No. 18-15845

In the United States Court of Appeals
for the Ninth Circuit

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs/Appellants,

v.

MICHELE REAGAN, *et al*.,

Defendants/Appellees,

and

ARIZONA REPUBLICAN PARTY, *et al.*,

Intervenors-Defendants/Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs' Opening Brief ("Br.") establishes that HB2023 and Arizona's policy of disenfranchising out-of-precinct voters (the "OOP Policy") are unconstitutional and violate Section 2 of the Voting Rights Act ("VRA"). In response, Defendants repeat many of the errors made by the District Court, offer other, easily rebutted legal and factual arguments, and largely avoid discussing *Feldman III*. There is no real dispute that HB2023 disparately impacts minority voters in Arizona. Similarly, there is no real dispute that the OOP Policy disenfranchises thousands of eligible Arizona voters per election cycle, or that the policy disenfranchises minority voters at about *twice the rate* at which it disenfranchised white voters in the 2016 general election. Defendants and the District Court take the position that these laws impose mere "inconveniences"—of no real concern under the Constitution or the VRA—and that the strength (or lack thereof) of the State's interests and the disparate impact on minority voters are essentially of no moment. Because the District Court's opinion rests on errors of law as well as fact, this Court should reverse the District Court and hold that HB2023 must be invalidated and that Arizona must partially count out-of-precinct ("OOP") ballots.

II. STANDARD OF REVIEW

Defendants' arguments that clear-error review applies to all issues raised in this appeal, including Plaintiffs' arguments that the District Court committed legal error, is incorrect. While factual findings are reviewed for clear error, "the district court's findings will be set aside to the extent that they rest upon an" error of law, "including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988); *Smith v. Salt River Project Agr. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997); *accord Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) (where a "court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard").

For example, in *Gomez*, a vote dilution VRA case, this Court reversed a finding that a Hispanic community was not politically cohesive because the finding was based on a misunderstanding of the meaning of political cohesiveness. This Court found that the district court erred by focusing on registration and turnout, and should have looked only to actual voting patterns. 863 F.2d at 1416. This Court also reversed the district court's finding that a Senate Factor was not present by recognizing facts that the district court had ignored.

Id. at 1417. Contrary to Defendants' suggestion, the clear error standard does not inoculate a district court from searching appellate review.

III. ARGUMENT

A. HB2023 Was Intended to Discriminate Against Minority Voters.

Proper application of the *Arlington Heights* standard to the record in this case compelled a finding that HB2023 was enacted, at least in part, with discriminatory intent. Br. 16-23. Defendants' arguments to the contrary do not alter this conclusion.[1]

For instance, Defendants contend that the predecessor bills to HB2023 are not important in assessing whether HB2023 was enacted with discriminatory intent, State Br. 68; Rep. Br. 16-19, but that is incorrect as a matter of law. As *Arlington Heights* held, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals *a series of official actions taken for invidious purposes*," and "[t]he specific sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker's purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (emphasis added); *see also Feldman III*, 843 F.3d at 369. And *Abbott v. Perez*, on which the Defendants rely,

[1] As used in this brief, the term "Defendants" includes both the State and the Arizona Republican Party, who—along with a number of Republican politicians—intervened to defend the challenged laws (collectively, the "Republican Party"). Where Plaintiffs respond to arguments made in only one of the Response Briefs, they specify whether the argument was made by the State or the Republican Party by using the citations "State Br." or "Rep. Br."

State Br. 68; Rep. Br. 16-17, explained that it did "not suggest either that the intent of the 2011 Legislature [wa]s irrelevant or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court"; "both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature." 138 S. Ct. 2305, 2327 (2018).[2] Here, as explained, the facts relating to the predecessor bills support a finding that HB2023 was enacted with discriminatory intent. Br. 19-21.

