluating the severity of the burden, "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 All.*, 836 F.3d at 1024 n.2; *Feldman III*, 843 F.3d at 396.

HB2023 does not withstand scrutiny under this test. On one side of the equation, the evidence at trial proved that HB2023's burdens on impacted voters are severe. Leah Gillespie, who personally observed 1,200 to 1,500 ballots collected by the Maricopa County Democratic Party, said that, because of the extra work required, her organization collects ballots only as a last resort: "[W]e do everything we can to have someone else take it into the polls ... *If there's no other option for a voter*, we take in the ballot." ER423-25, ER429 (emphasis added); *see also* ER26 (Op.); ER387 (most voters who asked for ballot collection did not have family who could help); ER423 (Q: "…did you ever encounter anyone who wouldn't have been able to turn in a ballot without your assistance?" A. "Yes. Absolutely. People said 'Thank you. I have no other way to get this in.'"); ER257-61 (on one occasion, he was only able to vote because of ballot collection); ER228-

30 (witness and her daughter have mobility issues and, pre-HB2023, a friend collected their ballots).

Carolyn Glover said that, after HB2023, some residents at her senior apartment complex were not able to vote because they did not have anyone to collect their ballots. ER254-56. Marva Gilbreath testified that, after HB2023, she moved, did not know where her polling place was, did not have family who could turn her ballot in, and did not know who to call for help; she did not vote in November 2016, though she said that ballot collection would have made it possible for her to vote. ER228-34; *see also* ER368-71 (campaign continued to receive requests for ballot collection after HB2023); ER623 (after HB2023, witness spoke to voters in the hospital or who otherwise were unable to travel and could not contact the recorder's office for assistance because the phone line was busy). Thus, contrary to the District Court's conclusion, the record makes clear that voters did *not* use ballot collection "out of convenience or personal preference," ER26 (Op.), but rather because other options were unduly burdensome or unavailable.

Nor was the District Court correct in holding that "Arizona law adequately accommodates" the circumstances that caused voters to use ballot collection. *Id.* Chief among these alternatives was the District Court's conclusion that the special election board process ameliorated many of these burdens, but that conclusion is contradicted by its own finding that "relatively few voters are aware" of that

process. ER27 (Op.).[12] In addition, a special election board is only available to voters who are "confined" because of "a continuing illness or disability," ER853; it must be requested by 5 p.m. on the second Friday before an election (unless a voter later becomes ill or disabled), *id.*; and there is no evidence indicating that Arizona election officials have the resources to make a special election board available to thousands (or even hundreds) of voters. Another voting method cited by the District Court, curbside voting, does not help those who have no means of traveling to a polling place. *See*, *e.g.*, ER257; *see also* ER633 (witnessed polling location where curbside voting was not possible). And, while Arizona requires employers to give an employee time off under limited circumstances, ER27 (Op.), the record does not indicate that any meaningful number of voters have used (or would be willing to assert) this right, and this provision likely would not help many who are unable to vote in person because they work multiple jobs. Thus, these alternative voting methods do not offset HB2023's severe burden.

The other alternative—voting in person in Arizona—is fraught with potential problems: election administrators in Arizona have made a number of serious errors, particularly with Spanish-language materials, ER70 (Op.); in-person

[12] *See also* ER630 (witness unaware of special election boards); ER257 (same); ER265-66 (same); ER305-06 (same); ER454 (city councilwoman stating "I consider myself to be very engaged in campaigns and politics. I had never heard of the special election board[.]").

voters in the 2016 presidential primary waited for as long as five hours to cast their ballots in Maricopa County, ER415; and Arizona rejects more OOP ballots per in-person ballot cast than any other state, *infra* at 44-45. *See also Feldman III*, 843 F.3d at 406 ("in-person voting opportunities are significantly hindered by lack of polling places and significant changes in polling places, all of which have caused extraordinarily long lines for voting in person" and have made such "'opportunities' for alternative voting … illusory").

