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.

Appeal from the United States District Court for the District of Arizona, (Rayes, J.)
Case No. CV-16-01065

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

Defendants-Appellees agree with the jurisdictional grounds identified in Plaintiffs-Appellants' brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court committed clear error in finding that an Arizona law requiring voters to vote in their assigned precincts is consistent with Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution.
2. Whether the district court committed clear error in finding that an Arizona law allowing voters to entrust a caregiver, family member, household member, mail carrier, or elections official to return their ballots, but prohibiting other, unauthorized third parties from doing so, is consistent with Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Several Arizona statutes combine to require in-person voters to cast ballots in the precinct where they reside. First, under state law, "[n]o person shall be permitted to vote unless such person's name appears as a qualified elector in both the general county register and in the precinct register or list of the precinct and election districts or proposed election districts in which such person resides." Ariz. Rev. Stat. § 16-122. Second, Ariz. Rev. Stat. § 16-135(B) provides:

> An elector who moves from the address at which he is registered to another address within the same county and who fails to notify the county recorder of the change of address before the date of an election shall be permitted to correct the voter registration records at the appropriate polling place for the voter's new address. The voter shall present a form of identification that includes the voter's given name and surname and the voter's complete residence address that is located within the precinct for the voter's new residence address. The voter shall affirm in writing the new residence address and shall be permitted to vote a provisional ballot.

Finally, Ariz. Rev. Stat. § 16-584 outlines several procedures for voters whose names do not appear on the precinct register. Among those, a voter may provide "identification verifying the identity of the elector that includes the voter's given name and surname and the complete residence address that is verified by the election board to be in the pre-

cinct." Ariz. Rev. Stat. § 16-584(B). Further, for voters who have moved, their new "residence address must be within the precinct in which the voter is attempting to vote." *Id.* § 16-584(C).

The portion of Arizona Revised Statutes § 16-1005 added by H.B. 2023 and at issue in this case provides:

> 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.

Ariz. Rev. Stat. § 16-1005(H). The same legislation goes on to identify numerous exceptions, including: a "family member," meaning "a person who is related to the voter by blood, marriage, adoption or legal guardianship," *id.* § 16-1005(I)(2)(c); a "household member," meaning "a person who resides at the same residence as the voter," *id.* § 16-1005(I)(2)(d); and a "caregiver," which includes "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," *id.* § 16-1005(I)(2)(a).

The Fourteenth Amendment to the United States Constitution mandates that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Section 2 of the Voting Rights Act of 1965 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

INTRODUCTION

After a 10-day trial featuring the testimony of dozens of witnesses, the district court, Judge Douglas L. Reyes, correctly concluded that Plaintiffs failed to prove any of their claims against a pair of Arizona elections regulations. In an 83-page opinion replete with factual findings, the district court rebuffed a constitutional claim under the Fourteenth Amendment because the burden imposed by these laws is minimal and the State's interest in the integrity of its elections is long-established. ER19–49. On similar findings, the court held that the same minimal burdens do not "result[] in the denial or abridgement" of voting rights. 52 U.S.C. § 10301(a); ER56–67. Alternatively, even assuming a cognizable burden exists, neither of the contested provisions "under the totality of the circumstances" makes Arizona elections "not equally open to participation" by minority voters. 52 U.S.C. § 10301(b); ER67–74.

Plaintiffs now ask this Court for a retrial of these "intense[ly] factual inquir[ies]," *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (first alteration in original), repeatedly citing testimony that did not persuade the district court while failing to explain how Judge Rayes

committed clear error. *E.g.,* Appellants' Opening Br. ("OB") 23 (arguing that the court "should have found . . . discriminatory intent"). Occasionally, Plaintiffs raise legal disagreements with the court below. But the law is settled, and precedent from *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), to *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (*Gonzalez II*), demonstrates that the regulations at issue fall comfortably within the scope of the States' ability to regulate elections.

STATEMENT OF THE CASE

I. Regulatory Background

"Voting in Arizona involves a flexible mixture of early in-person voting, early voting by mail, and traditional, in-person voting at polling places on Election Day." ER12. "Arizona voters do not need an excuse to vote early and Arizona permits early voting both in person and by mail during the 27 days before an election." *Id.* (citing Ariz. Rev. Stat. § 16-541). "[A]ll Arizona counties operate at least one in-person early voting location," some of which "are open on Saturdays." *Id.* Early voting is now "the most popular method of voting" in Arizona, "accounting

for approximately 80 percent of all ballots cast in the 2016 election." ER13.

Arizona has been a national leader in making voting easy. "In 2002, Arizona . . . became the first state to make available an online voter registration option, allowing voters to register online through Arizona's Motor Vehicle Division ('MVD') website." ER13. And "[i]n 2007, Arizona implemented permanent no-excuse early voting by mail, known as the Permanent Early Voter List ('PEVL')." *Id.* "Arizonans now may vote by mail either by requesting an early ballot on an election-by-election basis, or by joining the PEVL, in which case they will be sent an early ballot as a matter of course no later than the first day of the 27-day early voting period." *Id.* Voters who register "online through the MVD . . . can enroll in the PEVL by clicking a box." *Id.* (citing ER651).

As the ballots themselves make clear, "an early ballot must be received by the county recorder by 7:00 p.m. on Election Day" in order "[t]o be counted." *Id.* (citing Ariz. Rev. Stat. § 16-548). "Voters may return their early ballots by mail postage free." *Id.* "Additionally, some Arizona counties provide special drop boxes for early ballots, and voters

in all counties may return their early ballots in person at any polling place, vote center, or authorized election official's office without waiting in line." *Id.* (citing ER651).

H.B. 2023. For more than 20 years, Arizona law has provided that "[o]nly the elector may be in possession of that elector's unvoted early ballot." Ariz. Rev. Stat. § 16-542(D). In 2016, the Arizona Legislature enacted H.B. 2023, which amended Ariz. Rev. Stat. § 16-1005 to provide that "[v]oters . . . may entrust a caregiver, family member, household member, mail carrier, or elections official to return their early ballots, but may not entrust other, unauthorized third parties to do so." ER14.

The Precinct Vote Rule. "Since at least 1970, Arizona has required voters who choose to vote in person on Election Day to cast their ballots in their assigned precinct and has enforced this system by counting only those ballots cast in the correct precinct." ER14 (citing ER649). "Because elections involve many different overlapping jurisdictions, the precinct-based system ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote." *Id.*

While six "mostly rural and sparsely populated" counties have "adopted [a] vote center model," Arizona's "most populous counties . . . currently adhere to the traditional precinct-based model." ER15. In those precinct-based counties, a voter may "cast a provisional ballot" if she "arrives at a precinct but does not appear on the precinct register." ER14 (citing Ariz. Rev. Stat. §§ 16-122, -135, -584). If her "address is [later] determined to be within the precinct, the provisional ballot is counted." *Id.* If it is not, then no portion of the ballot is counted. *Id.*

"A majority of the states do not count [out-of-precinct] ballots, putting Arizona well within the mainstream on this issue." *Id.* & n.5 (collecting statutes). "[A]t no point has" the U.S. Department of Justice "objected to this practice, and Plaintiffs object to it for the first time in this case." ER14–15.

II. Preliminary Injunction

In a lawsuit filed in 2016, Plaintiffs challenged both H.B. 2023 and Ariz. Rev. Stat. § 16-122, the Precinct Vote Rule. Plaintiffs alleged that both laws "violate § 2 of the Voting Rights Act . . . by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American Arizonans"; that these laws "vio-

late the First and Fourteenth Amendments to the United States Constitution by severely burdening voting and associational rights"; and that H.B. 2023 violates § 2 of the Voting Rights Act and the Fifteenth Amendment "because it was enacted with the intent to suppress voting by Hispanic and Native American voters." ER2. Plaintiffs sought declaratory and injunctive relief. *Id.*

The district court declined to preliminarily enjoin enforcement of either law, and two separate appeals followed.

In the H.B. 2023 appeal, Plaintiffs sought, and a motions panel "unanimously denied," an "emergency motion for an injunction pending appeal." *Feldman v. Ariz. Sec'y of State's Office*, 841 F.3d 791, 794 (9th Cir. 2016) (order granting reh'g en banc) (O'Scannlain, J., dissenting). But on the merits panel's own motion, an expedited appeal ensued. *Id.* "In fourteen days a merits panel received briefing, heard oral argument, and issued an opinion affirming the district court and denying the request for a preliminary injunction by a two to one majority." *Id.* The merits panel issued its order on October 28, 2016. 16-16698, ECF No. 55. "The case was called en banc the same day the opinion was issued,"

and "memo exchange and voting took place over five days." *Feldman*, 841 F.3d at 794 (O'Scannlain, J., dissenting).