The Republican Party's argument that SB1412 was "substantially different" from HB2023, Rep. Br. 18, does not assist Defendants either. While it is correct that SB1412 "did not contain the same exceptions for family, household members, and caregivers," *id.*, this ignores that there was no need for any exceptions because SB1412 had no impact on individuals who collected 10 or fewer ballots, Br. 6.[3] In

[2] Two of the cases on which the Republican Party relies, Rep. Br. 17, addressed the use of legislative history for the purpose of interpreting statutory language, not for determining whether a law is discriminatory, *see 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); *Kansas City, Mo. v. Fed. Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir. 1962), and *Burton v. City of Belle Glade* involved decisions made 24 years apart from each other, 178 F.3d 1175, 1195 (11th Cir. 1999), obviously a quite different factual context than the series of ballot collection bills passed (and twice strategically repealed) by the Arizona legislature over the span of less than 5 years.

[3] Plaintiffs' Opening Brief incorrectly stated that SB1412 banned individuals from collecting more than ten ballots. Br. 6. While various proposed amendments to

other words, HB2023 is far *more* restrictive than SB1412 was. Further, the District Court's opinion states that the "demonstrably false" allegations of fraud related to ballot collection made by SB1412's sponsor, Sen. Don Shooter,[4] and "the racially-tinged LaFaro Video … spurred a larger debate in the legislature about the security of early mail voting as compared to in-person voting." ER77 (Op.). Thus, the legislative history regarding SB1412 is directly relevant to the assessment of the intent with which HB2023 was enacted.

Defendants downplay the significance of the LaFaro Video and the statement of the State Elections Director at the time SB1412 was enacted that SB1412 was "targeted at voting practices in predominantly Hispanic areas." State Br. 67, 69-70; Rep. Br. 19-20. With respect to the LaFaro Video, Defendants simply ignore the

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SB1412 would have prohibited individuals from collecting more than a specified number of ballots, FER1562-64, the final enacted version of SB1412 required any person who delivered more than ten early ballots to provide photo identification, and would have mandated the creation of a public statewide report listing the identities and personal information of ballot collectors, FER1558-61.

[4] Senator Shooter was also a member of the legislature that passed HB2023, and offered "unfounded and often farfetched allegations of ballot collection fraud" when speaking in favor of the bill. ER77 (Op.) (citing FER1566-67). In addition, Michelle Reagan, the sponsor of HB2305, the other predecessor bill to HB2023 that the legislature repealed rather than allow the voters to decide its fate in a referendum, had become the Arizona Secretary of State by the time HB2023 was brought to a vote. She actively supported HB2023 as Secretary of State, including making a "red meat" speech to the Conservative Political Action Committee that underscored the partisan nature of her (and the Republican Party's) opposition to ballot collection. FER1569-71; FER1572-73.

District Court's findings that the video contained "racially tinged and inaccurate commentary" and "became quite prominent in the debates over H.B. 2023." Br. 21; *see also* Br. 8-9. Additionally, the State attempts to sanitize statements made about SB 1412 by then-State Elections Director Amy Chan,[5] but they misleadingly cite to the District Court's findings at the preliminary injunction stage. Rep. Br. 19. Those findings, of course, were made *before* both Ms. Chan and John Powers, the DOJ employee who authored the report in which she was quoted, testified at trial. At trial, Powers testified that he took detailed contemporaneous notes of his interviews with submitting officials and used direct quotations of the actual language used by the official. FER1498-1500. He observed that the Chan interview stuck out to him because it was highly unusual for a submitting official to state that a bill had been adopted for the purpose of targeting voting practices in a minority community or that the "problem" the bill sought to address may result "from the different way that Mexicans do their elections." ER849-50; FER1498-1500, ER399-404. Chan, for her part, testified that she did not remember the conversation—not that she never made the statements or, as the Republican Party suggests, that they were taken out of context. ISER78; FER1516-17. Further, the State's contention that Chan's statements indicated a desire to *protect* voters in predominately Hispanic areas, State

[5] Amy Chan's maiden name was Bjelland and she is referred to as such in the corresponding documents and the State's brief.

Br.67, is irreconcilable with the District Court's finding that "*due to the high degree of racial polarization* in his district, Rep. Shooter was in part motivated by a desire to eliminate what had become an effective Democratic GOTV strategy." ER77 (Op.) (emphasis added).

