No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,

Plaintiffs/Appellants,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Appellees.

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

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FRAP 26.1 Corporate Disclosure Statement

Corporate Defendant-Intervenor Arizona Republican Party hereby certifies that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in the above-mentioned corporation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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I. STATEMENT OF JURISDICTION

The Defendant-Intervenor Appellees Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero (collectively, the "Intervenor Defendants") agree with the Jurisdictional Statement of Defendants-Appellees Secretary of State Michele Reagan and Attorney General Mark Brnovich (collectively, the "State").

II. ISSUES PRESENTED FOR REVIEW

1. Did the District Court clearly err in determining that the totality of the evidence relating to Arizona's 2016 enactment of limited restrictions on ballot collection, as part of House Bill 2023 ("H.B. 2023"), did not evince an intent to discriminate against minority voters in violation of Section 2 of the Voting Rights Act ("VRA") or the Fifteenth Amendment?

2. Did the District Court clearly err in determining, based on its evaluation of the entirety of Arizona's election regime, that H.B. 2023 and Arizona's disqualification of ballots cast outside an in-person voter's assigned location (the "Precinct Vote Rule") do not violate the First or Fourteenth Amendments because they impose only minimal

burdens on voters that are sufficiently justified by important government interests?

3. Did the District Court clearly err in determining, based on its examination of the totality of the circumstances in Arizona, that H.B. 2023 and the Precinct Vote Rule do not violate Section 2 of the VRA because those laws do not preclude minority voters from having an equal opportunity to vote?

III. ADDENDUM OF PERTINENT AUTHORITIES

In accordance with Ninth Circuit Rule 28-2.7, the following Arizona statutes are set forth in the Addendum to this brief: A.R.S. §§ 16-562, 16-564, 16-566, 16-570, 16-572, 16-579, 16-580, and 16-585. Except for the preceding Arizona statutes, all other applicable statutes, etc., are contained in the State's brief.

IV. STATEMENT OF THE CASE

The Intervenor Defendants concur with the State's Statement of the Case.

V. SUMMARY OF ARGUMENT

"[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the

democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). In Arizona, most voters exercise this right by voting either by mail or in-person at a polling place. To enhance the integrity of the mail option, H.B. 2023 (which is codified at A.R.S. § 16-1005(H)-(I)) restricts the possession of a voter's early ballot to the voter herself or to individuals that the legislature concluded are sufficiently trustworthy to serve as proxies (*i.e.*, family, household members, caregivers, mail carriers, and election officials). Similarly, to ensure the orderly administration of in-person voting and to encourage voting on all local candidates or initiatives, the Precinct Vote Rule has long served as an enforcement mechanism for the requirement that in-person voters vote at an assigned location in those counties that use a precinct system.[1]

The Plaintiffs challenged H.B. 2023 and the Precinct Vote under the Constitution and Section 2 of the VRA, but they simply could not put forth evidence to prove these claims, especially in light of the very minimal burdens imposed by those laws. After a ten-day bench trial, the District Court issued an 83-page decision that applied the legal

[1] Six Arizona counties use a "vote center model" that allows in-person voters to vote at any polling location within their county. ER15. "These counties are mostly rural and sparsely populated." *Id.*

standards recognized by this Court and the Supreme Court on constitutional and Section 2 challenges to election laws, thoroughly reviewed the evidence on the totality of the circumstances in Arizona, and made the ultimate factual determinations that each of Plaintiffs' claims failed. Plaintiffs now ask this Court to second-guess those factual determinations, but they are unable to show that the District Court committed any clear error.

First, the Arizona legislature did not enact H.B. 2023 with the intent to suppress minority voting in violation of the First and Fourteenth Amendments. After reviewing the legislative history, and hearing the live testimony of legislators and several other witnesses who either favored or opposed H.B. 2023, the District Court made the factual determination that H.B. 2023 reflected a sincere attempt by the legislature to enhance the security of voting by-mail. Given the increasing popularity of the mail-in vote in Arizona (which is how approximately 80% of voters cast their votes in the most recent general election), the legislature reasonably concluded that this process needed similar protections as in-person voting. Although opponents of H.B. 2023 speculated about potential impacts on minorities, Plaintiffs simply

did not persuade the District Court, in its role as the finder of fact, that the legislature enacted H.B. 2023 *because* of those claimed impacts. Indeed, Plaintiffs could not show that H.B. 2023 has actually resulted in any meaningful obstacle to voting for *any* Arizona voter, let alone any minority group.

Second, H.B. 2023 and the Precinct Vote Rule do not unconstitutionally burden the right to vote. The burdens of both of these practices are no greater than the burdens traditionally associated with the act of voting, especially when taking into account the entirety of Arizona's election system and the significant conveniences provided to encourage voting. Indeed, the burdens of the challenged practices are far less than the burdens of the Indiana voter identification law upheld in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199 (2008). Tellingly, Plaintiffs simply ignore this Supreme Court case.

On the other hand, H.B. 2023 and the Precinct Vote Rule both advance important regulatory interests. By limiting who may possess an early ballot by-mail, H.B. 2023 reduces the risk of votes not being counted due to the intentional or unintentional loss or destruction of ballots by third-party ballot collectors who, in many instances, were

unlikely to have any personal relationship with the voters whose ballots they collected.

By incentivizing in-person voters to vote at an assigned location, the Precinct Vote Rule helps avoid long lines and makes sure that each voter receives the correct ballot with *all* of the races in which that voter is eligible to vote. The Precinct Vote Rule thus has particular importance to local issues, such as educational bond initiatives, and candidates for local office, which includes several of the Intervenor Defendants. The local election is the "'laboratory' of democracy" and deserves protection. *Evenwel v. Abbott*, 136 S.Ct. 1120, 1141 (2016) (Thomas, J. concurring) (quoting *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S.Ct. 2652, 2673 (2015)).

Third, the actual results of H.B. 2023 and the Precinct Vote Rule do not violate Section 2 of the VRA. The Section 2 "results" claim required Plaintiffs to show, based on the totality of the circumstances in Arizona, that the challenged practices have deprived a protected minority group of the equal opportunity to vote. Plaintiffs could not meet this burden. With respect to H.B. 2023, Plaintiffs relied on anecdotal evidence by partisan advocates concerning the limited

historical use of ballot collection services *before* the law was enacted, but they could not produce a single voter who has personally faced any genuine difficulty in voting *after* H.B. 2023. Disparities in the convenience of voting are not cognizable under the VRA.

As for the Precinct Vote Rule, Plaintiffs could not show that minority voters are systemically given misinformation on where to vote as compared to non-minorities, or that they are assigned to polling places that are more difficult to find than non-minorities. The District Court also found that, as a statistical matter, Plaintiffs had not shown any practically significant disparities in out-of-precinct ("OOP") voting. Moreover, Plaintiffs failed to challenge the actual election practices that they claimed caused voters to arrive at the wrong polling place location at disparate rates, despite being put on clear notice of this defect in their case at the preliminary injunction phase.

In the end, Plaintiffs simply disagree with the District Court's factual findings and weighing of evidence. The District Court's judgment should be affirmed.[2]

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[2] Plaintiffs infer that Chief Judge Thomas' dissenting opinion in *Feldman v. Arizona Secretary of State's Office*, 840 F.3d 1057 (9th Cir. 2016) ("*Feldman I*"), and the en banc Court's attachment of the opinion

VI. ARGUMENT

A. The Applicable Standard of Review is Clear Error.

Plaintiffs repeatedly attempt to masquerade their arguments as involving legal issues subject to *de novo* review. In reality, however, Plaintiffs are challenging the District Court's ultimate findings of fact on claims that are inherently factual in nature. The clear error standard thus applies. *See* Fed. R. Civ. P. 52(a)(6). This has been confirmed by authorities on the specific claims at issue.

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in *Feldman v. Ariz. Secretary of State's Office*, 843 F.3d 366 (9th Cir. 2016) ("*Feldman III*"), are somehow controlling on this panel. *See* Opening Br. ("OB") 2. This inference is not correct. To start, the *Feldman III* order (not an opinion) was based on an incomplete factual record at the preliminary injunction phase rather than the complete trial record that now exists. Moreover, if *Feldman III* were good law, its injunction would remain in effect, which is simply not the case. *See Ariz. Sec'y of State's Office v. Feldman*, 137 S. Ct. 446 (2016) (staying Ninth Circuit's injunctive order on H.B. 2023 "pending final disposition of the appeal by that court"). Moreover, "summary orders"—such as the one issued in *Feldman III*—"have no precedential effect." *GMA Accessories, Inc. v. BOP, LLC*, 765 F. Supp. 2d 457, 470 (S.D.N.Y. 2011); *accord United States v. Seale*, 577 F.3d 566, 570 (5th Cir. 2009) ("The per curiam order of the en banc court is not precedential."); *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 830 (8th Cir. 2005) (similar). Indeed, Plaintiffs recognize that *Feldman III* only "essentially" incorporates Chief Judge Thomas' dissent in *Feldman I*, OB 2, which makes it impossible to tell from the *Feldman III* which specific aspects of Chief Judge Thomas' dissent are incorporated or relied upon. As a result, *Feldman III* (and its reference to *Feldman I*) is not precedent or binding on this Court.