On the other side of the equation, the justifications for HB2023 are thin. The District Court found "there has never been a case of voter fraud associated with ballot collection charged in Arizona[.]" ER34-35 (Op.); *see also Feldman III*, 843 F.3d at 369 n.1 ("[T]he sponsors of the legislation could not identify a single example of voter fraud caused by ballot collection. Not one. Nor is there a single example in the record of this case."); *Veasey*, 830 F.3d at 263; *see* ER34-35 (Op.). Rep. Michelle Ugenti-Rita, the sponsor of the bill, acknowledged that "[t]his bill doesn't reference fraud. This bill doesn't tackle that. This is about -- this is about an activity that could potentially lead to that." ER704; ER945.[13]

The District Court further found that "[a]s for public perception of fraud, the legislative record contains no evidence of widespread public concern that ballot

[13] Arizona had already long since criminalized ballot collection fraud. *See supra* at 9 n.7.

collectors were engaging in voter fraud." ER35 (Op.). Nor was there any evidence that the practice of ballot collection undermined confidence in elections, or that HB2023—a bill that still permits certain forms of ballot collection, has gone unenforced, and is clearly perceived by some to be targeted at minority voters—would do anything to address such a lack of confidence. On the contrary, just three years before the enactment of HB2023, the Legislature repealed a restriction on ballot collection that was less strict than HB2023 in order to avoid a vote of the electorate. *Supra* at 6-7.

Weighing the burdens imposed by HB2023 against the State's interests in the law is more than enough to doom it under the *Anderson-Burdick* test, but application of the required "means-end fit analysis" confirms the law's unconstitutionality. *See Feldman III*, 843 F.3d at 396. A state's interest in preventing voter fraud and promoting election integrity "does not mean … that [it] can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters." *N.A.A.C.P. v. Husted*, 768 F.3d 524, 547 (6th Cir. 2014). It "must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, *meaning it actually addresses*, the interest put forth." *Id.* at 545 (emphasis added); *see also One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 912-13 (W.D. Wis. 2016). Here, as set forth above, the State has not shown that HB2023 actually

addresses fraud. ER37 (Op.) ("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."); *accord Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (restriction likely unconstitutional where "no evidence" to support "vague" state justifications).

The means-end fit analysis also weighs in favor of a finding of unconstitutionality for at least three reasons. First, as the District Court recognized, Arizona law already includes ample measures designed to ensure the security of early mail ballots. ER36-37 (Op.). Arizona law already outlaws ballot tampering, vote buying, impersonating election officials, and discarding ballots, and the early voting process includes other safeguards, such as tamper-evident envelopes and a rigorous voter signature verification procedure. *Id.* Second, as the District Court recognized, HB2023 is unlikely to be a useful tool in preventing or deterring voter fraud, or preserving public confidence in election integrity. *Id.* at 36. HB2023 does not create a chain of custody for early ballots, and HB 2023 is not enforced by county recorders. *Id.* at 37. Third, in enacting HB2023, Arizona rejected less-restrictive methods of addressing concerns about ballot collection. As discussed above, Arizona had previously *enacted* ballot collection restrictions that were less burdensome than HB2023, but repealed both before they were implemented. *See supra* at 5-7. And as the District Court recognized, the authors of HB2023 also

rejected less restrictive alternatives that would have been *more effective* at establishing a recorded chain of custody of voted early ballots. ER 37 (Op.). *See Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015) ("[T]he interests identified by the State can … be served through other means, making it unnecessary to burden the right to vote."); *Burdick*, 504 U.S. at 434 (balancing must "tak[e] into consideration" extent to which "interests make it necessary to burden the plaintiff's rights") (citation and quotation marks omitted).