On November 2, 2016, the Court ordered that the case be reheard en banc. *Feldman*, 841 F.3d at 791. Two days later—and just four days before election day in 2016 and more than three weeks into the early voting period—the en banc Court reconsidered the decision to deny Plaintiffs' motion for an injunction pending appeal, and entered that injunction. *Feldman v. Arizona Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) (op. on reh'g en banc). The Supreme Court of the United States stayed the injunction the following day. *Arizona Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016).

The Precinct Vote Rule appeal proceeded at a similarly frenzied clip. In the nine days after Plaintiffs filed their notice of appeal, the parties fully briefed, and the Court heard oral argument on, Plaintiffs' appeal. Case No. 16-16865, ECF Nos. 1–32. A merits panel affirmed the district court's decision refusing to preliminarily enjoin the Precinct Vote Rule on November 2, 2016. *Id.*, ECF No. 33. On November 4, the Court granted en banc review. *Id.*, ECF No. 35. The en banc Court de-

nied Plaintiffs' motion for an injunction pending appeal the same day. *Id.*, ECF No. 36.

After the 2016 election, the Court stayed en banc proceedings pending the entry of a final judgment in the district court on Plaintiffs' request for permanent injunctive relief and ordered that the en banc Court retain jurisdiction over any subsequent appeal, which would be consolidated with the earlier appeals.

The Court later determined that the preliminary-injunction appeals are moot and dismissed them. No. 16-16698, ECF No. 97. The Court also granted the State's motion to assign this appeal to the panel that decided the preliminary-injunction appeals. ECF No. 18.

III. Trial and Post-Trial Proceedings in the District Court.

Plaintiffs tried their claims to the district court in October 2017. Over the course of a 10-day trial, the court heard the testimony of seven expert witnesses and 33 lay witnesses. In addition to the live testimony, eight witnesses testified by deposition. In May 2018, the district court entered its 83-page Findings of Fact and Conclusions of Law, rejecting all of Plaintiffs' claims. ER82–83.

The court entered judgment on May 8, 2018, ER96, and Plaintiffs timely appealed, ER93.

On May 14, 2018, the district court heard argument on Plaintiffs' oral motion for an injunction pending appeal. ER91. The same day, the court denied the motion regarding the Precinct Vote Rule and ordered briefing regarding H.B. 2023. *Id.* On May 25, the court denied Plaintiffs' motion for a stay regarding H.B. 2023 as well. ER84.

IV. Proceedings in this Court.

On May 25, 2018, Plaintiffs filed an emergency motion for a stay pending appeal in this Court. ECF No. 17. On June 21, the Court deferred consideration of the motion and set the briefing schedule for the instant appeal. ECF No. 22.

SUMMARY OF THE ARGUMENT

In the federal system, States set the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, and exert at least as much oversight of the elections for state offices. Those regulations stand unless they offend some other provision of the Constitution or federal law.

Arizona has long required its citizens to cast ballots at the precinct in which they reside. More recently, the State has expanded opportunities for voting by mail. To discourage fraud and build confidence in the integrity of Arizona elections, the State enacted H.B. 2023 to prohibit ballot collection by persons other than family members, residents of the same household, caregivers, and special elections boards.

Plaintiffs see political advantage in uprooting these regulations and have spent two years litigating their constitutionality and compliance with Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. After a trial, the district court rejected all of Plaintiffs' claims and explained at length the reasons for its decision. The court's factual findings—including the ultimate decision whether either contested provision of Arizona law violates Section 2—are entitled to this Court's greatest deference. *Gonzalez II*, 677 F.3d at 406.

Paramount among the district court's findings is the fact that neither of the contested provisions imposes more than a minimal burden on the right to vote. ER31, 45–46. The State's interest in honest and efficient elections, in contrast, is long-recognized and important. ER33–34, 46. And none of the burdens involved here even approaches the

burden upheld in *Crawford*. The district court's findings related to the burden, *vel non*, imposed by the two disputed state laws are also relevant to Plaintiffs claims under the Voting Rights Act. In addition, the court found that other factors, apart from the state laws, "result[] in" whatever burden might exist. 52 U.S.C. § 10301(a); ER58–63; 65–66. What remains is at most "a bare statistical showing of disproportionate impact," which does not violate Section 2. *Smith v. Salt River Project Agric. Improvement Dist.*, 109 F.3d 586, 595 (9th Cir. 1997).

Plaintiffs face an insurmountable task in attempting to reverse the trial verdict below. Precedents from *Crawford* to *Gonzalez II* reflect the federal courts' respect for States' role in regulating elections. This Court should affirm.

STANDARD OF REVIEW

This Court will not reverse a district court's factual findings unless they are "illogical, implausible, or without support" in the record. *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009). Moreover, "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer, N.C.*, 470 U.S. 564, 574 (1985). "This is so even when

the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.*

In a challenge under Section 2 of the Voting Rights Act, the "ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2" is a factual finding, reviewed for clear error. *Gonzalez II*, 677 F.3d at 406. Legal questions are reviewed de novo. *Salt River*, 109 F.3d at 591 ("We therefore review de novo the district court's determination that § 2 does not apply to the District.").

ARGUMENT

I. The District Court Correctly Upheld the Precinct Vote Rule.

Like many States, Arizona requires in-person voters to vote in the precinct in which they live.[1] Ariz. Rev. Stat. § 16-122. This rule reflects the States' interest in elections that are "fair and honest" and conducted

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[1] Thirteen States, including Arizona, do not count any votes on ballots cast out-of-precinct. Alaska Stat. § 15.20.207; Ark. Code. Ann. § 7-5-308; Ill. Comp. Stat. Ann. § 5/18A-15(e); Ind. Code § 3-11.7-5-1.5(d); Mont. Code Ann. § 13-15-107(3); Neb. Rev. Stat. § 32-195(5); N.C. Gen. Stat. § 163A-1168; N.Y. Elec. Law § 8-302(e); Ohio Rev. Code Ann. § 3505.183(D)(1); Okla Stat. tit. 26, § 7-114(B); Tenn. Code Ann. § 2-7-112(A)(3)(B)(i)(v); Ut. Code Ann. § 20A-4-107(2)(d).

according to "some sort of order, rather than chaos." *Short v. Brown*, --- F.3d ---, No. 18-15775, 2018 WL 3077070, at *3 (9th Cir. Jun. 22, 2018) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The district court correctly concluded that Arizona's Precinct Vote Rule complies with both the Voting Rights Act and the Fourteenth Amendment.

A. The Precinct Vote Rule Does Not Violate the Fourteenth Amendment.

"[E]venhanded restrictions that protect the integrity and reliability of the electoral process" are well within States' constitutional prerogative. *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). Indeed, the Constitution assigns States responsibility for "prescrib[ing]" "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. In that task, and in the regulation of their own elections, the States enjoy "[d]eference" to enact "local policies more sensitive to the diverse needs of a heterogeneous society." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

To separate "evenhanded" regulations from "invidious" ones, *Anderson* introduced a balancing test that has applied ever since. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Crawford*, 553 U.S. at 190 (Stevens, J.,

controlling opinion). Under the *Anderson/Burdick* test, a State's exercise of its Elections Clause authority does not violate the Constitution unless "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" outweighs "interests put forward by the State." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788–89).

The district court faithfully applied the *Anderson/Burdick* test. ER20–21. Judge Rayes noted this Court's practice of "repeatedly" upholding "generally applicable, evenhanded, politically neutral" regulations. ER21 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011)). Moreover, the district court recognized its obligation to consider a State's "election regime as a whole, including aspects that mitigate the hardships that might be imposed." ER21 (citing *Crawford*, 553 U.S. at 199). Plaintiffs do not dispute that the court correctly understood the law governing their Fourteenth Amendment claims. *Cf.* OB 36–37 (condemning rational basis review, which does not appear anywhere in the decision below). They are therefore left to argue that Judge Rayes committed clear error in assessing the severity of the burdens imposed.

OB 37–43 (Precinct Vote Rule), 44–53 (H.B. 2023). Plaintiffs are mistaken, and this Court should affirm.

It was not clear error for the court to consider undisputed evidence that the vast majority of Arizona voters are completely unaffected by the Precinct Vote Rule. Fully 80 percent of voters cast their votes by mail in the 2016 general election, meaning that the Precinct Vote Rule does not affect these voters. ER39. Of the remaining 20 percent of the voting population, virtually all of them vote at their correct precincts.[2] And the percentage who do not has been falling over time. In presidential election years, the percentage of ballots cast outside the voter's precinct has declined from 0.64 percent in 2008 to 0.15 percent in 2016—the latter fact having entered the record only after this Court reviewed the earlier preliminary-injunction appeals. ER40. The percentage of out-of-precinct ("OOP") voting in off-year elections has also declined, though less dramatically. ER40–41.

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[2] Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties all use vote centers. The Precinct Vote Rule does not affect in-person voters in these counties. ER15.