The Republican Party also offers that "some minority officials and organizations supported HB2023,"[6] Rep. Br.13 (citing ER78 (Op.)), but that plainly does not preclude—or even weigh meaningfully against—a finding of intentional discrimination. In fact, there was overwhelming opposition to HB2023 among groups that represent minority voters and legislators representing heavily minority districts. *See, e.g.*, ER587-90; ER695-97; ER718-19; ER834-36; ER842-43. Further, while the Republican Party asserts that "not one Native American community or group publicly opposed H.B. 2023 when it was proceeding through the legislative process," Rep. Br. 13 n.4, they ignore the vocal opposition of legislators like Reps. Benally, Otondo, Hale, and Fernandez, all of whom represent Native American voters on tribal lands and who specifically detailed the burdens that HB2023 would

[6] In support of this proposition, the District Court stated that former African American Council Member Michael Johnson supported HB2023, but did not acknowledge that Johnson explained at trial that he and his campaign volunteers frequently engaged in ballot collection in minority communities, and that his real concern was that ballot collectors could mislead voters by impersonating election officials (which was already illegal prior to HB2023). FER1527-31. And the only minority organization that supported HB2023 was the Arizona Latino Republican Association, ER78, which plainly does not undermine Plaintiffs' point that the law's known partisan impact is inextricable from its disparate impact on minority voters.

impose on their Native American constituents. *See, e.g.*, ER715-21, ER745-49; ER761-63; ER576-87.

The Republican Party's argument that the legislature as a whole should not be found to have acted with discriminatory intent because a majority of HB2023's supporters may have believed that the law was a necessary ballot security measure, Rep. Br. 15, does not withstand scrutiny. *Arlington Heights* shows that a court must consider *all* of the factors that motivated the legislature to act and that a law must be struck down if *one* of the purposes was to discriminate. Br. 16-17; *N.C. State Conference. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) ("courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices").[7] And, in the First Amendment context, the Supreme Court recently held that the impermissible discriminatory purpose of one decisionmaker should be imputed to other decisionmakers who were aware of the invidious purpose but who nonetheless remain silent. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm.*, No. 16-111, 2018 WL 2465172 (U.S. June 4, 2018).

[7] *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984), considered whether an individual legislator could be deposed in a First Amendment case; there were no questions about racially discriminatory intent and the court specifically found that depositions of individual legislators may be warranted in cases where plaintiffs must "prove invidious purpose or intent, as in racial discrimination cases." *Id.* at 1298. Likewise, *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968), did not concern racial discrimination.

Significantly, Defendants do not even try to explain how HB2023 can serve partisan interests without also being based on race in this context. State Br. 70-71. As even the District Court found, "some individual legislators and proponents of limitations on ballot collection harbored partisan motives—perhaps *implicitly informed by racial biases* about the propensity of GOTV volunteers in minority communities to engage in nefarious activities." ER76 (Op.) (emphasis added); Br. 21-22. And the record makes clear that HB2023 serves partisan interests in significant part because its burdens disparately fall on minority voters. *Cf. McCrory*, 831 F.3d at 214 (district court "ignored critical facts bearing on legislative intent, including the inextricable link between race and politics"). Indeed, HB2023's partisan implications are illustrated by the identity of the Plaintiffs, the fact that the Republican Party has intervened as a Defendant, and the fact that HB2023 was developed in stakeholder meeting that included the Chair of the Arizona Republican Party, Republican legislators, and a representative of the Republican Secretary of State; no Democrats were invited. FER1536-40; *see also* Br. 5-7, 11, 22; FER1572-73; ER912-23; ER1046-53; FER1471 (statement of Rep. Fernandez that "What I think, HB 2023 is meant to suppress Democratic votes, *not just Hispanic votes*. … There's other areas in Arizona that don't receive home … mail service, and I believe it's to suppress rural votes, Democratic votes, votes from poor people that don't have transportation.") (emphasis added). *See generally League of United Latin Am.*

Citizens v. Perry, 548 U.S. 399, 440, 442 (2006) (discussing "troubling blend of politics and race," in which the majority took "away the [minority group's] opportunity because [they] were about to exercise it"). For these reasons and those set forth in the Opening Brief, this Court should reverse the District Court and hold that HB2023 was intended to discriminate against minority voters.