The District Court also legally erred by inventing abstract state interests unsupported by the record. The District Court correctly acknowledged that the State's purported interests could have been addressed through more narrowly tailored means, including training or registering ballot collectors, or requiring tracking receipts or other proof of delivery. ER38 (Op.). But the District Court dismissed such less restrictive alternatives by invoking an abstract state interest—an interest *which the State itself did not claim*—in avoiding erecting a "complex . . . bureaucracy[.]" *Id.* However, nothing in the record suggests that the less restrictive, more narrowly tailored alternatives actually rejected by the Legislature would be more complex or bureaucratic. Not a single legislator

objected to the amendments on that basis.[14] *Cf. U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (state's "justification must be genuine, not hypothesized or invented post-hoc in response to litigation"). In sum, the burdens on voting imposed by HB2023 substantially outweigh the State's interest in banning most forms of ballot collection, particularly when less-restrictive alternatives for limiting ballot collection are taken into account. HB2023 therefore violates the First and Fourteenth Amendments.

III. ARIZONA SHOULD BE REQUIRED TO PARTIALLY COUNT OOP BALLOTS

A. Arizona's Disenfranchisement of OOP Voters Violates the First and Fourteenth Amendments.

Arizona's policy of disenfranchising OOP voters unduly burdens the right to vote and should be invalidated under the *Anderson-Burdick* test. As discussed above, Arizona disenfranchises a greater percentage of its in-person voters for voting OOP than does any other state. *See supra* 11-14. Arizona's outlier status in this respect stems from the combination of its decision not to count any votes on

[14] The Quezada Amendment would have required ballot collectors to provide voters with a written receipt containing the collector's name and address, ER673-74, and no legislator indicated that either requirement would be complex or bureaucratic. ER772-839. In fact, the Senate Government Committee had passed an identical bill one week before Senator Quezada introduced the Amendment. ER774. The Clark Amendment would have created a space on the absentee ballot envelope itself for the name and address of the ballot collector. ER671-72. No testimony indicated that the inclusion of chain of custody information on the ballot itself would be either complex or would require Arizona to erect a new bureaucracy, and no legislator objected to the amendment on that basis. ER707-44.

OOP ballots, even for races for which voters are otherwise eligible, and several other factors: (1) high rates of residential mobility, (2) inconsistent election administration, (3) confusing placement of polling locations, (4) poll-worker error, and (5) lack of access to transportation.

First, high rates of residential mobility are associated with higher rates of OOP voting in Arizona. ER42 (Op.); *see also* ER1163. Similarly, rates of OOP voting are higher in neighborhoods where renters make up a larger share of householders. ER42 (Op.) (citing ER1263). And Arizonans move at an unusually high rate. Between 2000 and 2010, *almost 70%* of Arizonans changed their residence, making Arizona the state with the second-highest rate of residential mobility. ER42 (Op.); *see also* ER1372; *cf.* ER946, ER949. "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." ER42 (Op.); *see also, e.g.*, ER222 (OOP voter moved three times in last four years); ER351 (same); ER359-60. The need to locate a new polling place after moving—as well as the requirement of updating voter registration—can be a source of voter confusion, particularly when voters move a short distance and are unaware that their polling location has changed as a result. ER1137-41; ER309-10; ER314 (OOP voter, who moved less than a mile from prior apartment, voted OOP at previous polling place); ER374-76 (in highly

transient district, voters' most common question was "Where do I vote?"; voters who moved a short distance often confused about correct polling place location); ER425-58; ER449-50; ER570-71 (Intervenor-Defendant Rep. Rivero agreeing that "if you move a lot . . . it's more likely you might end up at the wrong precinct").

Second, "changes in polling locations from election to election" and "inconsistent election regimes used by and within counties … all tend to increase OOP voting rates." ER42 (Op.). The rate of OOP voting increases by 40% when a voter's polling location has changed. ER43 (Op.) (citing ER1144-45, ER1186-87). And polling locations change frequently in Maricopa County, where approximately 2/3 of Arizona's registered voters reside. *See* ER42 (Op.) ("in Maricopa County, between 2006 and 2008 at least 43 percent of polling locations changed from one year to the next"); *see also id.* ("approximately 40 percent of Maricopa County's active registered voters' polling locations changed between 2010 and 2012"). In the presidential preference election in March 2016, Maricopa County switched to 60 vote centers, but it reverted back to a precinct-based system with 122 polling locations for the May special election, and then had over 700 polling locations for the August primary and November general elections. ER42-43 (Op.). Further complicating matters, Maricopa County (which usually has precinct-based elections) and the City of Phoenix (which uses vote centers) sometimes have elections *on the same day*. ER1185; ER449-451. Unsurprisingly, Phoenix residents

are more likely than other residents of Maricopa County to cast OOP ballots. ER1185.