Applying *Crawford*, the district court declined Plaintiffs' invitation to ignore the widely used alternative of early voting or the true causes of voters casting their ballots in the wrong precincts. ER41–43. Instead, as *Crawford* commands, the court looked at the Precinct Vote Rule in the broader context of Arizona's whole election system. In *Crawford*, the Supreme Court first considered the impact of obtaining qualifying photo identification "[f]or most voters." *Crawford*, 553 U.S. at 199. The Court then acknowledged that, for other groups, the contested law "may have imposed a special burden on their right to vote." *Id.* But this burden was mitigated by the fact that they could cast provisional ballots and later travel to the county seat to sign an affidavit establishing their eligibility. *Id.* *Crawford* demonstrates that the *Anderson/Burdick* analysis must consider available alternatives. In Arizona, any burden created by the precinct system is mitigated—if not nullified—by the widespread availability of mail voting. The district court did not clearly err in so finding.

Plaintiffs fail even to cite *Crawford* but fault the district court for two features of its *Anderson/Burdick* analysis: (1) finding that factors other than the Precinct Vote Rule are the real cause of OOP voting, and

(2) allegedly failing to consider "how burdensome" the Precinct Vote Rule is for "impacted voters." OB 50. On the first point, Plaintiffs' extended discussion of how residential mobility, poll worker error, and transportation challenges cause OOP voting only underscores the court's findings. OB 45–49. Plaintiffs ignore the findings of the 2016 Survey of Performance of American Elections—which the district court credited—that "approximately 94 percent of Arizona respondents thought it was very easy or somewhat easy to find their polling places." ER44. And, as Judge Rayes pointed out, "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." ER43.

On Plaintiffs' second point, courts need not consider subsets of the population when considering the constitutionality of a neutral law. *Crawford*, 553 U.S. at 205–06 (Scalia, J., concurring); *compare Burdick*, 504 U.S. at 436–39 (considering impact on voters generally) *with id.* at 446 (Kennedy, J., dissenting) (arguing for heightened scrutiny precisely because of burden on "some individual voters"). As the *Crawford* concurrence pointed out, *Crawford*, 553 U.S. at 205, the Supreme Court in *Clingman v. Beaver*, 544 U.S. 581 (2005), rejected strict scrutiny be-

cause the burden was "ordinary and widespread," *id.* at 593. Further scrutiny of the electoral regulations in *Clingman* would have invited "federal courts to rewrite state electoral codes." *Id.* For generally applicable laws like the Precinct Vote Rule, it is unnecessary to consider the special burden imposed on any subgroup of eligible voters.

Nevertheless, the district court examined the special burden on in-person voters and did not commit clear error in concluding that it was minimal. ER43–45. In *Crawford*, the Supreme Court noted that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph *surely* does not qualify as a substantial burden on the right to vote." 553 U.S. at 198 (emphasis added). If the *Crawford* burden for voters who "are eligible to vote but do not possess a current photo identification," *id.* at 198, is insubstantial, then so must be the burden of voting in one's own precinct. After all, as the district court found, precincts in Arizona are geographically based and consider such factors as access to public transportation when siting a polling place. ER44. The court also found that in-person voters had access to myriad resources, in English and Spanish, to identify the correct polling place. ER44–45 (listing re-

sources including the Secretary of State's voters' pamphlet, county elections offices, and the website of the Clean Elections Commission). Given these facts, the court found that "the burdens imposed on voters to find and travel to their assigned precincts are minimal and do not represent significant increases in the ordinary burdens traditionally associated with voting." ER45–46; *accord Crawford*, 553 U.S. at 198 (comparing burden to "the usual burdens of voting").

Weighed against this minimal burden, the State's interest must prevail under *Anderson/Burdick* "unless it is wholly unjustified." *Crawford*, 553 U.S. at 199. The district court found that the Precinct Vote Rule serves several state interests connected to the orderly administration of elections. ER46–48 (citing *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004), for the advantages of precinct-based voting); *see generally Short*, 2018 WL 3077070, at *3 (discussing States' interest in orderly elections). These interests include providing adequate resources at each polling place to serve the number of voters who should arrive there as well as avoiding the cost and delay of combing through OOP ballots for potentially valid votes in statewide races. ER46–48. Just last month, this Court affirmed States'

interest in orderly election administration, rejecting a Fourteenth Amendment challenge to California's county-by-county implementation of all-mail voting. *Short*, 2018 WL 3077070, at *6 (finding that the State's interest in "incremental election-system experimentation" was sufficient to justify differential treatment of voters). The regulation here is even easier to justify because it rests on longer-standing state interests and applies uniformly to every voter.

States retain wide latitude to regulate elections for both state and federal office. *Ariz. State Legislature*, 135 S. Ct. at 2573. Arizona's requirement that in-person voters cast their ballots in their own precincts is a commonplace and neutral exercise of the State's authority. If it imposes any burden on voters, that burden is minimal and pales in comparison to other regulations upheld under the Fourteenth Amendment. Under the *Anderson/Burdick* standard, the minimal burden imposed on Arizona voters is offset by the State's interest in administering precinct-based elections. The district court's factual findings regarding the relative magnitude of these interests certainly are not clearly erroneous. This Court should affirm.

B. The Precinct Vote Rule Does Not Violate the Voting Rights Act.

To establish that a law violates Section 2 of the Voting Rights Act, a plaintiff must prove two things. First, the law must "result[] 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). Second, "based on the totality of circumstances," the law must render elections "not equally open" to members of a protected class "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The two subparagraphs of Section 2 produce a two-part test. The first step requires a burden that results in—*i.e.*, causes—a denial of voting rights, while the second step tests the interaction between the burdensome regulation and discrimination, including social or historical circumstances that might prevent racial minorities from participating in the political process. *See, e.g.*, *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637–38 (6th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016); *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 240 (4th Cir. 2014); *Frank v. Walker*, 768 F.3d 744, 754–55 (7th Cir. 2014).

The district court correctly identified the controlling test and applied it to make reasonable factual findings with ample evidentiary support. ER52–53, 63–67. Because the district court's findings are at least "plausible in light of the record viewed in its entirety," this Court should not disturb the verdict. *Salt River*, 109 F.3d at 596 (quotation omitted). In fact, the district court identified multiple, independent ways in which Plaintiffs' case fails. *E.g.*, ER66–67 (explaining two free-standing barriers at the first step of Section 2). This Court may affirm on any of these grounds.

1. The District Court Correctly Found That Plaintiffs Failed to Establish a Burden Caused by the Precinct Vote Rule.

The first step of the Section 2 analysis asks whether the "standard, practice, or procedure . . . results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The statutory "results in" language creates a causation requirement. Thus this Court in *Salt River* held that "a bare statistical showing of disproportionate impact on a racial minor-

ity does not satisfy the § 2 'results' inquiry." 109 F.3d at 595. Sitting en banc, this Court recently reaffirmed that "a § 2 challenge based purely on a . . . statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." *Gonzalez II*, 677 F.3d at 405. Other circuits apply the same causation requirement at step one. *E.g.*, *Husted*, 834 F.3d at 637–38 ("the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact").

Judge Rayes faithfully applied this standard. ER53 (citing *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057, 1070 (9th Cir. 2016) (H.B. 2023 panel); *id.* at 1091 (Thomas, C.J., dissenting)). And because the "results in" language is not the only requirement in Section 2(a), the court below also underscored the need for a genuine burden. The Fourth Circuit summarized this point in its most recent vote-denial case: "Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than for others." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016). Reading Section 2 to apply to each and every variation in con-

venience would impose impossible burdens on States and invalidate numerous state and federal regulations. *Id.*; *see also Frank*, 768 F.3d at 754.

As an initial matter, therefore, the district court made several factual findings related to the minute fraction of Arizona's voting population affected by the Precinct Vote Rule at all. As discussed above, 80 percent of voters cast their votes by mail. ER39. And several counties use vote centers and do not require precinct-based voting. Among those voting in person, the number of OOP ballots has steadily declined, reaching a low in the 2016 general election of 0.15 percent. ER40. As a result of the small and plummeting number of voters casting ballots at the wrong precinct, the district court concluded that "Plaintiffs have not shown that the racial disparities in OOP voting are practically significant enough to work a meaningful inequality in the opportunities of minority voters . . . to participate in the political process." ER67.

Plaintiffs object that Section 2 asks "whether minority voters are disparately burdened, not how many voters are burdened." OB 55. But that summation begs the question whether every inconvenience is a cognizable Section 2 burden. Plaintiffs then cite Chief Judge Thomas's

earlier dissent for the proposition that the total number of OOP ballots might have changed the outcome in previous elections. *Id.* That is a misuse of the Chief Judge's opinion, which actually made a contrary point: changing the outcome in elections is *not* the standard for a Section 2 burden. *Feldman v. Arizona Sec'y of State's Office*, 842 F.3d 613, 634 (9th Cir. 2016) (OOP panel) (Thomas, C.J., dissenting). Judge Rayes expressly accepted this point on remand. ER57–58. What remains, therefore, is simply a factual question about whether "racial disparities in OOP voting are practically significant enough to work a meaningful inequality." ER67. Plaintiffs do not even attempt to argue that this finding was clearly erroneous.