On the claim of discriminatory intent, ascertaining a legislature's motivations for any particular legislation requires a "sensitive inquiry into [the available] circumstantial and direct evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). As such, the ultimate determination of whether a legislature acted with discriminatory intent is a question of fact reviewed for clear error. *See Abbott v. Perez*, 585 U.S. ____, 2018 WL 3096311, at *14 (U.S. June 25, 2018).

As for Plaintiffs' claim of an unconstitutional burden on voting, the determination of the burden imposed by an election law is an "intense[ly] factual inquiry." *Gonzalez v. Ariz.*, 485 F.3d 1041, 1050 (9th Cir. 2007) (internal quotations and citation omitted; alteration in original); *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122 (9th Cir. 2016) (severity of burden "is a factual question on which the plaintiff bears the burden of proof."). Thus, the District Court's factual determinations on the burdens of the challenged practices, and whether they advanced important government interests, should be reviewed for clear error. *See Veasey v. Abbott*, 830 F.3d 216, 256 (5th Cir. 2016) (applying clear error standard to factual finding regarding burden of

election law); *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (same).

Similarly, a "results" claim under Section 2 of the VRA requires a "searching practical evaluation of the past and present reality" though an "intensely fact-based and localized" examination. *Gonzalez v. Ariz.*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc) (internal quotations and citations omitted). This Court thus gives deference to "the district court's superior fact-finding capabilities" through the clear error standard, "including the ultimate finding whether, under the totality of the circumstances, the challenged practice violates [Section] 2." *Id.* (internal quotations and citations omitted).

The clear error "standard is significantly deferential and is not met unless the reviewing court is left with a 'definite and firm conviction that a mistake has been committed.'" *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011) (quoting *Cohen v. U.S. Dist. Court for N. Dist. of Cal.,* 586 F.3d 703, 708 (9th Cir. 2009)). Consequently, a factual finding is not clearly erroneous unless it is "'(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Crittenden v. Chappell*, 804

F.3d 998, 1012 (9th Cir. 2015) (quoting *Unites States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)). As detailed below, Plaintiffs cannot meet the demanding clear error standard.

B. The District Court Did Not Clearly Err in Determining that the Arizona Legislature Enacted H.B. 2023 for Non-Discriminatory Reasons.

Plaintiffs had a heavy burden to show intentional discrimination under the Fifteenth Amendment or the VRA, which they simply could not satisfy. ER82. The "good faith of [the] state legislature must be presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). This presumption can only be overcome by proof that a law was motivated by an "invidious discriminatory purpose." *Arlington Heights*, 429 U.S. at 266. "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Abbott*, 2018 WL 3096311, at *14.[3]

The "ultimate question" is whether legislation was enacted "'because of,' and not just 'in spite of,' its discriminatory effect." *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 200 (4th Cir. 2016) (quoting

[3] The State's Brief includes more fulsome descriptions of the legal standards applicable to Plaintiffs' different claims. The Intervenor Defendants agree with those descriptions, and provide a more abbreviated discussion of the applicable standards to avoid repetition.

Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)). To help guide this inquiry, *Arlington Heights* provided a list of non-exhaustive factors that may be relevant to the ultimate intent determination. *See Arlington Heights*, 429 U.S. at 266-68; ER76-81.

Applying these standards, the District Court rejected Plaintiffs' intentional discrimination claim because it correctly determined—after a thorough review and weighing of witness testimony, legislative history, and other trial evidence—that "the legislature that enacted H.B. 2023 was *not* motivated by a desire to suppress minority voters." ER82 (emphasis added); *see also* ER76-82 (analyzing evidence on intent). The District Court explained that "the legislature as a whole enacted H.B. 2023 *in spite of* opponents' concerns about its potential effect on [get-out-the-vote] efforts in minority communities, *not because of* that effect." ER80 (emphasis added).

Plaintiffs contend that the District Court's ultimate factual determination on intent is unsupported by the record, but they cannot show clear error. Plaintiffs instead present a one-sided and distorted view of the record below that omits any findings or other parts of the

record that do not support their claim. For example, Plaintiffs ignore the following findings by the District Court:

- The legislature acted with "a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." ER82. Consistent with this belief, the "proponents of H.B. 2023 repeatedly voiced concerns that mail-in ballots were less secure than in-person voting, and that ballot collection created opportunities for fraud." ER78.
- "H.B. 2023 found support among some minority officials and organizations." ER78; *cf. Abbott*, 2018 WL 3096311, at *18 n. 24 (rejecting claim that redistricting plan was discriminatory that was adopted "at the behest of minority groups").[4]
- Representative Charlene Fernandez—who is a Democrat, a Hispanic woman, and one of Plaintiffs' hand-picked fact witnesses at trial—"testified that she has no reason to believe

[4] Plaintiffs relied heavily during trial of the alleged burden of H.B. 2023 on Native American communities. Yet, as shown at trial, not one Native American community or group publicly opposed H.B. 2023 when it was proceeding through the legislative process. *See* ISER93-94.

H.B. 2023 was enacted with the intent to suppress Hispanic voting." ER78; *see also* ER8; ISER33-36.[5]

Likewise, Plaintiffs' discussion of intent completely ignores H.B. 2023's "broad exceptions for family members, household members, and caregivers." ER80; *see also* ISER82-83 (explaining reasons for broad exceptions).[6] Plaintiffs do not explain why the legislature would have included these broad exceptions if it truly intended to suppress minority votes. The exceptions instead support the District Court's finding that the legislature acted "sincere[ly]" to give by-mail voting comparable protections as in-person voting, ER82, while reasonably taking into account which persons should be considered "presumptively trustworthy proxies" for mailed ballots. ER38. The exceptions also ensure that H.B. 2023 does not unduly burden voters—at trial, Plaintiffs "could not 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." ER87 (emphasis added); *see also*

[5] "ISER" refers to the Intervenor Defendants' Supplemental Excerpts of Record.

[6] As noted, H.B. 2023 also includes exceptions for mail carriers and election officials. ER14.

ISER13 (discussing similar evidentiary absence at preliminary injunction phase).

Plaintiffs focus on the District Court's finding that some individual legislators harbored partisan motives, suggesting that this alone necessitated a finding of racially discriminatory intent. OB 22.[7] The argument fails because, regardless of the motives of isolated legislators, the District Court determined as a factual matter that "the *majority* of H.B. 2023's proponents were sincere in their belief . . . that H.B. 2023 was a necessary prophylactic measure to bring early mail ballot security in line with in person voting." ER77 (emphasis added). As a result, the "legislature *as a whole*" did not enact H.B. 2023 because of any intended effects on minority voters. *Id.* (emphasis added); *cf. City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) ("Individual legislators may vote for a particular statute for a variety of reasons");

[7] The District Court only identified one specific legislator that it believed acted with partisan motives: former State Senator Don Shooter. ER81 As discussed below, Senator Shooter had no involvement in the drafting of H.B. 2023. *See infra* at 18; *cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203 n.24 (1976) (in deciding legislative intent "[r]emarks . . . made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill, are entitled to little weight.").

United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.").

Plaintiffs also challenge several of the District Court's weight determinations, largely focusing on testimony or exhibits that the District Court concluded were not significant enough to be included in its 83-page decision. But Plaintiffs fail to show that any of those weight determinations constituted clear error. This is demonstrated by the following examples:

Predecessor Bills. Plaintiffs argue that the District Court should have placed more significance on the circumstances surrounding other ballot collection bills in Arizona, OB 20, which the District Court found to be "somewhat suspicious." ER80. The District Court immediately followed this statement, however, with the explanation that the predecessor bills "have less probative value because they involve *different* bills passed during *different* legislative sessions by a *substantially different* composition of legislators." ER80 (emphasis added).

Plaintiffs do not challenge these findings, which are key to placing the predecessor bills in proper context and assigning them appropriate weight. *See Abbott*, 2018 WL 3096311, at *14 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.") (internal quotations and citation omitted); *AD Glob. Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 67 Fed. Cl. 657, 678 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007) ("[L]egislative history from prior and subsequent Congresses is deemed less persuasive as evidence of the legislature's intent"); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1195 (11th Cir. 1999) ("We fail to see how evidence of . . . a [city's] prior refusal to annex [a housing project] standing alone establishes any intent, let alone a discriminatory one" for a later annexation decision); *Kansas City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir. 1962) (noting the "questionable import that the rejection of prior bills may have in determining congressional intent as to subsequently enacted legislation").

To illustrate, Plaintiffs focus much of their attention on S.B. 1412, and its sponsor (then-State Senator Don Shooter), but S.B. 1412

preceded H.B. 2023 by five years.[8] ER78. Plaintiffs cannot show that Senator Shooter had any involvement in the drafting of H.B. 2023. This much-later bill was instead written by Representative Michelle Ugenti-Rita, who testified that she did *not* use S.B. 1412 as a basis for drafting H.B. 2023. *See* ISER80-81; ISER84; ISER89.