Third, polling location placement can affect the rate of OOP voting. ER42 (Op.) (citing ER1142-45, ER1156-57, ER1174-82, ER1184-88). In Maricopa and Pima Counties, many polling places are located not in the geographic center of precincts but instead on their borders. ER1180. Voters who live on the other side of the precinct therefore may live closer to a polling place to which they are not assigned than to their assigned polling place. *Id.* at 46-52 (examples of precincts in Goodyear and airport neighborhoods in Maricopa); ER1324-30, at 44-50 (examples of precincts in near Glendale in Maricopa and South Tucson in Pima). In 2012, approximately 25% of OOP voters lived closer to the polling location at which they cast their OOP ballots than to their assigned polling place. ER1134, ER1183; *see also* ER1183 (median distance to from residence to OOP voting location was only two miles; only a small minority cast an OOP ballot at a polling place that was more than 10 miles from their residence).

In addition, some neighborhoods contain multiple polling locations that are located close to each other, causing understandable confusion—particularly where multiple polling places are consolidated in the same building or are located across the street from each other. Voters assigned to a polling place that was within a mile of two or more other polling places cast OOP ballots at a higher rate than those

whose assigned polling place was not in close proximity to other polling places. ER1134; ER1185; *see also* ER1182 (numerous voters disenfranchised at the consolidated St. Agnes Parish polling place because they went to the incorrect table); ER462 (OOP voter given wrong precinct ballot at correct polling location).

Fourth, errors by pollworkers and poor pollworker training significantly contribute to OOP voting. When a voter arrives at a polling place and his or name is not on the voter rolls, a poll worker is supposed to direct the voter to his or her assigned polling place and inform the voter that that a provisional ballot cast at the wrong location will not be counted. ER45 (Op.). The testimony at trial demonstrated, however, that voters who arrive to vote at the wrong polling place are sometimes not aware that they are in the wrong polling place or that their ballot will not count. ER219-20. With one exception,[15] every OOP voter who testified in this case said that, at the time his or her provisional ballot was cast, the voter did not know that he or she was in the wrong polling place or that his or her provisional ballot would not count. *See* ER43 (Op.); ER223-227; ER270-74;

[15] One witness, a teacher, arrived at the polling place late in the day due to his work schedule. By the time he discovered that he was in the wrong polling place, he did not have sufficient time to travel to the correct polling place before the polls closed. ER352-56.

ER307-13; ER346-50; ER435-41; ER458-62; ER626-29.[16] Indeed, it would make little sense for voters to take the time to locate a polling place, travel to the polling place, possibly wait in line, fill out a provisional ballot envelope, and cast a ballot if those voters knew their ballot would not count. Further, Lori Noonan testified that pollworkers affirmatively—and inaccurately—represented that her OOP ballot would be counted. *See, e.g.*, ER272.

Fifth, dependence on public transportation, inflexible work schedules, and mobility impairments can prevent voters who go to the wrong polling place from traveling to the correct polling place before it closes. *See, e.g.*, ER354-55; ER621-22; ER442-44 (a twenty-minute drive in Phoenix can take 1.5 hours on a two-seat bus route). This problem is particularly acute in the vast Navajo Nation, where voters who discover that they are in the wrong polling place often lack transportation to travel to the correct polling place miles away. ER283-85; ER1331-34 .

Taken together, these factors and Arizona's policy of disenfranchising OOP voters combine to impose severe burdens on Arizona voters. Indeed, the numbers speak for themselves: Arizona has discarded *tens of thousands* of OOP ballots over the last decade; it discards thousands of ballots in every general election; and

[16] Pollworker error is also clearly a cause of OOP voting when an OOP ballot is cast at the wrong precinct in a consolidated polling location that also contains the correct precinct. *See, e.g.*, ER1182 .

minority voters are approximately twice as likely as nonminority voters to be disenfranchised for voting OOP. *See supra* at 11-14.