Beyond the tiny scale of out-of-precinct voting and its steep downward trajectory, the district court found no cognizable Section 2 burden because other policies—not the subject of Plaintiffs' lawsuit—were the cause of voter error. As the court explained, "how Arizona treats OOP ballots after they have been cast does not make it difficult for these voters to find and travel to their correct precinct." ER45. This conclusion rests on numerous facts introduced regarding the root causes of OOP voting. Those include residential mobility, a metric in which

Arizona ranked second in the nation between 2000 and 2010. ER42. Fully 70 percent of Arizonans moved during that decade, *id.,* presumably for reasons unrelated to the State's treatment of OOP ballots. Similarly, even where voters maintain a constant residence, a change in the location of their polling place leads to a 40 percent increase in the rate of OOP ballots. *Id.* These trends play out in the expert report on which Plaintiffs stake their case. OB 54. That witness, Dr. Rodden, "confirm[ed] that OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently." ER66. Native American voters, the court found, face an additional cause of OOP voting: tribal elections and state elections do not necessarily use the same precinct boundaries. *Id.* As a result, the district court found that "Arizona's policy to not count OOP ballots is not the cause of the disparities in OOP voting." *Id.*

Plaintiffs tacitly concede this point, discussing at length the ways in which residential mobility, poll siting, changes to poll locations, poll worker mistakes, and transportation challenges *themselves* cause voters to vote in the wrong precincts. OB 45–49. They also tacitly concede that other causes of OOP voting are unconnected to any action by the

State. In discussing different rates of home ownership, for example, Plaintiffs state that "minorities in Arizona are far more likely than whites to be renters . . . *This* in turn *makes* minority voters more likely than white voters to cast OOP ballots." OB 56–57 (emphasis added). These statements, which Plaintiffs advance in their step-two argument, foreclose the possibility that it is the OOP policy that "results in" a discriminatory burden in the first place.

Finally, the court summarized an important deficit in Plaintiffs case: "there is no evidence that it will be easier for voters to identify their correct precincts if Arizona eliminated its prohibition on counting OOP ballots." ER43. The only evidence they presented on this point was the testimony of voters who said that, upon arriving at the incorrect polling place, they were not directed to the correct one. ER42–43. This complaint is directed at the competence of poll workers, not the requirement that in-person voters adhere to their correct precincts. But Plaintiffs do not challenge the training of poll workers or the many other measures that Arizona and its counties take to convey information about each voter's polling location. Even if they had raised such a challenge, Plaintiffs "offered no evidence" of minority voters being given

misinformation while non-minority voters received accurate instructions. ER66.

These findings doom Plaintiffs' legal theory. Just as Latino voters' statistically lower possession of identification documents was not the "result" of the contested regulation in *Gonzalez II*, the district court here concluded that minority voters "show[ing] up to vote at the wrong precinct at higher rates than their non-minority counterparts" was not the result of Arizona's Precinct Vote Rule. *Gonzalez II*, 677 F.3d at 407; ER66. While Plaintiffs fixate on the fact that 1 in 100 (in-person) minority voters cast their ballots in the wrong precinct compared to 1 in 200 non-minorities, OB 50, 55 (citing ER64–65),[3] this is nothing more than a "bare statistical showing of disproportionate *impact*" that "does not satisfy the § 2 'results' inquiry." *Salt River*, 109 F.3d at 595. As in *Salt River*, the district court found that differences in the relevant vari-

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[3] From the fact that 99 percent of minority voters and 99.5 percent of white voters comply with the Precinct Vote Rule, Plaintiffs state that minority voters are "twice as likely" to vote OOP. OB 50. The Seventh Circuit explained the folly of such reasoning through an example using almost identical figures. *Frank*, 768 F.3d at 752 n.3. In short, it "mask[s] the fact that the populations were effectively identical." *Id.*

able—home ownership in *Salt River* and voting OOP here—are "better explained by other factors independent of race." *Id.* at 591.

Other circuits have rejected Section 2 claims against laws that do not themselves produce a disparity. The Third Circuit upheld Pennsylvania's policy of purging voter rolls based on voters' inactivity even though more minority voters were inactive. *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3d Cir. 1994). The court reasoned that "the purge statute did not cause the statistical disparities," and therefore withstood attack under Section 2. *Id.* at 314. In the same way, the Seventh Circuit upheld an identification requirement despite noting "a disparate outcome" attributable to the fact that certain minority voters are "disproportionately likely to live in poverty." *Frank*, 768 F.3d at 753. Here, the district court's reasoning follows the same path: various factors that correlate with race also correlate with voting in the wrong precinct. *Id.* That bare correlation, however, is insufficient to challenge "what Arizona does with OOP ballots after they have been cast, which does not cause the disparities in OOP voting." *Id.*

The district court's assessment of the evidence amply supports the conclusion that Plaintiffs failed to satisfy the first step of a Section 2

claim. None of those factual findings was clearly erroneous, and this Court can affirm the verdict on that basis alone.

2. Even If Plaintiffs Had Identified a Discriminatory Burden, the District Court Did Not Clearly Err in Finding That Such Burden Did Not Interact With Past Discrimination to Deny Voting Rights.

Having found that Plaintiffs failed to prove a disparate burden resulting from the requirement that in-person voters vote in their precincts, the district court needed go no further. The court nevertheless went on to discuss Plaintiffs' further failure to establish that the true causes of any inconvenience in voting are not actionable under Section 2. As in step one, the court's findings are reasonable, and its ultimate conclusion regarding the "totality of the circumstances" can be reversed only if clearly erroneous. *Gonzalez II*, 677 F.3d at 406. Plaintiffs come nowhere near carrying that burden.

The second paragraph of Section 2 asks whether "the political processes . . . are not equally open to [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). This inquiry considers the "totality of circumstances," *id.*, including how the contested state laws "interact with so-

cial and historical conditions," *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In the context of drawing electoral districts, the Supreme Court has announced a series of factors to guide courts in making this determination. *Id.* at 36–37. The so-called "Senate factors" are, however, a loose framework. Courts are free to ignore certain factors as inapplicable and to add additional factors as needed. *Id.* at 46.

Because *Gingles* itself was a vote-dilution case based on district boundaries, its applicability to vote-denial claims like the current case is dubious. As the Seventh Circuit explained, "[t]he Fourth and Sixth Circuits . . . found *Gingles* unhelpful in voter-qualification cases (as do we)." *Frank*, 768 F.3d at 754; *see also Veasey*, 830 F.3d at 306 (Higginson, J., concurring) ("Using the *Gingles* factors is error on several levels."). The basis for this doubt is the fact that "citizens lumped into a district can't extricate themselves except by moving, so clever district-line drawing can disadvantage minorities," whereas generally applicable regulations affect every voter. *Frank*, 768 F.3d at 753. This Court's reasoning in *Gonzalez II* acknowledges the same ill fit between *Gingles* and vote-denial claims: the Court in *Gonzalez II* considered "[r]elevant" only three of the nine factors. 677 F.3d at 405–06. As precedent for

vote-denial cases continues to develop, this Court should no longer rely on *Gingles* outside the vote-dilution context.

Even though Plaintiffs' claim failed at step one, and despite the poor fit of the *Gingles* framework in a vote-denial case, Judge Rayes analyzed the Senate Factors before concluding that "Plaintiffs have not carried their burden." ER67–75. Recapitulating the court's findings is unnecessary, but several key facts stand out. First, the court found that "Arizona's recent history is a mixed bag of advancements and discriminatory actions." ER71. Some of the "actions detrimental to the voting rights of minorities" have been based on "partisan objectives." *Id.* Second, like every State, Arizona has racially polarized voting. *Id.* Third, the court found the existence of racial disparities in various socioeconomic factors. *Id.* Fourth, the court found some evidence of racial appeals in the "LaFaro video," which showed a "man of apparent Hispanic heritage" dropping off a large number of ballots. ER72–73. Fifth, Arizona's (proportional) minority representation in elective office is high, ranking sixteenth in the nation. ER73. Sixth, the court found "insufficient" Plaintiffs' evidence allegedly showing a lack of responsiveness to minority needs and instead credited the Citizens Clean Election Com-

mission with outreach to Hispanic and Native American communities. ER74. Seventh, the court listed numerous virtues of the precinct-based voting system before concluding that "[t]his justification [for the OOP rule] is not tenuous." *Id.* While some of the Senate factors were present in Arizona, others were not. *Id.* On balance, the district court concluded that Plaintiffs failed to carry their burden under step two. ER75.

On appeal, Plaintiffs challenge this holding in two ways. First, they point to special circumstances on Indian Reservations that the State did not create. OB 57–58. Second, they dispute the district court's factual finding that the connection between historical discrimination and present economic inequality is "too tenuous." OB 58–59; ER75. Neither argument warrants reversal.