S.B. 1412 was also a substantially different amendment than H.B. 2023. It did not contain the same exceptions for family, household members, and caregivers. ER80. Moreover, S.B. 1412 included a requirement that high-volume ballot collectors provide photo identification to election officials, and much of the concern about S.B. 1412 specifically related to that identification requirement, which is not part of H.B. 2023. *See* ISER118-19; ISER121 (statement by MALDEF attorney that her only objection to S.B. 1412 was the photo identification requirement); *see also* ER848 (discussing concerns with photo identification requirement); ER850 (same); *cf. Abbott*, 2018 WL

[8] Plaintiffs also continue to rely on the fact that Arizona was previously subject to federal preclearance requirements under Section 5 of the VRA. OB 18. This ignores that: (1) many states were also subject to preclearance; (2) Arizona did not receive any federal objections to "its statewide procedures for registration or voting" during the approximate 38-year period that preclearance requirements applied, ER70; and (3) preclearance requirements became irrelevant after *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013).

3096311, at *14 ("Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature.").

Despite the different circumstances relating to S.B. 1412, Plaintiffs reference a purported statement by the former Arizona State Elections Director (Amy Chan) that this 2011 bill "was 'targeted at voting practices . . . in predominantly Hispanic areas.'" OB 19 (quoting ER849-50). The District Court previously discussed the same statement at the preliminary injunction phase, however, and explained how Plaintiffs had "ignore[d] the context in which it was made." ISER11; *see also* ISER12 ("[T]his report describes the 'practice' targeted by S.B. 1412 not as ballot collection, generally, but as voter fraud perpetrated through ballot collection"). The District Court's previous explanation was confirmed by Ms. Chan's trial testimony. ISER74-75. As such, the District Court properly concluded in its discretion that the issue did not merit further discussion.

LaFaro Video. Plaintiffs similarly suggest that the District Court should have given more weight to the "LaFaro Video." OB 21. But Plaintiffs fail to mention that the LaFaro Video was simply surveillance

footage and did not contain any audio. ER72; ISER122-23. The narrative commentary that the District Court found to be "racially tinged" was included in a blog post by someone who was not a member of the legislature. ER72; ISER122-23.

Statements by H.B. 2023's Sponsor. Plaintiffs contend that Representative Ugenti-Rita made statements that "dismissed concerns about the impact of [H.B. 2023] on voters." OB 21. Even if accepted at face value, this argument is entirely consistent with the District Court's ultimate finding that the legislature enacted H.B. 2023 *in spite of*, rather than *because of*, any claimed voter impacts. ER82. Further, the District Court had no obligation as the finder of fact to accept Plaintiffs' characterizations concerning the meaning or significance of the referenced statements. The District Court heard Representative Ugenti-Rita's live testimony on the non-discriminatory motivations for H.B. 2023, had before it the full context of the statements on which Plaintiffs rely, and determined what evidence was weighty enough to be included in its 83-page decision. *See* ER590-91; ER598-99; *see also* ISER58-60; ISER85-86; ISER90-93; ISER95-97.

In sum, a consideration of entirety of the record below, as opposed to Plaintiffs' selective snippets, shows that the District Court had ample basis for concluding that the legislature did not intend to suppress minority voting with H.B. 2023. Plaintiffs were unable to meet their burden of proof at trial, and they cannot show clear error now. The District Court's finding should be affirmed.[9]

C. The District Court Did Not Clearly Err in Finding that H.B. 2023 and the Precinct Vote Rule Impose No More than Minimal Burdens that are Outweighed by Important Regulatory Interests.

The District Court rejected Plaintiffs' claim that H.B. 2023 and the Precinct Vote Rule impose unjustified burdens on voting, in

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[9] Plaintiffs' suggestion that this case is analogous to *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), is also incorrect. OB 21, 22. Unlike this case, *McCrory* involved an "unusual[ly]" rushed legislative process that was initiated *immediately* after North Carolina was released from federal preclearance obligations by *Shelby County*. *McCrory*, 831 F.3d at 216, 228. *McCrory* also involved a specific request by the legislature for statistical data concerning minority voting practices. *Id.* at 216. Plaintiffs do not argue that any of these circumstances were present with respect to H.B. 2023. *Cf. Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 604 (4th Cir. 2016) (distinguishing *McCrory* when legislation was not an immediate response to the removal of preclearance obligations, followed the standard legislative process, and was not precipitated by the legislature asking for or receiving racial data on the voting practice at issue).

violation of the First and Fourteenth Amendments. ER38-39, 49. "[G]overnments necessarily 'must play an active role in structuring elections,' and '[e]lection laws will invariably impose some burden upon individual voters.'" *Pub. Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016) (quoting *Burdick,* 504 U.S. at 433) (second alteration in original). Consequently, courts apply a "'flexible standard'" to evaluate constitutional challenges to state election law. *Id.* (quoting *Burdick,* 504 U.S. at 434).

This standard balances "the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (internal quotations and citations omitted). As the District Court correctly noted, this balancing framework requires consideration of "the state's election regime *as a whole*, including aspects that mitigate the hardships that might be imposed by the challenged provisions." ER21 (citing *Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016), and *Crawford*, 553 U.S. at 199) (emphasis added).

Plaintiffs do not dispute that the District Court applied the balancing framework described above, but instead disagree with the factual result that it reached. But they simply cannot show clear error. For both of the challenged practices, Plaintiffs' evidence was weak on both sides of the balancing framework.

1. The Burdens of H.B. 2023 are Minimal, at Most.

"At most, H.B. 2023 minimally burdens Arizona voters as a whole." ER22. For voters that *choose* to vote by-mail, the burden of H.B. 2023 is merely "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." ER23. This "does not increase the ordinary burdens traditionally associated with voting." ER22-23. Indeed, "[e]ven with H.B. 2023's limitations, the burden on early voters to return their early mail ballots is less severe than the burden on in-person voters." ER23.[10] Plaintiffs do not challenge any of these findings.

[10] The District Court correctly noted below that "Plaintiffs have never explained how the travel associated with returning an early mail ballot can constitutionally compel Arizona to permit early mail ballot

Plaintiffs also do not contest the District Court's explanation that H.B. 2023 imposes less severe burdens than the voter identification law upheld by the Supreme Court in *Crawford*. ER23-24. They instead pretend that *Crawford* does not exist, failing to cite it *anywhere* in their Opening Brief. *Cf.* ER89 (noting Plaintiffs had not "attempted to bridge [the] disconnect" between their arguments and *Crawford*). As the District Court recognized, *Crawford* is critically important because it concluded that the more onerous burdens 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, or even represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198.

Rather than addressing the actual burden of H.B. 2023 on the total electorate or attempting to distinguish the controlling Supreme Court authority, Plaintiffs assert that some voters have specific

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collection when the more onerous burdens associated with in person voting do not constitutionally compel states to offer early mail voting in the first place." ER88; *see also McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807-08 (1969) (recognizing that there is no fundamental right to vote by absentee ballot). That explanation still has not been provided.

circumstances that amplify the burdens of H.B. 2023. This argument fails under *Crawford*, which explained that the specific burdens of an election law on a discrete subgroup of voters should *only* be examined if a court has sufficient evidence to quantify the "magnitude of the burden" imposed on that subgroup, including the extent to which the burden is "fully justified." *Crawford*, 553 U.S. at 200; *see also Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631-32 (6th Cir. 2016) (before engaging in subgroup analysis, a court must have "quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will become disenfranchised as a result of" the challenged law); ER25.

Here, the District Court concluded that it had "insufficient evidence from which to measure the burdens on discrete subsets of voters." ER26. The District Court explained that, based on the limited evidence presented by Plaintiffs, it could not determine "roughly how many voters have used ballot collection services" or "*why* voters used these services." *Id.*; *see also* ER31.

Critically, Plaintiffs do not challenge the District Court's determination that the record was insufficient to conduct a "subgroup"

analysis with respect to H.B. 2023. Their failure to appeal this conclusion is fatal.

However, even if this Court did consider Plaintiffs' argument concerning voter subgroups, Plaintiffs failed to show a severe burden on any discrete class of voters. "[I]f an appreciable number of voters could not vote or would encounter substantial difficulties voting without the assistance of now-prohibited ballot collectors, it is reasonable to expect that at least one such voter would have been presented to testify at trial." ER87. As discussed, however, Plaintiffs could not produce a single witness who could personally testify that H.B. 2023 would impose a significant burden for him or her. *Id.*; *see also* ER63.

In fact, "all but one 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). The sole exception (Marva Gilbreath) had mailbox access "but simply forgot to timely mail her ballot." *Id.; see also* ER30. Plaintiffs do not challenge the District Court's statement that "[r]emembering relevant election deadlines 'does not qualify as a substantial burden on the right to vote, or even

represent a significant increase over the usual burdens of voting.'" ER27 (quoting *Crawford*, 553 U.S. at 198).

Additionally, the District Court correctly recognized that "Arizona accommodates many of the circumstances that tend to make voting in general (and not just early mail voting) more difficult" for the subgroups identified by Plaintiffs. ER27. For voters with illness or disability problems, for example, Arizona provides a statutory special election board procedure. *Id.* (citing A.R.S. § 16-549). Plaintiffs do not contest the District Court's finding 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.[11]

For working voters, the District Court correctly stated that Arizona law requires employers to give employees time off to vote. *Id.* (citing A.R.S. § 16-402). As with the special election board, nothing in H.B. 2023 prevents Plaintiffs from educating voters about this right. Although Plaintiffs speculate that this right does not help people who work multiple jobs, OB 39, they cite nothing in the record below to

[11] Plaintiffs contend that curbside voting does not help voters without transportation, OB 39, but do not question that this option could be helpful to Arizona voters with mobility issues, which is one of the subgroups they identified. ER26-27.

support this speculation or explain why over a 27-day period a valid vote cannot be cast.