B. HB2023 and the OOP Policy Unduly Burden the Right to Vote.

Plaintiffs also established that both HB2023 and Arizona's OOP Policy violate the First and Fourteenth Amendments. Specifically, Plaintiffs established that both impose severe burdens on impacted voters, that the State's interests in the laws are minor and cannot outweigh those burdens, and that the means-fit analysis weighs in favor of the conclusion that both are unconstitutional. Br. 13-14, 37-53. Defendants' attempts to rebut these showings are unpersuasive.

1. Defendants Incorrectly State the Applicable Legal Standards.

Defendants make a number of incorrect statements about the governing legal standards. For instance, Defendants reason that if the voter ID law in *Crawford* was permissible, HB2023 and the OOP policy must *also* be permissible given that the voter ID law was (in Defendants' view) more restrictive than the policies at issue here. State Br. 14-15; Rep. Br. 5. *Crawford* itself emphasized, however, that courts must not "apply[] any 'litmus test' that would neatly separate valid from invalid restrictions" and must "make the 'hard judgment' that our adversary system

demands" in each case. 553 U.S. 181, 190 (2008) (Stevens, J., controlling op.). In other words, each case requires a careful weighing of the evidence before the court; to accept Defendants' position would be to do the very thing that the Supreme Court stated would be impermissible: adopt a "litmus" test in which courts simply assess whether a law is more or less burdensome than the voter identification law at issue in *Crawford*. But *Crawford* adhered closely to the evidence (or more accurately, the *lack* of evidence) presented *in that case*. Specifically, in *Crawford* it was not possible "on the basis of the evidence in the record … to quantify [] the magnitude of the burden" or to determine the extent to which that burden was justified, *Id.* at 200 (controlling op.). Here, the record contains extensive evidence regarding the burdens imposed by HB2023 and the OOP Policy and demonstrates that those burdens are not justified by the State's interests in those polices. Br. 37-44, 44-53. The District Court and Defendants both sidestep the voluminous record in this case in favor of a superficial comparison to the voter identification law in *Crawford*, but that constitutes legal error and should be rejected.

The State also incorrectly contends that "courts need not consider subsets of the population when considering the constitutionality of a neutral law." State Br. 21-22.[8] But the State relies upon Justice Scalia's concurrence in *Crawford*, which

[8] The Republican Party incorrectly states that "Plaintiffs do not challenge the District Court's determination that the record was insufficient to conduct a 'subgroup'

represented the views of only three of the Justices. *See* 553 U.S. at 204-205 (Scalia, J., concurring). As the *controlling* opinion in *Crawford* explained, the relevant burdens are on the voters who are actually impacted by the challenged measure, and a law can be found unconstitutional based on the burdens it imposes "on a political party, an individual voter, or a discrete class of voters." *Id.* at 191, 198 (controlling op.). Further, this Court, sitting *en banc*, has held that "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016); *see also Feldman III*, 843 F.3d at 396.

The State also misstates the standard that applies when the burden on voters is found to be minimal. While the State contends that its interest must prevail "unless [the law] is wholly unjustified," State Br. 23; *see also* State Br. 51-52, *Crawford* explained that "[h]owever slight th[e] burden may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." 553 U.S. at 191 (controlling op.) (internal quotation marks omitted). Likewise, this Court, sitting *en banc*, has explained that "*Burdick* calls for neither rational basis review nor burden shifting." *Pub. Integrity All.*, 836 F.3d at 1025; *accord Feldman*

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analysis with respect to H.B. 2023." Rep. Br. 25-26. Plaintiffs' Opening Brief states that "the evidence at trial proved that HB2023's burdens *on impacted voters* are severe." Br. 37 (emphasis added).

III, 843 F.3d at 396 n.2 ("A court may not avoid application of a means-end fit framework in favor of rational basis review simply by concluding that the state's regulatory interests justify the voting burden imposed.").