Plaintiffs cite three features of life on the Navajo Nation, each of which Judge Rayes also considered in finding that the Precinct Vote Rule does not unequally limit minority participation: (1) some voters "lack standard addresses"; (2) boundaries for tribal elections can differ from boundaries for state elections, leading to different polling places for each; and (3) public transportation is limited. ER66. The first two

facts are products of tribal sovereignty and do not compel the State to alter its otherwise justified approach to precincts. As the court found, Arizona's method of drawing district boundaries is a credit to the State's fairness, ER70, and the system of geographic precincts itself serves the purpose of orderly elections, ER74. There is no evidence that the State intentionally draws different district boundaries or does a poor job of assigning voters without conventional addresses to their appropriate geographic precinct. As for the absence of public transportation, this inconvenience is the product of rural living, and not even Plaintiffs allege a nefarious withholding of resources.

Plaintiffs' second argument is that the Precinct Vote Rule renders Arizona's electoral system "not equally open" to minority voters because "socioeconomic disparities linked to Arizona's history of discrimination directly contribute to . . . OOP voting." OB 58; *see also id.* 34–35 (making the same step-two argument with respect to HB 2023). The district court considered this argument but rejected the evidence of causation as "too tenuous." ER75. Simply put, Plaintiffs never showed how historical racial discrimination caused more residential mobility or less access to transportation.

Illustrating the deficiency, the district court explained that "virtually any aspect of a state's election regime would be suspect [under Plaintiffs' approach] as nearly all costs of voting fall heavier on socioeconomically disadvantaged voters." ER75. A poll's closing time or the requirement that voters register at all, for example, likely "fall heavier" on individuals who do not own a car or who work longer hours. Unable to dispute the district court's point, Plaintiffs try to transform it into legal error, arguing that, "[i]nstead of assessing the impact of [the Precinct Vote Rule]," "the [d]istrict [c]ourt made conclusory and overbroad assertions about the *potential* effect that a finding of a VRA violation would have on other practices." OB 35. This is nonsense. Pointing out the logical end of Plaintiffs' approach—the elimination of virtually all election regulations—shows how mistaken Plaintiffs are but does not suggest the court was deciding anything other than the case before it.

The district court's holding is also consistent with other courts that have rejected Section 2 claims in which variables other than race account for difficulty complying with voting regulations. The court below is therefore like the district court in *Salt River*, which held that a difference in home ownership rates among African-American and white

households is "better explained by other factors independent of race." 109 F.3d at 591. Similarly, the Seventh Circuit in *Frank* acknowledged that "the reason Blacks and Latinos are disproportionately likely to lack an ID is because they are disproportionately likely to live in poverty, which in turn is traceable to the effects of discrimination in areas such as education, employment, and housing." 768 F.3d at 753. Yet, Wisconsin's voter-identification requirement satisfied Section 2 because all racial groups enjoyed the same opportunity to obtain identification, even if one or more groups were "less likely to *use* that opportunity." *Id.*

This is why Section 2 requires courts to analyze the "totality of circumstances." States with some history of racial discrimination are not condemned to have every fact (*e.g.*, residential mobility, automobile ownership) funneled through their regrettable past. Instead, a trial record can include evidence of a "general history of discrimination" without implying that a neutral regulation closes the political process to minority participation. *Gonzalez II*, 677 F.3d at 407. The district court did not clearly err in reaching that conclusion here.

II. The District Court Correctly Upheld H.B. 2023.

The district court also correctly rejected Plaintiffs' attacks on H.B. 2023.

A. H.B. 2023 Does Not Violate the Fourteenth Amendment.

"[A] court faced with a constitutional challenge to a state election law 'must first consider the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate,'" and next "'must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Short*, 2018 WL 3077070, at *3 (quoting *Anderson*, 460 U.S. at 789). "[T]he state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

Here, the district court correctly found that, "[a]t most, H.B. 2023 minimally burdens Arizona voters as a whole," the "vast majority of [whom] are unaffected by the law." ER21. "There are no records of the numbers of voters who, in any given election, return their ballots with the assistance of third parties," but Plaintiffs' counsel's "best estimate of the number of voters affected by H.B. 2023 based on the evidence at tri-

al" was "'[t]housands.'" ER22. In the last general election, voters cast more than *2.6 million* ballots. ER40.

For affected voters, the court found, H.B. 2023 "does not increase the ordinary burdens traditionally associated with voting." ER22–23. "Early voters may return their own ballots, either in person or by mail, or they may entrust a family member, household member, or caregiver to do the same." ER23. "[T]he burden H.B. 2023 imposes is [thus] the burden of traveling to a mail box, post office, early ballot drop box, any polling place or vote center (without waiting in line), or an authorized election official's office, either personally or with the assistance of a statutorily authorized proxy, during a 27-day early voting period." *Id.* This burden (such as it is) is "less severe than the burden on in-person voters, who must travel to a designated polling place or vote center on Election Day." *Id.*

These factual findings comparing the "burden" of H.B. 2023 to the conventional process of voting enabled the district court to follow the logic of *Crawford*, which considered the marginal burden an identification requirement imposed on persons lacking qualifying identification relative to "the usual burdens of voting." 553 U.S. at 198. As the dis-

trict court found, whatever burden H.B. 2023 imposes is less onerous than the one upheld in *Crawford*. There, "[a] voter who had photo identification but was unable to present it on Election Day, or a voter who was indigent or had a religious objection to being photographed, could cast a provisional ballot, which then would be counted if the voter traveled to the circuit court clerk within ten days after the election and either presented photo identification or executed an affidavit." ER23–24. For voters who did *not* have photo identification, the Supreme Court concluded that "the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph" was not a cognizable burden. *Crawford*, 553 U.S. at 198.

"At most," the district court explained, "H.B. 2023 requires only that early mail voters make the first trip described by *Crawford*—the trip to vote"; it also allows voters "27 days in which to make it," and allows them to choose "between traveling to the nearer and most convenient" of various destinations or "hav[ing] a family member, household member, or caregiver make the trip on [voters'] behalf." ER24. If the law at issue in *Crawford* passes constitutional muster, the court rea-

soned, then so does H.B. 2023. *Id.* That is undoubtedly correct, and Plaintiffs do not even cite *Crawford* much less distinguish it.

H.B. 2023 easily survives constitutional scrutiny for another reason. As the district court explained, "there is no blanket constitutional or federal statutory right to vote by absentee ballot." ER88 (citing *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807–08 (1969); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring). If the State is not constitutionally required to provide for absentee voting at all, then it necessarily follows that the State does not violate the Constitution merely by making absentee voting marginally less convenient for some voters. *Cf. Husted*, 834 F.3d at 623 (rejecting a "theory of disenfranchisement that would create a 'one-way ratchet' that would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances").

And, as a factual matter, the court found that "[t]he evidence available largely shows that voters who have used ballot collection services in the past have done so out of convenience or personal preference." ER26. "The Constitution does not demand 'recognition and ac-

commodation of such variable personal preferences, even if the preferences are shown to be shared in higher numbers by certain identifiable segments of the voting public,'" "[n]or does it require states to prioritize voter convenience above all other regulatory considerations." ER31 (quoting *Husted*, 834 F.3d at 629).

Plaintiffs do not contend that the district court got it wrong on the law. Instead, they attack Judge Rayes's factual findings—ignoring the facts they dislike and inviting this Court to reweigh the evidence they favor, all while forgetting that this Court reviews the district court's factual findings only for clear error. *Gonzalez II*, 677 F.3d at 406. Each of Plaintiffs' attacks misses the mark.

First, Plaintiffs dispute the district court's finding that "H.B. 2023 . . . does not increase the ordinary burdens traditionally associated with voting." ER22–23. Based on the testimony of three witnesses—party activist Leah Gillespie and voters Carolyn Glover and Marva Gilbreath—Plaintiffs claim that "the evidence at trial proved that H.B. 2023's burdens on impacted voters are severe." OB 37. It did not.

The district court apparently did not credit Gillespie's testimony at all—a fact Plaintiffs ignore. *Compare id. with* ER26–30; *see also*

ER87 (dismissing "testimony from activists" like Gillespie "who collected ballots in prior elections" in light of actual voters' testimony).

As for Glover, Plaintiffs claim she "said that, after H.B. 2023, some residents at her senior apartment complex were not able to vote because they did not have anyone to collect their ballots." OB 38. But the district court found that "H.B. 2023 does not severely burden voters like Glover, who admittedly can hand her ballot to a postal worker, provided she remembers to do so" or, "if [her] mobility issues make it difficult for her to travel to a post office, she can request to vote via a special election board." ER29. Plaintiffs simply overlook these findings.