H.B. 2023's broad exceptions further alleviate any perceived burden on subgroups. *See* ER27-28. This was demonstrated by the trial testimony, as several of Plaintiffs' fact witnesses on H.B. 2023 confirmed they had family members available who could return their ballot, and not one witness testified that they could not return their ballot under the exceptions provided by H.B. 2023 during the 27-day early voting period. *See* ER28-30; *see also* ER87. Plaintiffs also failed to provide any evidence showing that, for any subgroup, H.B. 2023 made early voting more restrictive or burdensome than in-person voting.

Given all this, the District Court correctly concluded that "the evidence available largely show[ed] that voters who have used ballot collection services in the past have done so out of convenience or personal preference, or because of circumstances that Arizona law adequately accommodates in other ways." ER26. This is not a severe burden, and by no means was this finding clear error.[12]

[12] The District Court also rejected Plaintiffs' contention (which Plaintiffs did not press at trial) that H.B. 2023 imposes an

2. H.B. 2023 Advances Important Regulatory Interests.

Because H.B. 2023 imposes, at most, minimal burdens on voters, ER 22, the justifications for the law were subject to "less exacting review." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("[A] State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."). Applying this standard, the District Court found that "H.B. 2023 reasonably reduces opportunities for early ballots to be lost or destroyed" and is, therefore, "one reasonable way to advance what are otherwise important state regulatory interests." ER38-39.

Plaintiffs contend this was a "weak" justification for H.B. 2023, largely focusing on the lack of prosecutions in Arizona for *intentional* criminal voter fraud associated with ballot collection (requiring a showing of guilt beyond a reasonable doubt). OB 18. But this argument obscures the fact that the District Court determined that H.B. 2023 reasonably addresses the risk of *unintentional* loss or destruction of collected ballots "[b]y limiting who may possess another's early ballot." ER38. Even if a ballot collector has good intentions, that same collector

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unconstitutional burden on freedom of association. *See* ER31-33. Plaintiffs have not appealed this determination.

can still fail to timely deliver *all* ballots in his or her possession due to reckless or even careless behavior, particularly when high-volume collection is taking place without oversight by any election official. *See* ISER90-91 ("You could collect ballots and then forget where you stored them. You could collect ballots and misplace them. You could collect ballots and . . . miss the deadline in which you have to turn them in, on accident."); *see also* ISER47-50 (describing signature collector's unintentional loss of voter registration forms in California).

Before H.B. 2023, Arizona law did not fully address the threat of early ballot loss or destruction, which stood in sharp contrast to Arizona's extensive protections for in-person voting. *See* A.R.S. §§ 16-562, 16-564, 16-566, 16-570, 16-572, 16-579, 16-580, 16-585. Although Plaintiffs note that Arizona law prohibited the discarding of ballots before H.B. 2023, OB 42, this law only applied to conduct committed "knowingly." ER37; A.R.S. § 16-1005(F). Reckless or negligent loss or destruction of early ballots was not covered. As such, H.B. 2023 furthers Arizona's important interest in ensuring that all eligible votes are counted, taking into account that voting by-mail is inherently less secure than in-person voting. *See* ER36 ("[M]any courts have recognized

that absentee voting presents a greater opportunity for fraud") (citing cases); *see also Pub. Integrity Alliance*, 836 F.3d at 1028 (upholding a municipal election law that furthered the same interests as other municipal laws because of the additional impact it might have).

Arizona did not need to wait for proof of instances of intentional or unintentional ballot loss or destruction before deciding to act. Plaintiffs do not contest that "Arizona's legislature is not limited to reacting to problems as they occur," and need not "base the laws it passes on evidence that would be admissible in court." ER35: *see also Crawford,* 553 U.S. at 195 (upholding voter identification law intended to prevent fraud even though "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history."); *Voting for Am. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) (states "need not show specific local evidence of fraud in order to justify preventative measures"). It is logical that as Arizona developed more convenient methods of voting (i.e., no excuse mail-in ballots), Arizona would also ensure that ballot security concerns were properly addressed, consistent with in-person voting.

Plaintiffs nevertheless argue that Arizona could have achieved its goals through less restrictive means, such as a receipt and tracking system for collected early ballots. This argument fails for several reasons.

First, because H.B. 2023 imposes, at most, minimal burdens on voters, the law did not need to be narrowly tailored. *See Burdick*, 504 U.S. at 433 (declining to require that restrictions imposing minimal burdens on voters' rights be narrowly tailored); *Pub. Integrity Alliance*, 836 F.3d at 1028 (upholding law that furthered the interest of "ensuring local representation by and geographic diversity among elected officials" even though less restrictive ordinance might have achieved same goal); *Arizona Green Party v. Reagan*, 838 F.3d 983, 991-92 (9th Cir. 2016) (rejecting argument that a state must "adopt a system that is the most efficient possible" when a law imposes a "de minimis burden") (internal quotations and citation omitted).

Second, regardless of what alternatives may have existed, H.B. 2023 constitutes a reasonable method for accomplishing Arizona's goals given that it "closely follows the recommendation of the bipartisan Commission on Federal Election Reform, chaired by former President

Jimmy Carter and former Secretary of State James A. Baker III" (the "Commission"). ER38; *see also Feldman III* 843 F.3d at 414, (favorably citing Commission report) (Bybee, J. dissenting). This Commission specifically recommended that states "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Building Confidence in U.S. Elections* § 5.2 (Sept. 2005), *available at* https://www.eac.gov/assets/1/6/Exhibit%20M.PDF. Plaintiffs do not dispute that the District Court properly took judicial notice of the Commission report. ER38-39 n.11. To the contrary, Plaintiffs do not address the report at all.

Third, the District Court correctly recognized that Arizona had good reasons for not wanting to create a "complex, system of training and registering ballot collectors and requiring tracking receipts or other proof of delivery." ER38. Plaintiffs contend that the District Court "invent[ed] abstract state interests unsupported by the record," but this is simply incorrect. OB 43. The State and Intervenors explicitly asked for such a determination in the proposed findings submitted to the District Court, ISER02-03, and the trial testimony confirmed that

Plaintiffs' proposed tracking system would be "a regulatory nightmare." ISER87-88.

At their core, Plaintiffs arguments reflect their own subjective disagreement with the "wisdom of H.B. 2023," but that disagreement is properly directed to the legislative process. ER82; *see also Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). This Court should affirm the denial of Plaintiffs' constitutional challenge to H.B. 2023.

3. The Precinct Vote Rule Imposes Minimal Burdens that are Traditionally Associated with Voting.

The burden of the Precinct Vote Rule, which only applies to in-person voters in the Arizona counties that use a precinct system, "merely requires voters to locate and travel to their assigned precincts." ER43.[13] These "are ordinary burdens traditionally associated with voting." *Id.* Indeed, Arizona has applied the Precinct Vote Rule since at least 1970, "[a] majority of states do not count OOP ballots," and the

[13] "Early mail voting is the most popular method of voting in Arizona, accounting for approximately 80 percent of all ballots cast in the 2016 election." ER39. Also, as stated above, six Arizona counties use vote centers instead of a precinct system. ER15.

United States Department of Justice has never objected to this practice in any state. ER14-15.

Further alleviating the minimal burden, the District Court made findings that the State (and local governments within the State) have taken significant steps to educate voters on the importance of voting at the correct location and to provide a wide variety of methods for voters to learn of their assigned location. *See* ER44-45. A 2016 survey "found that none of the survey respondents for Arizona reported that it was 'very difficult' to find their polling places," and "approximately 94 percent of the Arizona respondents thought it was very easy or somewhat easy to find their polling places." ER44; *see also* ISER56-57.

The minimal burden of the Precinct Vote Rule is further reflected by data showing that "the vast majority of in-person voters successfully vote in their assigned precincts, and OOP voting has consistently declined as a percentage of the total ballots cast in Arizona." ER40. For example, in the 2016 general election, OOP ballots represented only 0.15% of the total ballots cast in Arizona. *Id.*; *see also* ER40-41 (detailing statewide and countywide data on OOP voting trends); ISER129-46 (same).

Plaintiffs do not challenge *any* of these factual findings by the District Court, but instead focus on specific circumstances that might make compliance with the Precinct Vote Rule more difficult for certain voter subgroups. *See* OB 45-50. This argument fails for several reasons.

First, just as with their H.B. 2023 challenge, Plaintiffs failed to "quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that [was] fully justified." *Crawford*, 553 U.S. at 200. The District Court thus did not have the necessary record before it to assess the discrete burdens on any purported subgroups, including quantifiable evidence on the reasons why purported subgroup voters had voted OOP, which is necessary to determine which voters (if any) suffered meaningful hardship. *See id.* at 200-01; *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 631-32; *see also* ER26.