2. HB2023 Cannot Survive *Anderson-Burdick* Scrutiny.

Defendants' arguments that HB2023 can survive constitutional scrutiny because there is no constitutional right to vote by absentee ballot misunderstands the *Anderson-Burdick* analysis. State Br. 44; *see also* Rep. Br. 24-25 n.10. As discussed, *Crawford* makes clear that courts should not apply a litmus test to *Anderson-Burdick* claims and instead must "make the 'hard judgment' that our adversary system demands." 553 U.S. at 190 (Stevens, J., controlling op.). And many courts have applied constitutional and statutory protections to early and absentee voting. *E.g.*, *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012) ("OFA"); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 109 (2d Cir. 2008); *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 931-35 (W.D. Wis. 2016); *see also McCrory*, 831 F.3d at 236; *Florida v. United States*, 885 F. Supp. 2d 299, 328-29 (D.D.C. 2012). Further, the State's argument ignores the fact that early voting is a statutory right in Arizona. A.R.S. § 16-541. "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *OFA*, 697 F.3d at 428. In short, Arizona cannot offer early voting and then impose undue burdens on the exercise of that method of voting.

The State is also mistaken in suggesting that the District Court did not credit the testimony of Leah Gillespie, who personally interacted with thousands of voters through her work, FER1501, and that the District Court broadly dismissed the testimony of individuals who were familiar with the use of ballot collection in disproportionately minority communities. State Br. 45-46. In fact, the District Court repeatedly cited Gillespie's testimony, *see* ER16, ER59-60, ER62, as well as the testimony of other people who had collected ballots, *see, e.g.*, ER26, ER60-62, and it made no adverse credibility determinations as to lay witnesses who testified at trial.[9]

Defendants' attempt to minimize the burden that HB2023 imposes on Carolyn Glover likewise fails. State Br. 46. To be sure, Glover (who lives alone, uses a wheelchair a majority of the time, and is sometimes bedridden) and the other mobility-challenged residents of the senior citizens facility at which she lives can send ballots through outgoing mail—*provided they wait outside their apartments and personally hand their ballots to the mail carrier*. FER1472-79. But while HB2023 did not make it *impossible* for Glover and her neighbors to vote, the law imposed a significant burden upon this group of voters, many of whom had for years relied upon the regular assistance of the same trusted group of ballot collectors, and

[9] The Court expressed "concerns about the credibility" of Victor Vasquez, an OOP voter, but the Court did not observe the witness in person. ER30 (Op.). His testimony was presented by deposition because he passed away prior to trial.

at least some of whom did not vote in the 2016 general election because they had no one to collect their ballot. *Id.* And the evidence showed that Glover and her neighbors are not the only voters who relied on others to vote; the District Court specifically found that "for many Native Americans living in rural locations […] voting is an activity that requires the active assistance of friends and neighbors." ER61 (Op.).

Further, Defendants' argument that no voters testified that they were significantly burdened by HB2023 is unavailing. State Br. 47-48; Rep. Br. 26, 44. The record makes clear that some voters were able to vote in elections prior to HB2023 only because ballot collection was permissible and that the elimination of ballot collection impeded some voters from voting in the 2016 general election. ER228-34; ER257-61; ER423-25, ER429; ER623; ER361-64; ER418-20; FER1502-04; ER447-48; ER452-53; FER1509-10. Defendants and the District Court both suggest that testimony from impacted voters themselves is the only type of evidence to assess the burden of a voting law, as opposed to other witnesses with personal knowledge who can testify directly to the impact that the law has had on voters. That suggestion is unsupported by authority and is another example of the District Court's imposition of a heightened evidentiary burden in this case. *Cf. Feldman III*, 843 F.3d at 404 ("once the plaintiffs had established the burden on minority voters, the district court imposed a higher standard of proof, rather than

shifting the burden of rejoinder to the State"). Thus, Defendants' arguments do not change the conclusion that HB2023 severely burdens impacted voters in Arizona.