Plaintiffs next point to Gilbreath's testimony "that, after H.B. 2023, 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[m] to call for help," and "that ballot collection would have made it possible for her to vote [in November 2016]." OB 38. What Plaintiffs fail to mention, let alone dispute, are the district court's factual findings that Gilbreath "voted in the 2016 presidential preference election by mailing her early ballot herself," and "received an early mail ballot for the general election but did not return it because she waited too long to mail it

and was not sure where to go to deliver it in person." ER30. "Gilbreath has access to a mailbox," the court found; "she simply must remember to timely mail her ballot." *Id.* And "[r]emembering relevant election deadlines . . . is not a severe burden; it is an ordinary part of any form of voting, be it absentee or in-person." ER87.

Plaintiffs also ignore the court's factual findings (at ER28–30) regarding the other three voters who testified at trial, "[n]one of [whom] would be severely burdened by H.B. 2023's limitations." ER28. "[N]o individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." ER63. "In fact," except for Gilbreath, who "simply forgot to timely mail her ballot," "*all* . . . of the voters who testified about the impacts of H.B. 2023 successfully voted in the 2016 general election, after the law took effect." ER87 (emphasis added). "[I]f an appreciable number of voters could not vote or would encounter substantial difficulties voting without the assistance of now-prohibited ballot collectors," the court explained, "it is reasonable to expect that at least one such voter would have been presented to testify at trial." *Id.* But in the 18 months between Plaintiffs' filing this lawsuit and trying their claims, "they were

still unable to produce a single voter to testify that H.B. 2023's limitations on who may collect an early mail ballot would make voting significantly more difficult for her." *Id.* This Court recently found the same lack of evidence damning for a similar election challenge. *Short*, 2018 WL 3077070, at *4 (upholding California's Voter Choice Act where plaintiffs had "not even alleged—let alone introduced evidence to demonstrate—that the VCA will prevent anyone from voting"). The fact that H.B. 2023 prevented *no* witness from voting in 2016 is devastating for Plaintiffs, so they ignore it.

Second, Plaintiffs dispute the district court's factual finding that "[t]he available evidence largely shows that voters who have used ballot collection services in the past have done so . . . because of circumstances that Arizona law adequately accommodates in other ways." ER26; OB 38. The district court noted that every county in Arizona provides "special election boards," who will personally deliver a ballot to anyone who is confined by reason of illness or disability. ER27 (citing Ariz. Rev. Stat. § 16-549). Plaintiffs cannot dispute the accuracy of this finding, so they instead argue that the court "contradicted" its conclusion "that the special election board process ameliorated" the effects of H.B. 2023 be-

cause the court also found that "relatively few voters are aware of this service." OB 38; ER27. But Plaintiffs ignore the court's findings that "there is no evidence that Arizona has done anything to hide [this] option[] from voters," ER87, and that "nothing in H.B. 2023 prevents Plaintiffs from educating voters about the special election board option and assisting them in making those arrangements," ER27.

Plaintiffs also contest the district court's finding that Arizona accommodates "working voters" by "requir[ing] employers to give employees time off to vote" under certain circumstances and prohibiting employers from "penalizing an employee for exercising this right." ER27; OB 39. Plaintiffs acknowledge that these laws exist but complain that "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." OB 39. As the district court explained, however, "[i]f voters . . . feel uncomfortable requesting time off, they have a 27-day window to vote in person at an on-site early voting location," and "even under H.B. 2023 voters with . . . time limitations may entrust their early ballots to family members, household members, caregivers,

or elections officials." ER27–28. So too voters with "transportation difficulties," *id.*, whom Plaintiffs claim will not benefit from curbside voting, OB 39—another accommodation the district court identified, ER27. Each of these accommodations mitigates the burden, if any, created by H.B. 2023. Although Plaintiffs would have weighed the evidence differently, that is insufficient to reverse the findings below.

Third, Plaintiffs challenge the district court's factual finding that "the regulatory interests Arizona seeks to advance are important" and justify the "minimal[] burdens" H.B. 2023 imposes. ER33, 36; OB 40. In the district court (as here), Plaintiffs did not dispute that "[f]raud prevention and preserving public confidence in election integrity are facially important state regulatory interests." ER33–34. "Instead, they argue that H.B. 2023 is unjustified because (1) there is no evidence of absentee voter fraud perpetrated by ballot collectors or of widespread public perception that ballot collection leads to fraud and (2) H.B. 2023 is not an appropriately tailored means of accomplishing Arizona's objectives." ER34; OB 40–41. The district court correctly rejected both arguments.

"Although there is no direct evidence of ballot collection fraud or of widespread public perception that ballot collection undermined election integrity," the court explained, "Arizona's legislature is not limited to reacting to problems as they occur, nor is it required to base the laws it passes on evidence that would be admissible in court." ER35 (citing *Voting for Am. Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013)); *see also* ER35–36 (quoting *Crawford*, 553 U.S. at 195; *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986)). Further, the court found (and Plaintiffs do not dispute) that "absentee voting presents a great opportunity for fraud" and that "mail-in ballots by their very nature are less secure than ballots cast in person at polling locations." ER36. And both the Sixth and Seventh Circuits have recognized that it is "practically self-evidently true" that implementing a measure aimed at preventing voter fraud would instill public confidence. *Husted*, 834 F.3d at 633 (citing *Crawford*, 553 U.S. at 197); *Frank*, 768 F.3d at 750. Notably, the Supreme Court in *Crawford* also observed that Indiana had presented "no evidence of any such fraud [*i.e.*, voter impersonation] actually occurring." 553 U.S. at 194. Yet the Court upheld the challenged regulation.

Plaintiffs ignore all of this and instead argue that "application of the required 'means-end fit analysis' confirms [H.B. 2023's] unconstitutionality." OB 41. Not so. No "means-end fit" analysis is "required" here at all. *Id.* The controlling opinion in *Crawford* held that the State's "unquestionably relevant" interests outweighed a limited burden on voters' rights imposed by the voter-identification law without considering the fit between those interests and the challenged law. *Crawford*, 553 U.S. at 203; *cf. Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025–28 (9th Cir. 2016) (en banc) (describing "*Burdick*'s balancing and means-end fit framework," but not conducting a means-end analysis after concluding that a city's electoral system "imposes no constitutionally significant burden on voters' right to vote" and was justified by "a valid, sufficiently important interest"). Arizona's interests in preventing fraud and preserving voter confidence are essentially the same as those Indiana asserted in *Crawford* and are sufficient to justify the minimal burdens H.B. 2023 imposes.

Even if a means-ends fit test were required, however, H.B. 2023 would clearly pass. The district court noted that H.B. 2023 "closely follows the recommendation of the bipartisan Commission on Federal

Election Reform," which recommended that States "'prohibit[] "third-party" organizations, candidates, and political party activists from handling absentee ballots." ER38 (quoting *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005)). Moreover, as the district court explained, "[a]lthough Arizona's legislature arguably could have addressed" its concerns regarding early mail ballot fraud "through a more narrowly tailored, but also more complex, system of training and registering ballot collectors and requiring tracking receipts or other proof of delivery, the Constitution does not require Arizona to erect such a bureaucracy if the alternative it has chosen is not particularly burdensome." *Id.* The same principle animated this Court's recent holding that municipalities may enact multiple statutes aiming at the same purpose in hopes that each will contribute to the common goal. *Pub. Integrity All.*, 836 F.3d at 1027 (upholding "ward-based primaries in addition to maintaining a residency requirement"). States are not constitutionally required to adopt the fewest possible regulations to accomplish their interests, especially in preventing something as elusive as fraud and strengthening something as ephemeral as popular confidence in elections.

Plaintiffs claim this was legal error because the district court somehow "invent[ed] abstract state interests unsupported by the record" in "avoiding erecting a 'complex . . . bureaucracy.'" OB 43. But of course the court did no such thing. It merely pointed out that while the State *hypothetically could have* achieved a narrower fit through more complex means, it was not *legally required* to do so.

B. H.B. 2023 Rule Does Not Violate the Voting Rights Act.

All parties agree that, to prove that H.B. 2023 violates § 2 of the Voting Rights Act, Plaintiffs must show that (1) H.B. 2023 "impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"; and (2) "that burden [is] in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240; OB 23.

1. The District Court Correctly Found That Plaintiffs Failed to Establish That H.B. 2023 Caused a Discriminatory Burden.

The district court correctly concluded that "Plaintiffs [had] not carried their burden at step one" to show that H.B. 2023 resulted in mi-

nority voters' having less opportunity than other Arizonans to participate in the political process, ER63—a factual finding that this Court reviews for clear error, *see Gonzalez II*, 677 F.3d at 406.