Second, as the District Court correctly noted, Plaintiffs did not actually challenge the constitutionality of any of the election practices that they claim make it more difficult for purported subgroups to vote in the correct location, such as polling place selections or assignments, voter education efforts, or poll worker training. ER43. Although

removal of the Precinct Vote Rule may change the *effect* of OOP voting for a very small percentage of Arizona voters, the rule has no impact on the actual *burden* associated with ascertaining and traveling to the correct location. *See id.*

Third, Plaintiffs could not show that the burdens of the Precinct Vote Rule are severe, either for the Arizona electorate as a whole or for any subset of voters, particularly when reviewed in the context of the Arizona's entire election scheme and the many voter conveniences that it provides. *See* ER43-46; *see also* ER12-13. This burden is certainly less than the burdens upheld by the Supreme Court in *Crawford*. *See Crawford*, 553 U.S. at 198. "Moreover, for those who find it too difficult to locate their assigned precinct, Arizona offers generous early mail voting alternatives," ER46, which is how approximately 80% of Arizonans vote. ER22. For those who choose to vote in-person, "it does not seem to be much of an intrusion into the right to vote to expect citizens, whose judgment we trust to elect our government leaders, to be able to figure out their polling place." *Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *14 (Colo. Dist. Ct. Oct. 18, 2004); *see also Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344

(6th Cir. 2012) (voters cannot be absolved "of all responsibility for voting in the correct precinct or correct polling place by assessing voter burden solely on the basis of the outcome—i.e., the state's ballot validity determination.").

4. The Precinct Vote Rule Advances Important Regulatory Interests.

On the other side of the balancing framework, the District Court correctly found that the Precinct Vote Rule serves "numerous important state regulatory interests." ER46. Many of those interests are not challenged by Plaintiffs. Specifically, Plaintiffs do not dispute that precinct-based voting helps promote orderly election administration (including reduced voter wait times) and "ensures that each voter receives a ballot reflecting only the races for which that person is entitled to vote." ER46; *see also Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (detailing the "significant and numerous" advantages of precinct-based voting).

Plaintiffs instead argue that, despite the many advantages of encouraging in-person voters to vote at a specific location, the State should nevertheless partially count OOP ballots. The District Court

properly rejected this argument based on its factual finding that taking away the State's enforcement mechanism "would deprive precinct based counties of the *full range* of benefits that correspond with the precinct-based system." ER49 (emphasis added).

In support of this finding, the District Court found that the partial counting of OOP ballots "would impose a significant financial and administrative burden on Maricopa and Pima Counties because of their high populations." ER48. Plaintiffs suggest that the District Court overstated this burden by speculating that the duplication process for OOP ballots might not take as long as a Pima County official testified. OB 52 n. 17. They cannot show, however, that the District Court clearly erred in looking to this official for guidance on this sort of technical election administration issue and concluding that his testimony was credible. *See* ER47; ISER66-68. Whether California (or another state) has an election system that allows for more efficient ballot duplication has little bearing on Arizona's system.

The District Court also found that taking away the Precinct Vote Rule could cause in-person voters to intentionally or inadvertently vote in the wrong location, which would undermine the goals of orderly

election administration, reduced voter wait times, and the promotion of voting for local issues and candidates. ER48.[14] This outcome would particularly harm candidates for local office, including several of the Intervenor Defendants, who would have "to expend resources to educate voters on why it nevertheless is important to vote within their assigned precincts." *Id.* [15]

Plaintiffs speculate that any increase in incidences of OOP voting would be outweighed by changes in voter turnout between elections. OB 53. However, Plaintiffs do not actually cite anything in the record below to support this speculation.

Plaintiffs also challenge the District Court's factual findings by asserting that it should have required evidence that other states that partially count OOP ballots had experienced problems. *Id.* This argument does not come anywhere close to establishing clear error when: (1) the District Court heard extensive testimony on the *Arizona*-

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[14] Ironically, these outcomes (longer wait times, voter confusion, reduced voter confidence) are precisely what Plaintiffs objected to in their Amended Complaint. *See* ISER16-27.

[15] The original Plaintiffs in this case included several national political campaigns, which do not share the same interest in local candidates and issues. *See* ER1408-09.

specific impacts on the removal of the Precinct Vote Rule, ISER51, ISER69-73, ISER98-113; and (2) "North Carolina . . . has experienced a problem with 'political organizations intentionally transporting voters to the wrong precinct.'" ER48 (quoting *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 461 (M.D.N.C. 2016), *rev'd on other grounds,* 831 F.3d 204 (4th Cir. 2016)).[16] Further, because the Precinct Vote Rule imposes only minimal burdens on voters, the State's interests for the rule were subject to "less exacting review." *Timmons*, 520 U.S. at 358.

The justifications for the Precinct Vote Rule far outweigh the minimal burdens it imposes. The District Court properly rejected the constitutional challenge to that rule, and this Court should affirm.

D. The District Court Did Not Clearly Err in Finding that H.B. 2023 and the Precinct Vote Rule Do Not Violate Section 2.

The District Court also rejected Plaintiffs' "results" claim under Section 2 of the VRA. *See* ER63, 67, 75. This claim required Plaintiffs to establish two elements:

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[16] Although the Fourth Circuit in *McCrory* reversed the trial court's ultimate finding on intentional discrimination, it did not question the post-trial finding concerning the intentional misdirection of voters to the wrong precinct.

> First . . . the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice; [and]
>
> Second . . . that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Ohio Democratic Party, 834 F.3d at 637 (alteration in original); *see also Feldman I*, 840 F.3d at 1070 (applying two-part framework); *id.* at 1091 (Thomas, C.J. dissenting) (same).

The District Court concluded that Plaintiffs failed to carry their burden at either of the two steps for H.B. 2023 or the Precinct Vote Rule. *See* ER75. These factual determinations were not clearly erroneous and should be affirmed.

1. Plaintiffs Failed to Carry their Burden at Step One.

For H.B. 2023 and the Precinct Vote Rule, Plaintiffs essentially make the same objection to the District Court's step one determination. In short, Plaintiffs contend that because minority voters have been more likely than non-minorities to have used ballot collection services and to have voted at the wrong location, the District Court had no

choice but to conclude that step one was satisfied for both practices. *See* OB 27, 55.

This argument is inherently flawed because it misunderstands the factual question before the District Court. The actual question, as dictated by the statutory text of § 2, was whether the challenged practices resulted in "a denial or abridgement" by causing equal minority voters to have "less *opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301 (emphasis added); *see also Ohio Democratic Party*, 834 F.3d at 637-38 ("We . . . emphasize that the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members *less opportunity to participate in the political process*.") (emphasis added).

This standard requires more than "a bare statistical showing of disproportionate impact on a racial minority." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). It was instead "crucial" that Plaintiffs prove a "'causal connection between the challenged voting practice and a *prohibited* discriminatory

result'"—i.e., a deprivation of an equal opportunity to vote. *Gonzalez*, 677 F.3d at 405 (quoting *Salt River Project*, 109 F.3d at 595) (emphasis added); *see also Ohio Democratic Party*, 834 F.3d at 637 (the first step "cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2"). For both of the challenged election practices, the District Court correctly found that Plaintiffs failed to meet this burden.

a. H.B. 2023.

The District Court provided two separate reasons why H.B. 2023 does not cause any inequality in minorities' opportunity to vote, notwithstanding the anecdotal testimony on the historical use of ballot collection. *See* ER62-63. One reason concerned the utter lack of evidence at trial to show any genuine impact from H.B. 2023 on the voters who had used ballot collection services before that legislation was enacted. *See* ER63. Despite Plaintiffs' assertions of widespread minority use of ballot collection, not a single "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; *see also* ER87 (similar).

Further, Plaintiffs failed to provide *any* witness who had used ballot collection services from the Native American or rural communities that they speculated would be especially harmed by H.B. 2023 due to purported mail service limitations.[17] This inability to show any actual impact on voters is not surprising—again, H.B. 2023 includes "broad exceptions," ER80, and "does not impose burdens beyond those traditionally associated with voting." ER63.

Plaintiffs make the irrelevant assertion that Section 2 does not require proof that the challenged election practice makes voting "impossible." OB 24. But the District Court never held Plaintiffs to an "impossibility" standard. The District Court instead explained that "H.B. 2023 does not deny minority voters meaningful access to the political process simply because the law makes it *slightly more difficult or inconvenient* for a small, yet unquantified subset of voters to return their early ballots." ER63 (emphasis added); *see also* ER89 ("H.B. 2023 imposes, at most, a disparate inconvenience on voters.").

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[17] Plaintiffs attempted to perform expert analysis on the availability of residential mail service, but they excluded the two Arizona counties with the highest populations in the State. *See* ER8 (noting that Dr. Rodden's analysis did "not reveal whether, on a statewide basis, minorities have disparate access to home mail service as compared to non-minorities."); *see also* ISER41-42.