In concluding that Arizona's disenfranchisement of OOP voters imposes only "minimal" burdens, ER45-46, ER49 (Op.), the District Court erred. Characterizing OOP voters as a "small and ever-dwindling subset," ER45 (Op.), the court mistakenly concluded that the number of burdened voters was insufficient to establish more than a minimal burden. As explained above, however, "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 All.*, 836 F.3d at 1024 n.2. In other words, the court should have considered not only the number of impacted voters but also how burdensome Arizona's policy of disenfranchising OOP voters is *on those voters*. There is no burden more severe than the absolute disenfranchisement of those whose ballots are cast aside because they voted OOP. Further, if a policy that results in the disenfranchisement of thousands of voters in every general election is considered minimally burdensome because *so few* voters are disenfranchised, then the *Anderson-Burdick* test provides scant protection for the fundamental right to vote. *But cf. One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 949 (W.D. Wis. 2016).

The District Court also wrote that "Plaintiffs do not directly challenge the electoral practices actually responsible for higher rates of OOP voting," ER42-43 (Op.), such as polling location placement—suggesting that Arizona's disenfranchisement of OOP voters is attributable to those practices rather than Arizona's policy of not counting OOP ballots. Of course, OOP voting is problematic in significant part *because* of Arizona's policy of discarding OOP ballots. Thus, notwithstanding the District Court's conclusion, Arizona's policy of not counting OOP ballots imposes severe burdens on Arizona voters.

These burdens are not justified by the State's interests in its policy regarding OOP ballots. "Counting OOP ballots is administratively feasible." ER47 (Op.). Indeed, 20 states partially count OOP ballots. *Id.* New Mexico counts such ballots through a hand-tally procedure, with election workers identifying the races in which the voter was eligible to vote and marking the votes on a tally sheet. *Id.* California uses a duplication method, whereby election workers review each OOP ballot, obtain a paper ballot for the correct precinct, and duplicate the votes cast on the OOP ballot onto the ballot for the correct precinct. *Id.* The duplicated ballot is then scanned through an optical-scan voting machine and electronically tallied. *Id.* This process takes approximately one to three minutes per ballot. ER405-07.

Arizona itself already has a duplication procedure that it uses 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 because they did not submit proof of citizenship. *See* ER47 (Op.). The duplication procedure is also used to count 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 by a military or overseas voter via fax. ER47 (Op.).[17]

Further, although the District Court pointed to the State's interests in its "strict enforcement regime," ER48 (Op.), those interests are plainly outweighed by the burdens on voters from Arizona's policy of not counting OOP ballots.[18] In particular, the District Court asserted that, if Arizona partially counted OOP ballots, voters "might decide to vote elsewhere"; "[v]oters might also be nefariously directed to vote elsewhere";[19] and counties would be unable to

[17] Although one Arizona election administrator witness at trial estimated that the duplication process takes twenty minutes per ballot, ER47 (Op.), this witness's estimate at trial was higher than his estimate in his deposition, ER560-62, and the witness appeared to reconsider his answer when the court pointed out that his calculation would result in the county spending approximately 3,000 hours duplicating ballots in a general election. ER563-64. In contrast, the California election administrator witness's testimony that the duplication process in California takes one to three minutes was uncontradicted, ER405-07.

[18] The District Court acknowledged that "if strict scrutiny applies and Arizona were required to narrowly tailor its precinct enforcement to achieve compelling state interests, Plaintiffs' critiques might carry more weight." ER48 (Op.).

[19] The District Court's lone citation in this section is not to the record in this case—because it contains no support for such assertions—but to *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 461 (M.D.N.C. 2016), which the

accurately estimate voter turnout, allocate resources, and prevent lines from forming. ER48-49 (Op.). But there is no evidence in the record indicating that there is any meaningful increase in OOP voting in states that partially count OOP ballots. *See* ER608. And it is highly doubtful that counting OOP ballots would affect counties' ability to allocate resources and prevent lines from forming; even if there were a significant increase in the number of OOP voters, fluctuations in turnout from election to election would have a much larger impact on the number of voters who show up to vote at any given precinct in a given election.