As the district court explained, "H.B. 2023 is facially neutral": "[i]t applies to all Arizonans regardless of race or color." ER56. And while Plaintiffs contend H.B. 2023 "disparately burdens Hispanic, Native American, and African American voters," "there are no records of the numbers of people who, in past elections, have relied on now-prohibited third parties to collect and return their early mail ballots, and of this unknown number Plaintiffs have provided no quantitative or statistical evidence comparing the proportion that is minority versus non-minority." *Id.* Indeed, even though "the trial in this matter occurred after H.B. 2023 had been in effect for two major elections . . . Plaintiffs still were unable to produce data on the law's impact." *Id.* at 58 n.17.

Judge Rayes "noted that [this] lack of quantitative or statistical evidence makes it impossible to gauge with any degree of certainty the number of voters who would be affected by H.B. 2023 or the approximate portion that are minorities." ER88. And the court was "aware of

no vote denial case in which a § 2 violation has been found without quantitative evidence measuring the alleged disparate impact of a challenged law on minority voters." ER57. As far as Defendants are concerned, this lack of evidence should have been the end of the analysis. If Plaintiffs cannot provide empirical evidence of an impact on minority voters, they cannot satisfy the statutory requirement that such voters have "less" access to the electoral process. 52 U.S.C. § 10301(b). But "mindful . . . that no court has explicitly required quantitative evidence to prove a vote denial claim," the district court did "not find against Plaintiffs on this basis." ER58. Instead, the court weighed "Plaintiffs' circumstantial and anecdotal evidence" and "[found] that prior to H.B. 2023's enactment minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." ER58, 62.

The court "found . . . that H.B. 2023 did not work a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities" for two key reasons. ER89. First, "even under generous assumptions the vast majority of all early mail voters returned their ballots without [the] assistance" of ballot collectors. *Id.* "[I]t is [therefore]

unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." ER63. Second, "H.B. 2023 imposes, at most, a disparate inconvenience on voters," ER89, but not "burdens beyond those traditionally associated with voting," ER63. "Although, for some voters, ballot collection is a preferred and more convenient method of voting," the court explained, "H.B. 2023 does not deny minority voters meaningful access to the political process simply because the law makes it slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots." ER63. "In fact, no individual voter testified that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." *Id.* The court thus concluded "that Plaintiffs [had] not carried their burden" to "establish a cognizable disparity under § 2" or show that H.B. 2023 "den[ies] minority voters meaningful access to the political process." ER58, 63.

Plaintiffs attack that factual finding on three grounds, none of which withstands scrutiny. ***First***, Plaintiffs claim Judge Rayes's "conclusion rests on an error of law," because "'[t]he total number of votes

affected is not the relevant inquiry; the proper test is whether minority votes are burdened.'" OB 27 (quoting *Feldman*, 842 F.3d at 635 (OOP panel) (Thomas, C.J., dissenting)). Plaintiffs base this argument primarily on a sentence from the dissenting opinion in the earlier OOP appeal that cited no authority and answered a question not posed here—whether Plaintiffs must show a "meaningful electoral effect" to prove a Section 2 violation. *Id.*; *Feldman*, 842 F.3d at 635 (OOP panel) (Thomas, C.J., dissenting). Justice Scalia's dissenting opinion in *Chisom v. Roemer* addressed the same non-issue. 501 U.S. 380, 407–08 (1991) (Scalia, J., dissenting). But even if Plaintiffs were correct about the applicable rule, they never even attempt to explain how the district court violated it. Nor can they.

Inconveniences are not tantamount to burdens. *Crawford*, 553 U.S. at 198. "Every decision that a State makes in regulating its elections will, inevitably, result in somewhat more inconvenience for some voters than others"—"[f]or example, every polling place will, by necessity, be located closer to some voters than to others." *Lee*, 843 F.3d at 601. But Section 2 does not require "that every polling place . . . be precisely located such that no group had to spend more time traveling to

vote than did any other," nor would it invalidate "motor-voter registration . . . [if] members of the protected class were less likely to possess a driver's license." *Id.*

Here, the district court correctly found that while "H.B. 2023 imposes, at most, a disparate inconvenience on voters" who prefer to use ballot collectors, it "did not work a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities." ER89. "Stated differently," even if "H.B. 2023 eliminated a voting inconvenience that was used by more minority voters, it does not follow that what all voters—minority and non-minority alike—must do to vote early by mail causes an inequality in the opportunities enjoyed by minority voters to elect their preferred representatives." *Id.*

By its terms, Section 2 demands this comparative inquiry: whether, "under the *totality of the circumstances*," the election process is "not *equally open* to participation by members of a [protected] class . . . in that its members have *less opportunity than other members* of the electorate to participate in the political process." 52 U.S.C. § 10301(b) (emphases added). Given that "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting

system," courts *must* "look at everything" unless Section 2 is to "dismantle every state's voting apparatus" and "sweep[] away almost all registration and voting rules." *Frank*, 768 F.3d at 754. But even if Plaintiffs were right that "what matters for purposes of Section 2 is . . . simply that 'any' minority voter is being denied equal opportunities," OB 28 (quoting *League of Women Voters*, 769 F.3d at 244), the district court found that minority voters in Arizona are *not* being denied equal opportunities to participate in the political process because of H.B. 2023. ER62–63, 89. That finding is entitled to this Court's deference. *Gonzalez II*, 677 F.3d at 406.

Second, Plaintiffs argue "the record evidence is contrary to the [d]istrict [c]ourt's conclusion that only a 'relatively small' number of voters used ballot collection." OB 28 (quoting ER63). That factual determination, too, is entitled to deference. *Gonzalez II*, 677 F.3d at 406.

It is also correct. "There are no records of the numbers of voters who, in any given election, return their ballots with the assistance of third parties." ER22. But the district court found that "[t]he [Arizona Democratic Party] collected 'a couple thousand' ballots in 2014," and a "community advocate" once testified "that he had once collected 4,000

ballots." *Id.* When asked at closing argument "for his best estimate of the number of voters affected by H.B. 2023 based on the evidence at trial," Plaintiffs' counsel responded: "'Thousands . . . but I don't have a precise number of that.'" *Id.* The court concluded that response "suggests that possibly fewer than 10,000 voters are impacted." *Id.* But "[p]urely as a hypothetical," the court noted that if it "were to draw the *unjustified* inference that 100,000 early mail ballots were collected and returned by third parties during the 2012 general election, that estimate would leave over 1.4 million early mail ballots that were returned without such assistance." *Id.* (emphasis added). "The point," the court explained, "is that H.B. 2023's limitations have no effect on the vast majority of voters who vote by early mail ballot because, even under generous assumptions, relatively few early voters give their ballots to individuals who would be prohibited by H.B. 2023 from possessing them." *Id.* That is correct: Even if 10,000 or 100,000 early voters were affected by H.B. 2023—*of which there is no evidence*—that number would be "small" relative to the more than 2.6 million Arizonans who voted in 2016. ER21–22, 63.

Third, Plaintiffs contend "the [d]istrict [c]ourt incorrectly found that [they] failed to demonstrate a discriminatory burden because the evidence of disparities in the use of ballot collection was insufficiently precise." OB 29. That is not what the district court found. To the contrary, the court noted that, in the absence of precise quantitative evidence, "the anecdotal estimates from individual ballot collectors indicate that a relatively small number of voters have used ballot collection services in past elections," and thus "even among socioeconomically disadvantaged voters, most do not use ballot collection services to vote." ER63. The court therefore concluded that "it is unlikely that H.B. 2023's limitations on who may collect an early ballot cause a meaningful inequality in the electoral opportunities of minorities as compared to non-minorities" or "burdens beyond those traditionally associated with voting." *Id.* That "no individual voter testified that H.B. 2023's limitations . . . would make it significantly more difficult to vote" only underscored that factual determination. *Id.*

2. Even If Plaintiffs Had Identified a Discriminatory Burden, the District Court Did Not Clearly Err in Finding That Such Burden Was Not Tied to Past Discrimination.

Because Plaintiffs failed to show that H.B. 2023 imposes a discriminatory burden, their Section 2 claim failed at the first step of the analysis. It would also have failed at the second step—*i.e.*, that no such burden was tied to past discrimination—for all the reasons their parallel challenge to the Precinct Vote Rule failed. *See supra* Part I.B.2.

C. H.B. 2023 Was Not Enacted with a Racially Discriminatory Purpose.

The district court also correctly "[found] that H.B. 2023 was not enacted with a racially discriminatory purpose," "that the legislature that enacted H.B. 2023 was not motivated by a desire to suppress minority votes," and that H.B. 2023 therefore does not violate either Section 2 or the Fifteenth Amendment. ER76, 82. This Court should affirm.

The parties agree that the framework articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), applies to determine whether H.B. 2023 was enacted with an "invidious discriminatory purpose." "There, the Supreme Court explained that 'official action will not be held unconstitutional

solely because it results in a racially disproportionate impact.'" ER76 (quoting *Arlington Heights*, 429 U.S. at 264–65). "Rather, '[p]roof of racially discriminatory intent or purpose is required to show a violation' of the Constitution." *Id.* (quoting *Arlington Heights*, 429 U.S. at 265).