Significantly, Plaintiffs do not dispute that "Section 2 'does not sweep away all election rules that result in a disparity in the convenience of voting.'" ER 55 (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016)). Nor could they. Such an argument would require "an unjustified leap from the disparate inconveniences that voters face when voting to the denial or abridgment of the right to vote." *Lee,* 843 F.3d at 601; *see also Ohio Democratic Party*, 834 F.3d at 623 (rejecting Section 2 challenge to "regulation [that] may slightly diminish the convenience of registration and voting" for some voters); *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir 2014) (rejecting Section 2 claim when state had not "made it '*needlessly* hard'" to obtain the requisite photo identification for voting"); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) ("[I]nconvenience does not result in a denial of 'meaningful access to the political process'" in violation of Section 2) (quoting *Osburn v. Cox*, 369 F.2d 1283, 1289 (11th Cir. 2004)); ER55.

The District Court's other reason for concluding that Plaintiffs failed to carry their burden at step one was its separate finding that the vast majority of Arizona voters did *not* use ballot collection services

before the enactment of H.B. 2023, regardless of their minority or socioeconomic status. *See* ER62-63. Because this was an alternative basis, the District Court's ultimate conclusion at step one did not rely on this factual finding. *See* ER63. Nonetheless, Plaintiffs' arguments against this sound finding all lack merit.

Plaintiffs attempt to concoct a legal issue by asserting that the District Court was strictly prohibited from assessing the number of minority voters potentially affected by H.B. 2023. OB 27-28. But this argument contradicts the text of Section 2, which directs courts to consider the "totality of the circumstances," including the voting opportunities of the "members of the electorate" as a whole. 52 U.S.C. § 10301(b).

The circumstances here included evidence that "the vast majority of Arizonans, minority and non-minority alike, vote without the assistance of third-parties who would not fall within H.B. 2023's exceptions." ER63. Based on this factual finding, the District Court logically concluded that ballot collection by non-exempted parties has no meaningful connection to the opportunity to vote in Arizona, regardless of any anecdotal testimony or innuendos concerning racial disparities in

the limited historical use of the practice. *See id.*; *see also Osburn*, 369 F.3d at 1289 (Section 2 requires "the exclusion of the minority group from *meaningful* access to the political process") (emphasis added).

This conclusion is a factual one entitled to deference. The en banc Court in *Gonzalez* indicated the requisite disparate burden for a Section 2 claim must be a "relevant" one, which inherently requires a factual assessment. *Gonzalez*, 677 F.3d at 405 (quoting *Smith*, 109 F.3d at 595); *see also Ne. Ohio Coal. for the Homeless*, 837 F.3d at 628 ("A law cannot disparately impact minority voters if its impact is insignificant to begin with."); *Frank*, 768 F.3d at 754 (rejecting theory that mere existence of racial disparities in voter registration or in-person voting are sufficient to invalidate those practices under Section 2 given that "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system"); ER54.

Plaintiffs further argue that "the record evidence is contrary to the District Court's conclusion that only a 'relatively small' number of voters used ballot collection." OB 28. But Plaintiffs cannot show that this finding was clearly erroneous. At closing argument, Plaintiffs' own counsel vaguely estimated that the historical number of early ballots

collected by non-exempt individuals was somewhere in the "thousands." ER22. The testimony cited by Plaintiffs similarly suggests that the correct number falls somewhere within their own counsel's nebulous estimate. *See* OB 28-29. Whatever the actual number may be (which Plaintiffs never quantified), Plaintiffs' estimate continues to pale in comparison to the total number of early mail ballots in Arizona. In the 2016 general election, for example, more than two million Arizonans voted by early ballot. ER22.

Plaintiffs also suggest that the District Court effectively imposed a mandate that they provide quantitative evidence at step one. *See* OB 29. But the District Court explicitly stated this was not the case. ER58 ("The Court . . . does not find against Plaintiffs" due to the lack of any quantitative evidence on historical ballot collection."). Rather than basing its ruling on Plaintiffs' admitted lack of quantitative evidence, the District Court concluded that even when Plaintiffs' anecdotal evidence was afforded "generous assumptions," the inescapable fact remained that "relatively few early voters give their ballots to

individuals who would be prohibited by H.B. 2023 from possessing them." ER 22.[18]

In short, the District Court was faced with circumstantial evidence that H.B. 2023 only potentially affected a small (but unquantified) subset of Arizona voters, and, of this subset, Plaintiffs could not bring forth a single voter witness who faced any genuine obstacle to voting after H.B. 2023. *See* ER62-63. Given this record, the District Court's factual determination that Plaintiffs failed to carry their burden at step one was neither illogical, implausible, or without support in the record. *Crittenden,* 804 F.3d at 1012. This determination should be affirmed.

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[18] Because "[d]isparate impact analysis is a comparative exercise," ER56, the District Court could have rejected Plaintiffs' Section 2 claim concerning H.B. 2023 at step one due to their admitted failure to provide any quantitative evidence. *See Veasey*, 830 F.3d at 244 ("courts regularly utilize statistical analyses to discern whether a law has a discriminatory impact"); *Budnick v. Town of Carefree,* 518 F.3d 1109, 1118 (9th Cir. 2008) (outside the VRA, courts have repeatedly "recognized the *necessity* of statistical evidence in disparate impact cases.") (emphasis added); *see also Feldman I*, 840 F.3d at 1073 ("[P]ast cases suggest that [quantitative] evidence is typically necessary to establish a disproportionate burden on minorities' opportunity to participate in the political process"); ER57. Also, as the District Court correctly determined, circumstantial evidence from partisan stakeholders related to socioeconomic problems are an "imprecise proxy for disparities in ballot collection use." ER62-63; *see also* ER88.

b. Precinct Vote Rule.

With respect to the Precinct Vote Rule, the District Court had several bases to support its factual determination that Plaintiffs failed to carry their burden at step one, none of which were clearly erroneous.

First, Plaintiffs' evidence that a higher proportion of minorities voted OOP failed to demonstrate that the Precinct Vote Rule deprived an equal *opportunity* to vote, as Section 2 requires. "Plaintiffs . . . offered no evidence of a systemic or pervasive history of minority voters being given misinformation regarding the locations of their assigned precincts, while non-minority voters were given correct information." ER66. Nor did Plaintiffs show that "precincts tend to be located in areas where it would be more difficult for minority voters to find them, as compared to non-minority voters." *Id.* Plaintiffs do not challenge either of these findings. As such, they cannot show that the Precinct Vote Rule prevents any minority group from having an equal opportunity to have their vote counted by either voting at an assigned polling place or, alternatively, using the popular voting by-mail option. The need for in-person voters to learn where to vote, and to then travel to that location, represent nothing more than the acts "traditionally associated with

voting." ER43; *see also Ohio Democratic Party*, 834 F.3d at 623 (rejecting Section 2 challenge when regulation at issue "applie[d] even-handedly to all voters" and state "continue[d] to provide generous, reasonable, and accessible voting options"); *Frank*, 768 F.3d at 754 ("It is better to understand [Section 2] as an equal-treatment requirement (which is how it reads) than as an equal-outcome command.").

Second, the District Court properly concluded that because "OOP ballots account for such a small fraction of votes cast statewide, Plaintiffs have not shown that the racial disparities in OOP voting are practically significant enough to work a meaningful inequality in the opportunities of minority voters" to vote. ER67. This was demonstrated, for example, in the 2016 general election, in which OOP ballots "represent[ed] only 0.15 percent of all votes cast." ER65.

Plaintiffs do not dispute these numbers, but instead repeat their assertion that the number of voters impacted by an election practice cannot be considered at step one. OB 55. As discussed, this argument fails because it ignores the District Court's obligation to consider the "totality of the circumstances," including the overall voting opportunities of the "members of the electorate." 52 U.S.C. § 10301(b).

This requires consideration of whether Plaintiffs had shown any "relevant" statistical disparity between minorities and the total electorate. *Gonzalez*, 677 F.3d at 406 (internal quotations and citations omitted); *N.E. Ohio Coal. for the Homeless*, 837 F.3d at 628 (insignificant impacts not cognizable under VRA); *Frank*, 768 F.3d at 754 (Section 2 does not demand perfect parity).

Not every disparity has "practical significance." ER65-66 (citing Fed. Judicial Ctr., Reference Manual on Scientific Evidence 252 (3d ed. 2011) (the "Manual")). Statistical principles instead recognize that "practical significance is lacking . . . when the size of a disparity is negligible." Manual at 252. The District Court applied these principles and determined that any disparities in OOP voting were not practically significant. *See* ER65-67. Plaintiffs have not shown that this analysis—which is intensely factual in nature—was clearly erroneous.[19]

Third, the District Court properly determined that Plaintiffs failed to "show[] that Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than

[19] Contrary to Plaintiffs' assertion, OB 55, the District Court did not require Plaintiffs to show at trial that the number of voters allegedly impacted by the Precinct Vote Rule would be sufficient to impact the ultimate result of any particular election. *See* ER62-63.

their non-minority counterparts." ER67. The District Court explained that those negligible disparities instead derived from practices that Plaintiffs had *not* challenged, such as polling place assignments and re-registration requirements. ER66. Plaintiffs also did not bring action against the Arizona counties that are actually responsible for selecting precincts and polling places. *Id.* Because Plaintiffs did not challenge the actual practices that created the disparities of which they complain, they failed to provide the "crucial" evidence of a "'causal connection between the *challenged* voting practice and a prohibited discriminatory result.'" *Gonzalez*, 677 F.3d at 405 (quoting *Salt River Project*, 109 F.3d at 595) (emphasis added).