Nor are there grounds for concluding that these burdens are justified by the State's interests in banning most ballot collection. As Plaintiffs previously explained, HB2023 does not meaningfully further the State's interests in preventing fraud[10] or instilling confidence in elections. Br. 40-41. The Republican Party also argues that the District Court properly concluded that adopting a less restrictive alternative to HB2023 would have created significant complications for the State, but the Republican Party cites only to the *post-hoc* trial testimony of Rep. Ugenti-Rita, Rep. Br. 33-34, not to any evidence that the legislature actually considered this purported state interest adopting HB2023 rather than an alternative method of regulating ballot collection. *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (state's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"). Nor is it clear why the alternatives before the Legislature would have been either complex or bureaucratic—both imposed simple requirements upon *ballot collectors*, not on the State—and no evidence was

[10] The reliance by the Republican Party and the District Court on a 2005 report by a federal advisory commission, Rep. Br. 32-33, is misplaced. This report, which contains a single sentence discussing ballot collection, was never offered into evidence. As Plaintiffs pointed out when the District Court raised the report *sua sponte* during closing arguments, the report fails every basis for judicial admission and Plaintiffs had no opportunity to offer evidence why it is neither applicable nor persuasive here. FER1545-48.

presented to suggest that it would. And while the Republican Party asserts that HB2023 guards against the unintentional loss of ballots, Rep. Br. 5, that argument is speculative and contradicts the record, which shows that ballot collectors were conscientious. *See, e.g.*, ER424, ER431-32; FER1551-56; FER1484-86. Thus, the burdens imposed by HB2023 outweigh the State's interests in that law, and it should be struck down under the *Anderson-Burdick* test.

3. The OOP Policy imposes undue burdens that are not outweighed by any state interest.

In arguing that the OOP Policy does not unduly burden the right to vote, the State points to the District Court's holding that OOP voting results from factors other than the OOP Policy. State Br. 20-21. It is, however, the OOP policy that directly results in voters' total disenfranchisement. *See* Br. 51. The State does not respond to this point. Instead, it suggests that factors other than the OOP policy, such as polling location placement, are the true cause of the voters' disenfranchisement. These other factors that contribute to the high incidence of OOP voting in Arizona make the OOP policy particularly insidious, because the State or its subdivisions, not the voter, is at fault for creating them. Br. 46-48.

The Republican Party supports their argument by pointing to cases analyzing different OOP laws from other jurisdictions. Rep. Br. 37-38. But, as discussed, *Crawford* makes clear that litmus tests should not be applied. And this case demonstrates why it would be inappropriate as a constitutional matter to prejudge

all of a certain family of voting laws in the abstract: Arizona's OOP Policy disenfranchises voters at a *significantly* higher rate than other states, Br. 13, a fact that by itself strongly suggests that, whatever the burdens associated with other states' systems as they relate to out-of-precinct ballots, Arizona's OOP Policy imposes meaningfully higher burdens on its voters than those other laws do in other states.[11]

The Republican Party's assertion that the District Court "did not have the necessary record before it to assess the discrete burdens [from the OOP Policy] on any purported subgroups," Rep. Br. 36, is demonstrably incorrect. Plaintiffs provided, and the District Court credited, rigorous quantitative evidence regarding

[11] Notably, the OOP voting rules at issue in *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *14 (D. Colo. Oct. 18, 2004), were less burdensome than Arizona's OOP Policy. *All* votes for president and vice president (including votes cast out of precinct) were counted; when a voter went to the wrong precinct because of incorrect directions from an election official, the voter's provisional ballot counted "for all votes that the voter could have cast had he been in the right precinct"; and "[t]he testimony from local election officials was uniform: when duly registered voters show up at the wrong precinct, election judges are trained to direct them to the right precinct." *Id.* at *1, *14. In contrast, Arizona's OOP Policy does not count *any* votes on a ballot cast by a voter out-of-precinct, there are *no* safeguards for voters who appear in the wrong precinct due to incorrect information from an elections official, and the testimony in this case (and another, contemporaneous state case) established that voters who appear at the wrong precinct are regularly *not* informed that they are in the wrong precinct or that the ballot they are casting will not count. Br. 48-49; *see also* Under Advisement Ruling 5-6, *Jones v. Reagan*, CV2016-014708 (Ariz. Super. Ct. Sept. 9, 2016) (finding that numerous voters were either told by poll workers that their vote would count, or by silence, were misled to believe that their vote would count).