To determine whether such a discriminatory purpose exists, courts consider factors including "(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." ER76 (citing *Arlington Heights*, 429 U.S. at 266–68).

Importantly, "[l]egislators' awareness of a disparate impact on a protected group is not enough: the law must be passed *because of* that disparate impact." *Veasey*, 830 F.3d at 231. The "ultimate question" is thus whether "the legislature enact[ed] a law 'because of,' and not just 'in spite of,' its discriminatory effect." *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 200, 204 (4th Cir. 2016) (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

"The challengers bear the burden to show that racial discrimination was a substantial or motivating factor behind enactment of the law;

if they meet that burden, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Veasey*, 830 F.3d at 231 (quoting *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (internal quotation marks omitted)).

"Legislative motivation or intent is a paradigmatic fact question." *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000) (citing *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999)). Accordingly, the district court's finding that H.B. 2023 "was not enacted with a racially discriminatory purpose," ER76, is reviewed for clear error, *Gonzalez II*, 677 F.3d at 406. Plaintiffs cannot show that the district court's conclusion was erroneous at all, much less that it was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1262.

Historical background. Contrary to the district court's factual findings, Plaintiffs claim "the record conclusively demonstrates that H.B. 2023 was intended to discriminate against minority voters." OB 18. As proof that "Arizona has a lengthy history of discrimination," Plaintiffs point out that "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." OB 18. But Plaintiffs ignore the fact that the coverage formula was struck down because it was based on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 553 (2013).

Plaintiffs also argue that "[t]he sequence of events preceding the enactment of H.B. 2023 . . . strongly support a finding of discriminatory intent," based mostly on the history of two different voter-protection laws enacted and then repealed by two different legislatures, S.B. 1412 and H.B. 2305. OB 19–21. Plaintiffs note that "HB2305 was repealed by the Legislature after it was put on the ballot for a referendum," OB 20, but even Plaintiffs stop short of claiming that H.B. 2305's lifecycle proves anything about the intent behind *H.B. 2023*. Plaintiffs also point out that S.B. 1412 was "withdrawn from the preclearance process," *id.*, but as just noted, the Supreme Court shortly thereafter invalidated the preclearance formula because it was based on obsolete data. *Shelby Cty.*, 570 U.S. at 553.

Plaintiffs rely heavily on the statements of one of S.B. 1412's *opponents*. *See* OB 19–20 (repeatedly quoting then-State Rep. Ruben

Gallego). But for obvious reasons "[t]he Supreme Court has . . . repeatedly cautioned . . . against placing too much emphasis on the contemporaneous views of a bill's opponents," and the Fifth Circuit reversed a district court's finding of discriminatory intent when it did just that. *Veasey*, 830 F.3d at 234–35 (quoting *Butts v. City of New York*, 779 F.2d 141, 147 (2d Cir. 1985)).

Plaintiffs also quote a statement from former State Elections Director Amy Bjelland that S.B. 1412 "was 'targeted at voting practices . . . in predominantly Hispanic areas' near the border." OB 19. But they "ignore the context in which it was made," Dkt. 204 at 13—as they have repeatedly done throughout this litigation. "In context," as the district court previously explained, "this report describes the 'practice' targeted by S.B. 1412 not as ballot collection, generally, but as voter fraud perpetrated through ballot collection, which Bjelland believed was more prevalent along the border because of perceived 'corruption in the government and the voting process in Mexico,' and the fact that 'people who live close to the border are more impacted by that.'" *Id.* In other words, Bjelland's statement suggests that S.B. 1412 was intended to *protect* voters in predominately Hispanic areas.

As the district court found, the earlier laws prove little "because they involve different bills passed during different legislative sessions by a substantially different composition of legislators." ER80. But even if Plaintiffs could show that those earlier laws were enacted with discriminatory intent (and they have done no such thing, *see* ER78–80), "this is [not] a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature," *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018). "Under these circumstances, . . . what matters . . . is the intent of the" legislature that enacted H.B. 2023, "[a]nd it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the [enacting] legislature acted with invidious intent." *Id.* This they failed to do.

Departures from the legislative process. Plaintiffs also argue that "Arizona's departures from the normal procedural sequence strongly support a finding of discriminatory intent." OB 19. Yet they do not point to even *one* such "departure[]" regarding H.B. 2023, because there were none. This is not a case like *McCrory*, for example, where "immediately after *Shelby County*," the North Carolina legislature "rushed through the legislative process the most restrictive voting legislation

seen [there] since enactment of the Voting Rights Act." 831 F.3d at 227. Rather, this case is more like *Lee*, in which the Fourth Circuit upheld a Virginia law that was *not* enacted immediately in response to *Shelby County*, was "passed as part of Virginia's standard legislative process, following full and open debate," and was not precipitated by the legislature's asking for or receiving racial data on the practice at issue. 843 F.3d at 604. The same is true of H.B. 2023. *See* Dkt. 17-2 at 84–85, 115–137, 145–264, 299–373, 423–91, 533–64. Judge Reyes correctly found that H.B. 2023 was enacted in the normal legislative process. ER80.

Legislative history. Plaintiffs' reliance on H.B. 2023's legislative history to prove discriminatory intent fares no better. OB 21–22. The "racial appeals" the district court found were "made in the specific context of legislative efforts to limit ballot collection" were made regarding the "*earlier bills*" already discussed, not H.B. 2023. OB 21; ER72 (emphasis added). Additionally, the district court found that while the so-called "La Faro Video" helped "convinc[e] H.B. 2023's proponents that ballot collection presented opportunities for fraud that did not exist for in-person voting," that motivation was not a pretext for discrimination:

"these proponents appear to have been sincere in their beliefs that this was a potential problem that needed to be addressed." ER78. Plaintiffs do not contest either of these findings.

Plaintiffs likewise cannot show that the district court clearly erred by finding that "the legislature *as a whole* enacted H.B. 2023 *in spite of* opponents' concerns about its potential effect on GOTV efforts in minority communities, not because of that effect." ER76 (emphasis added). The court also recognized that partisanship was a motive for at least some legislators and held open the possibility that these calculations were "*perhaps* implicitly informed by racial biases about the propensity of GOTV volunteers in minority communities to engage in nefarious activities." ER76–77 (emphasis added). Plaintiffs seize on this language and claim that it leads inexorably to a finding that H.B. 2023 "was . . . enacted with racially discriminatory intent." OB 22. "Given that there is no concrete evidence of fraud in connection with ballot collection," they say, "HB2023 serves partisan interests in significant part because its burdens disparately fall on minority voters." *Id.*

But Plaintiffs simply ignore the district court's factual findings that, "[d]espite the lack of direct evidence supporting their concerns, the

majority of H.B. 2023's proponents were sincere in their belief that ballot collection increased the risk of early voting fraud, and that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in-person voting." ER76–77; *see also* ER81–82. They also ignore the court's findings that "partisan motives are not necessarily racial in nature" and in any event "did not permeate the entire legislative process." ER81. Even if they did, partisan motives do not violate the Constitution or the Voting Rights Act. *Id.* In any event, "many proponents acted to advance facially important interests"; and "[t]hough Plaintiffs might disagree with the manner in which the legislature chose to address its concerns about early ballot security, 'the propriety of doing so is perfectly clear,' and the legislature need not wait until a problem occurs to take proactive steps it deems appropriate. ER81–82 (quoting *Crawford*, 553 U.S. at 196).

Disparate impact. Plaintiffs also claim the Legislature enacted H.B. 2023 with a discriminatory purpose because it "disproportionately burdens minority voters" and "the State's justifications for restricting ballot collection are weak." OB 18. For the reasons above, *supra* Part

II.A, the district court's contrary factual findings were correct. Plaintiffs cannot show otherwise.

D. Neither the Precinct Vote Rule Nor H.B. 2023 Violates the First Amendment

Finally, at four different places in their brief, Plaintiffs claim the precinct vote rule or H.B. 2023 violates the First Amendment but never even attempt to argue the point. OB 36, 44. Plaintiffs have abandoned this claim, as the district court found, and it fails on the merits in any event. ER31–33.

CONCLUSION

The district court, after a 10-day trial with dozens of witnesses, concluded that Arizona's contested elections regulations are lawful. That conclusion follows almost entirely from factual findings regarding the burdens (if any) imposed by the disputed provisions and their comparison to recognized state interests in preserving the integrity of the electoral system. Plaintiffs do nothing to prove that these conclusions were clearly erroneous. Instead, they offer sweeping legal theories at odds with precedent from this Court and the Supreme Court. Because they have not shown legal or factual error, this Court should affirm the district court's judgment.

June 10, 2018

Respectfully Submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Defendants-Appellees state that this case is related to two cases previously heard in this Court which concern the case being briefed, Case Numbers 16-16685 and 16-16698.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Circuit Rule 32-1(a), because this brief contains 13,541 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook type.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 June 10, 2018. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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