Strangely, Plaintiffs attempt to challenge this finding by jumping to the *second* step of the VRA results test. OB 56. But a plaintiff only gets to step two after the step one hurdle has been cleared. *Ohio Democratic Party*, 834 F.3d at 638. For the reasons discussed, the Plaintiffs correctly found that Plaintiffs did not clear that first hurdle, and this Court should affirm.

2. Plaintiffs Failed to Carry their Burden at Step Two.

Because Plaintiffs fail to carry their burden at step one of the VRA results test, this Court need not go to the second step and ask "whether the challenged voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions" that have produced discrimination. *Ohio Democratic Party*, 834 F.3d at 638 (emphasis omitted). But, to the extent this Court addresses step two, the District Court properly found that Plaintiffs failed to carry their burden because their proof of interaction between the challenged practices and historical discrimination was simply "too tenuous." ER75. Plaintiffs cannot show that this finding was clearly erroneous.

Plaintiffs largely focus their argument on whether the "Senate Factors"[20] are present in Arizona, but the mere existence of some of those factors is not enough to meet the second step of the VRA results test. *See Gonzalez*, 677 F.3d at 406 (rejecting Section 2 claim despite presence of some Senate Factors in Arizona). Plaintiffs instead had to prove a *causal* interaction between the Senate factors, the challenged

[20] The "Senate Factors" derive from a Senate Report accompanying 1982 amendments to the VRA and provide a non-exhaustive list of items to be considered in determining whether a challenged voting practice interacts with social and historical conditions to produce a disparate impact. *See Thornburg v. Gingles,* 478 U.S. 30, 36-37 (1986).

practices, and the alleged prohibited discriminatory burden. *See Ohio Democratic Party*, 834 F.3d at 638. Plaintiffs make nearly no attempt to make this necessary link.[21]

For example, Plaintiffs could not show at trial that racially polarized voting (Senate Factor 2), racial appeals in political campaigns (Senate Factor 6), or minority representation in office (Senate Factor 7) has caused minorities to be more likely to have their ballot collected by non-exempted persons or to vote at the wrong polling place. Indeed, several of the Senate Factors are not "particularly germane to vote denial claims" because they are instead geared towards vote-dilution. *See* ER52 (citing *Frank*, 768 F.3d at 752-55 and *Ohio Democratic Party*, 834 F.3d at 638).

The only real effort by Plaintiffs to link the Senate Factors to the challenged practices is their contention that socioeconomic disparities allegedly make it more difficult for some minorities to return an early ballot in a 27-day period or to vote at the correct in-person polling place.

[21] Plaintiffs continue to rely on Dr. Allan Lichtman's Senate Factor opinions, despite the District Court's conclusion that his expert testimony "presented more like an attorney's closing argument than an objective analysis of data," and that "the credibility of his trial testimony was undermined by his seeming effort to advocate a position rather than answer a question." ER04-05.

OB 35, 58. But the District Court properly determined that such evidence was too "loose" to show causation given that "nearly all costs of voting fall heavier on socioeconomically disadvantaged voters." ER75. If the presence of socioeconomic disparities were enough at step two, this could "potentially would sweep away any aspect of a state's election regime in which there is not perfect racial parity." *Id.* For example, voter registration requirements could be invalidated by simply showing that, because of socioeconomic disparities, minorities had registered at lower rates than non-minorities. *See Frank*, 768 F.3d at 755.

Plaintiffs do not question that their causation theory could call into question "virtually any aspect of a state's election regime," ER75, but instead argue that the District Court improperly expanded its analysis to include potential repercussions on other laws. OB 35. But this argument mischaracterizes the District Court's decision. By discussing the implications of Plaintiffs' argument, the District Court explained why it would be inconsistent with this Court's "repeated emphasis on the importance" on causation in Section 2 vote-denial cases to make a factual finding in Plaintiffs' favor at step two based on the flimsy evidence that Plaintiffs had provided. ER75 (citing *Salt River*

Project, 109 F.3d at 595); *see also Lee,* 843 F.3d at 601 (discussing implications of overbroad interpretation of Section 2); *Frank*, 768 F.3d at 755 (same); *Gonzalez*, 677 F.3d at 406 (rejecting Section 2 claim despite presence of socioeconomic disparities in Arizona).

Although the District Court did not need to go any farther on step two, there was other evidence that supported its ultimate finding at this stage. To start, the State has non-tenuous justifications for both of the challenged practices (Senate Factor 9) that it properly considered as part as of the totality of the circumstances analysis. *See* ER74-75.

The specific evidence relating to the challenged practices also supported the District Court's ultimate finding at step two. With respect to H.B. 2023, the trial evidence indicated that the anecdotal disparities in the historical use of ballot collection services did not arise out of historical discrimination (or any other Senate Factor) but instead from an intentional strategy by "[t]he Democratic Party and community advocacy organizations [to] focus[] their ballot collection efforts on low-efficacy voters, who trend disproportionately minority." ER62; *see also* ER16, ER77. Also, while Plaintiffs argued that limitations in mail service in certain rural communities amplify the effect of H.B. 2023 in

those areas, they provided no evidence at trial to show that discrimination caused any mail service limitations.

As for the Precinct Vote Rule, Plaintiffs again ignore that they have not challenged the actual election practices that cause voters to show up at the wrong polling place. *See* ER42-43, ER66; *see also* ISER6-8 (discussing same issue at preliminary injunction phase). Plaintiffs thus cannot show that "the *challenged* voting standard or practice causes the discriminatory impact as it interacts with social and historical conditions." *Ohio Democratic Party*, 834 F.3d at 638 (emphasis omitted). Additionally, the very low rates of OOP voting (just 0.15% of total ballots cast in the 2016 general election) seriously calls into question whether historical discrimination is linked to this rare event. ER65. The "vast majority" of voters have no issue navigating the Precinct Vote Rule, regardless of race or socioeconomic status. ER66.

Moreover, Plaintiffs ignore that the totality of the circumstances included evidence of significant efforts by Arizona to *enhance* the opportunities of minorities to participate in the political process and elect their preferred representatives. For example, the Arizona Independent Redistricting Commission has acted to "ensur[e] the

competitiveness of legislative and congressional districts and ensur[e] that minorities have the opportunity to elect candidates of their choice." ER70-71. Arizona has also formed a Citizens Clean Elections Commission that "engages in outreach to various communities, including the Hispanic and Native American communities, to increase voter participation." ER74. And "Arizona has been recognized for improvements in the number of Hispanics and Native Americans registering and voting, as well as in the overall representation of minority elected officials in the State." ER73.

For all these reasons, the District Court's factual determination that Plaintiffs had not met their burden at step two was correct. It was certainly not illogical, implausible, or without support in the record. *Crittenden,* 804 F.3d at 1012. To the extent necessary to resolve this case, this Court should affirm that finding.

VII. CONCLUSION

The District Court did not apply an incorrect legal standard or make a clearly erroneous factual finding at any point in the proceedings below. Plaintiffs simply disagree with the result that the District Court reached after reviewing the entirety of Arizona's election system and

are seeking to re-litigate the facts on appeal. The District Court's judgment should be affirmed.

Dated: July 10, 2018

Respectfully submitted,
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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Intervenor Defendants state that they are not presently aware of any related cases that are currently pending in this Court.

Dated: July 10, 2018

By: *s/ Brett W. Johnson*
Brett W. Johnson

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,990 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) 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 Century font size 14.

Dated: July 10, 2018

By: *s/ Brett W. Johnson*
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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 July 10, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 10, 2018

By: *s/ Brett W. Johnson*
Brett W. Johnson

No. 18-15845

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DEMOCRATIC PARTY, *et al.*,

Plaintiffs/Appellants,

v.

ARIZONA SECRETARY OF STATE'S OFFICE, *et al.*,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Defendant-Intervenors/Appellees.

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

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A.R.S. § 16-562. Preparation and arrangement of polling place with voting booths and ballot boxes

A. The arrangement of the polling place shall be such that neither the ballot boxes nor the voting booths are hidden from the view of persons immediately outside the voting area.

B. No person other than the election officers, voters, party representatives and challengers shall be permitted within six feet of the ballot boxes or voting booths except by authority of the election officers for the purpose of keeping order and enforcing the law.

A.R.S. § 16-564. Opening, exhibiting and locking ballot box before receipt of ballots; removal and opening of box

A. Before receiving any ballots the election board, in the presence of the persons assembled at the polling place, shall open, exhibit and lock the ballot box, and thereafter it shall not be removed from the polling place or presence of the bystanders until all ballots are counted, nor opened until after the polls are finally closed, except in the case of an

emergency that renders the polling place unusable to the point where it can no longer function as a polling place because law enforcement or other emergency personnel have ordered that the polling place be evacuated or as determined by the officer in charge of elections to allow voting to continue while awaiting an evacuation order from law enforcement or other emergency personnel.

B. If a locked ballot box must be moved from a polling place due to an emergency, at least two members of the election board from that polling place who are not members of the same political party shall accompany the locked ballot box to a new polling place designated by the officer in charge of elections, subject to the following:

1. If practicable and available, a law enforcement officer shall aid in the transfer of the locked ballot box.

2. If two members of the election board from that polling place are not available, one member of the election board and one law enforcement officer may accompany the locked ballot box to the new polling place.