Put simply, Arizona can count OOP ballots and the administrative burdens of doing so would be limited, particularly when compared to the burdens that Arizona's policy of not counting OOP ballots imposes on voters. *See generally Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify a practice that impinges upon a fundamental right). Arizona's policy of disenfranchising OOP voters therefore fails the *Anderson-Burdick* test.

B. Arizona's Disenfranchisement of OOP Voters Violates the VRA

As discussed above, a law violates Section 2 if (1) it imposes a discriminatory burden on members of a protected class and (2) that burden is caused by or linked to the ongoing effects of discrimination against members of

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Fourth Circuit overruled because the district court erred in not finding intentional discrimination. *McCrory*, 831 F.3d at 204.

that class. *See supra* at 23-24. Based on the evidence before it, the District Court should have concluded that Arizona's disenfranchisement of OOP voters meets both elements and violates the VRA.

The record clearly establishes a disparate burden. The District Court credited the analysis of Plaintiffs' expert Dr. Rodden, ER6-8 (Op.), who found that minority voters have consistently been far more likely than white voters in Arizona to be disenfranchised for casting a ballot out of precinct. *See* ER64-65 (Op.); *see also* ER1167 (minority voters "vastly over-represented among those casting out-of-precinct ballots"); ER1167-68 (disparities "have been quite persistent over time"). In 2012, white voters made up 70% of all in-person voters in Maricopa County but only 56% of OOP voters. ER1167. In comparison, African Americans accounted for 10% of in-person voters but 13% of disenfranchised OOP voters, while Hispanic voters made up 15% of in-person voters but 26% of disenfranchised OOP voters. ER1167-70; *see also* ER959 ("in Maricopa County voters with Hispanic surnames were disparately impacted by the problem of not counting votes cast in the wrong precinct"; "voters with Hispanic surnames comprised 10 percent of all voters in the 2012 general election, but 24 percent of those casting out-of-precinct provisional ballots"). In addition, the rate of OOP voting in Arizona in 2012 was 37 percent higher for Native Americans than for whites. ER1168-70

"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." ER64 (Op.). With the exception of tiny La Paz County, which has a small minority population, racial disparities in OOP voting were found in every county. ER65 (Op.).

In spite of these plain racial disparities in the disenfranchisement of voters due to Arizona's policy of discarding OOP ballots, the District Court wrongly concluded that Plaintiffs failed to meet their burden at step one of the VRA results test. In reaching that conclusion, the District Court erroneously held that because "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." ER65 (Op.). As discussed above, however, the pertinent issue under the VRA is whether minority voters are disparately burdened, not how many voters are burdened. *See supra* at 28-29. Further, there have in fact been elections in which OOP ballots could have made the difference. *See, e.g.*, *Feldman II*, 842 F.3d at 634 (Thomas, C.J., dissenting) (listing elections); ER217-18; *see also Under Advisement Ruling* 5-7, *Jones v. Reagan*, CV2016-014708 (Ariz. Super. Ct. Sept. 9, 2016) (OOP votes exceeded margin of victory).

The District Court also erred in concluding that Plaintiffs did not establish a violation of the VRA because "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." ER67 (Op.) (emphasis added). To violate the VRA, a challenged voting practice does not need to cause a disparity *by itself*. *See Farrakhan*, 338 F.3d at 1018-19. To the contrary, the VRA is violated when a law "impose[s] a discriminatory burden on members of a protected class" and 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*." *Feldman III*, 843 F.3d at 378-79 (emphasis added).