C. If a ballot box was moved due to an emergency, two additional board members shall verify whether the locked ballot box arrived at the new polling place location and that it was not opened or damaged.

D. All election board members who accompanied the locked ballot box to the new location and the one or two election board members who verified the ballot box's arrival shall file a report with the officer in charge of elections that describes the actions taken by the election board members. This report shall be filed on the day of the emergency.

E. On the day that an emergency occurs as prescribed in subsection A, all election board members, including those who aided in the transfer and verification of the locked ballot box, shall indicate on the official documents containing their oath whether they witnessed the transfer of the ballot box and whether the ballot box remained locked.

F. If during the course of an election day the ballot box can no longer accommodate additional ballots, the board members may remove a sufficient number of ballots from the ballot box and shall place the removed ballots into the case that will be used for the transfer of the

ballots to the officer in charge of elections. The inspector and both judges shall oversee the transfer and the following shall apply:

1. An immediate count of the number of ballots removed shall be made by the election board members and a sheet indicating the count and signed by the board members supervising the count shall be placed in the transfer case with the removed ballots and shall be kept sealed for the remainder of the election day.

2. Once the removed ballots are sealed in the transfer case, the original ballot box shall be relocked and voting may continue.

3. At the close of the polls, the removed ballots and the ballots in the locked ballot box shall be moved together to the tabulating place designated by the officer in charge of elections.

G. At the close of the polls, if a ballot box has been transferred to a new polling place or a ballot box has been opened, a report detailing those events and other pertinent information shall be made by the officer in charge of elections to the chairpersons of all recognized political parties in that county.

A.R.S. § 16-566. Opening and closing of polling place; unused ballots

A. At least thirty minutes before the opening of the polls the precinct election officers shall arrive at the polling place and set up the voting booths so that they will be in clear view of the election officers. If voting devices are used, they shall open and place them in the voting booths, examine them to see that they have the correct ballot labels by comparing them with the sample ballots and are in proper working order. They shall open and check the ballots, ballot cards, supplies, records and forms, and post the sample ballots and instructions to voters.

B. As soon as the polls have been closed and the last qualified voter has voted, the voting or marking devices shall be sealed against further voting. All unused ballots or ballot cards shall be placed in a container and sealed for return to the board of supervisors or other officer in charge of elections

A.R.S. § 16-570. Conduct of election; duties of officers; placing machines

A. One election official shall attend the voting machine, and the other officers shall attend the poll books and perform the duties of election officials as provided by law.

B. The voting machine shall be so placed and protected that it is accessible to only one voter at a time and is in full view of all election officers and watchers at the polling place.

C. The election official attending the machine shall inspect the face of the machine periodically to ascertain whether the ballot labels are in their proper places and that the machine has not been injured or tampered with.

D. During elections the door or other compartment of the machine shall not be unlocked or opened or the counters exposed except for good and sufficient reasons, a statement of which shall be made and signed by the election officers and attached to the returns.

A.R.S. § 16-572. Delivery and custody of ballots at polling place

A. On opening the polls, the inspector shall produce the sealed package of official ballots and publicly open it and deliver one book or block of ballots therein contained to the judges. The other blocks or books of ballots, if any, shall be retained by the inspector until called for by the judges and required for voting.

B. One of the judges of election shall keep the ballots within the polling place in plain view of the public and deliver them only to qualified voters.

C. A person shall not take or remove a ballot from the polling place before the polls are closed.

A.R.S. § 16-579. Procedure for obtaining ballot by elector

A. Every qualified elector, before receiving a ballot, shall announce the elector's name and place of residence in a clear, audible tone of voice to the election official in charge of the signature roster or present the elector's name and residence in writing. The election official in charge

of the signature roster shall comply with the following and the qualified elector shall be allowed within the voting area:

1. The elector shall present any of the following:

(a) A valid form of identification that bears the photograph, name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including an Arizona driver license, an Arizona nonoperating identification license, a tribal enrollment card or other form of tribal identification or a United States federal, state or local government issued identification. Identification is deemed valid unless it can be determined on its face that it has expired.

(b) Two different items that contain the name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including a utility bill, a bank or credit union statement that is dated within ninety days of the date of the election, a valid Arizona vehicle registration, an Arizona vehicle insurance card, an Indian census card, tribal enrollment card or other form of tribal identification, a property tax

statement, a recorder's certificate, a voter registration card, a valid United States federal, state or local government issued identification or any mailing that is labeled as "official election material". Identification is deemed valid unless it can be determined on its face that it has expired.

(c) A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register or the identification is a valid United States military identification card or a valid United States passport and does not bear an address, the identification must be accompanied by one of the items listed in subdivision (b) of this paragraph.

2. If the elector does not present identification that complies with paragraph 1 of this subsection, the elector is only eligible to vote a provisional ballot as prescribed by section 16-584 or a conditional provisional ballot as provided for in the secretary of state's instruction and procedures manual adopted pursuant to section 16-452.

B. Any qualified elector who is listed as having applied for an early ballot but who states that the elector has not voted and will not vote an early ballot for this election or surrenders the early ballot to the precinct inspector on election day shall be allowed to vote pursuant to the procedure set forth in section 16-584.

C. Each qualified elector's name shall be numbered consecutively by the clerks and in the order of applications for ballots. The judge shall give the qualified elector only one ballot, and the elector's name shall be immediately checked on the precinct register.

D. For precincts in which a paper signature roster is used, each qualified elector shall sign the elector's name in the signature roster prior to receiving a ballot, but an inspector or judge may sign the roster for an elector who is unable to sign because of physical disability, and in that event the name of the elector shall be written with red ink, and no attestation or other proof shall be necessary. The provisions of this subsection relating to signing the signature roster shall not apply to electors casting a ballot using early voting procedures.

E. For precincts in which an electronic poll book system is used, each qualified elector shall sign the elector's name as prescribed in the instructions and procedures manual adopted by the secretary of state pursuant to section 16-452 before receiving a ballot, but an inspector or judge may sign the roster for an elector who is unable to sign because of physical disability, and in that event the name of the elector shall be written with the inspector's or judge's attestation on the same signature line.

F. A person offering to vote at a special district election for which no special district register has been supplied shall sign an affidavit stating the person's address and that the person resides within the district boundaries or proposed district boundaries and swearing that the person is a qualified elector and has not already voted at the election being held.

A.R.S. § 16-580. Manner of voting; assistance for certain electors

A. Except as prescribed by subsection G of this section, only one person per voting booth shall be permitted at any one time to sign for the receipt of a ballot and to wait for an opportunity to vote.

B. On receiving a ballot the voter shall promptly and without leaving the voting area retire alone, except as provided in subsection G of this section, to one of the voting booths that is not occupied, prepare the ballot in secret and vote in the manner and substantial form as required by the instruction to voters.

C. In order that the rights of other voters shall not be interfered with, a voter shall not be allowed to occupy a voting booth for more than five minutes when other voters are waiting to occupy the booth. If the voter refuses to leave after the lapse of five minutes, the voter may be removed by the judges. If a voter has not completed a ballot after the allotted five minutes, the voter may request the marshal to hold the ballot and when another booth is empty and all voters present have had an opportunity to vote the removed person may be allowed an additional five minutes in the booth.

D. Before leaving the voting booth the voter shall fold the ballot lengthwise and crosswise, or place the voter's card in the ballot envelope, but in such a way that the contents of the ballot shall be concealed and the stub, if any, can be removed without exposing the contents of the ballot and shall keep the ballot folded until the voter has delivered it to the inspector, or judge acting as such.

E. The election board official shall receive the ballot from the voter and in the presence of the election board and if the ballot includes a stub, remove the stub without opening the ballot, deposit the ballot in the ballot box, or if the voter so requests, hand the ballot to the voter and permit the voter to deposit the ballot in the ballot box, and string the stub, if any, on a string provided. If the ballot is of the type that includes a stub and the stub has been removed from the ballot before receipt by the election official, it shall not be deposited in the ballot box, but it shall be marked "spoiled" and placed with the spoiled ballots.

F. After delivery of the ballot to the election board official, or if the voter has asked to deposit the ballot in the ballot box, after the ballot is deposited, the voter shall then proceed outside the voting area and shall

not again enter the voting area unless the voter is an authorized election official.

G. Any registered voter, at the voter's option, may be accompanied by a minor who is permitted in the voting booth pursuant to section 16-515, subsection E, be accompanied and assisted by a person of the voter's own choice or be assisted by two election officials, one from each major political party, during any process relating to voting or during the actual process of voting on a paper ballot, machine or electronic voting system. A person who is a candidate for an office in that election other than the office of precinct committeeman is not eligible to assist any voter.

A.R.S. § 16-585. Spoiled ballots; disposition

If a voter spoils a ballot or ballot card and obtains another, the inspector and one of the judges shall write on the back thereof the words "returned spoiled", sign their names thereto, and without opening the ballot, string it upon a string provided for that purpose and return

it with the stubs of voted ballots to the board or persons from whom the ballots were originally received.

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 July 10, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 10, 2018

By: *s/ Brett W. Johnson*
Brett W. Johnson