Here, the evidence shows that the disparate disenfranchisement of voters resulting from Arizona's policy of not counting OOP ballots is caused by and linked to the ongoing effects of Arizona's history of discrimination. Nearly all of the Senate Factors are present in Arizona. *See supra* at 31-35. Moreover, as the District Court recognized, some of the socioeconomic disparities that have resulted from Arizona's history of discrimination cause minority voters to be more likely than white voters to cast OOP ballots. ER66 (Op.). For example, minorities in Arizona are far more likely than whites to be renters, at least in part due to Arizona's history of discrimination. ER946; ER949; ER1161-62. This in turn

makes minority voters more likely than white voters to cast OOP ballots, because rates of OOP voting are higher in neighborhoods in which renters make up a greater share of the population. ER1263. Minorities in Arizona are also more likely than whites to move. ER1296; ER935. This again has implications for the relative burdens of Arizona's policy of disenfranchising OOP voters, as those who move must educate themselves about their new voting location, ER946; ER1137-42, and are more likely than other voters to cast OOP ballots, ER7, 66 (Op.); *see also* ER42 (Op.) ("high rates of residential mobility are associated with higher rates of OOP voting").

The socioeconomic disparities that have resulted from Arizona's history of discrimination also put minority voters who arrive at the wrong precinct at a disadvantage. As compared to white voters, minority voters in Arizona are less likely to have access to reliable transportation, are more likely to rely upon public transportation, are more likely to have an inflexible work schedule, and are more likely to rely on income from an hourly wage job. *See supra* at 31-32; ER946-50; ER1054-60; ER1324-34. Minority voters are therefore more likely than white voters to face significant burdens in traveling—or to be unable to travel—from one polling location to another.

The burdens on Native-American voters are particularly acute. The District Court found that "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." ER66 (Op.); *see also* ER278-81; ER24750; ER340-42; ER286-89; ER1332-34. In addition, the boundaries for tribal elections are often different from precinct boundaries, and at least some voters cast their ballots in tribal elections based on the location of residence in which they grew up rather than their current residence, meaning that many voters must vote at one location in tribal elections and another location in other elections—sometimes on the same day. ER66 (Op.); ER282-83; ER1332-34. Further, traveling from one polling location to another is disparately burdensome for Native-American voters in Arizona due to significant disparities in access to transportation. ER66 (Op.); ER949 (16% of African Americans, 8.4% of Hispanics, and 17.1% of Native Americans in Arizona lack access to a vehicle, compared to 5.5% of whites); ER1338 ("[O]n the largest reservations, more than one in every five households does not have access to a vehicle. In some Census tracts, one in every four households lacks access to an automobile."); *see also* ER283-84 (on the Navajo Nation, "Public transportation, there's no such thing. There's no such thing[] as a taxicab"); ER1331-32.

In sum, socioeconomic disparities linked to Arizona's history of discrimination directly contribute to Arizona's statistically significant racial disparities in OOP voting. The District Court therefore erred in holding that

Plaintiffs had not met their burden as to the second prong of the Section 2 inquiry. Arizona's refusal to partially count OOP ballots violates the VRA.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reverse the District Court, hold that HB2023 and Arizona's policy of not counting OOP ballots violate the U.S. Constitution and the VRA, and order that HB2023 and Arizona's policy of not partially counting OOP ballots be enjoined.

RESPECTFULLY SUBMITTED this 3rd day of July, 2018.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs hereby inform the Court that this matter was previously ruled upon by the Ninth Circuit during preliminary injunction proceedings under Case Numbers 16-16685 and 16-16698.

Dated: July 3, 2018

s/ *Sarah R. Gonski*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Michelle DePass*

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Plaintiffs-Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1(a). The brief contains 13,636 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*

No. 18-15845

In the United States Court of Appeals
for the Ninth Circuit

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

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

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KEY PROVISIONS OF THE U.S. CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. 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.

Fifteenth Amendment

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

KEY PROVISIONS OF THE VOTING RIGHTS ACT, 52 U.S.C. § 10301

Section 2.

No voting qualifications 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.

KEY PROVISIONS OF THE ARIZONA REVISED STATUTES - TITLE 16

§ 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 sections 16-125, 16-135 and 16-584.

§ 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.

42 U.S. Code §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 3, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Sarah R. Gonski*