disparities in OOP voting and the factors that predict OOP voting. Br. 14, 44-49; ER42-43 (Op.) (citing ER1141-45, ER1156-57, ER1174-82, ER1184-88, ER1263); ER64-65 (Op.) (citing ER1283, ER1299-1301, ER1308-1314); *see also* ER1324-34 (case studies of neighborhoods in Maricopa, Pima, and Apache counties). The Republican Party's arguments are grounded in a fundamental inconsistency: it contends both that the number of disenfranchised voters is so small that the burden on voting is minimal but also that the costs to the State from partially counting OOP ballots would be substantial. *See* Rep. Br. 6, 39. In fact, the opposite is true. Whereas counting OOP ballots is manageable, Br. 51, the disenfranchisement of voters is irreparably harmful. *See Johnson v. Halifax Cty.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) ("administrative and financial burdens" to county from developing interim voting plan were "not … undue in view of the otherwise irreparable harm to be incurred by plaintiffs").

The State's argument that the burdens resulting from the OOP Policy are "mitigated—if not nullified—by the widespread availability of mail voting," State Br. 20, fails as well. Even putting aside the fact that the State made early voting more difficult for some voters with HB2023, the State's argument ignores that OOP voting is not something that voters *plan* to do. *See* FER1518-22 (Defendant-Intervenor Rivero acknowledging that no voters vote OOP on purpose). At the point at which voters discover they are in the wrong precinct (if they do at all), it is too late to vote

by mail. *See* A.R.S. 16-542(E) (mail ballot request must be received by county recorder by eleventh day preceding the election); A.R.S. § 16-548 (ballot must be received on Election Day); ER332-33; ER352-56.

Thus, as Plaintiffs established, the OOP Policy imposes severe burdens on impacted voters, and these burdens outweigh the State's interest in not counting OOP ballots. *See* Br. 51-53.[12] The OOP Policy should be invalidated under the *Anderson-Burdick* test.

C. HB2023 and the OOP Policy Violate Section 2 of the VRA.

There should be no serious question that HB2023 disparately burdens minority voters. Br. 24-27. Indeed, the District Court found that "prior to H.B. 2023's enactment minorities []were more likely than non-minorities to return their early ballots with the assistance of third parties." ER62 (Op.); ER58-59 (Op.); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 241-42 (4th Cir. 2014) ("LWV") (holding that "an eye toward past practices is part and parcel of the totality of the circumstances," finding a state's "previous voting practices … centrally relevant," and concluding that the elimination of "voting opportunities … that African Americans disproportionately used is … relevant to an assessment of

[12] The Republican Party asserts that the District Court did not clearly err in crediting the estimate that the duplication process takes twenty minutes. Rep. Br. 39. For the reasons set forth in the Opening Brief, however, this finding was clearly erroneous. Br. 52 n.17.

whether … African Americans have an equal opportunity to participate"). The District Court's failure to give this critical fact the weight it deserves was error. *See id.* at 243 ("In waving off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere 'preferences' that do not absolutely preclude participation, the district court abused its discretion.[13]

Plaintiffs have also demonstrated that the Senate Factors support the conclusion that these burdens are linked to the ongoing effects of Arizona's history of discrimination, and that some of these ongoing effects—such as disparities in access to a vehicle and in health—are directly tied to the fact that HB2023 imposes disparate burdens. Br. 31-35.

This case, accordingly, comes before this Court under strikingly similar circumstances as those involved in *LWV*, in which the Fourth Circuit found:

> At the end of the day, we cannot escape the district court's repeated findings that Plaintiffs presented undisputed evidence showing that same-day registration and out-of-precinct voting were enacted to increase voter participation, that African American voters disproportionately used those electoral mechanisms, and that House Bill 589 restricted those mechanisms and thus disproportionately impacts African American voters. To us, when viewed in the context of relevant "social and historical conditions" in North Carolina, this looks precisely like the textbook example of Section 2 vote denial Justice Scalia provided[.]

[13] The District Court's conclusion as to step one of the VRA inquiry is not entitled to deference if it was premised on an error of law. *But see* State Br. 60 (taking opposite view). Where a "court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Raleigh Wake Citizens Ass'n*, 827 F.3d at 340.

769 F.3d at 246 (internal citation omitted). This case likewise presents a "textbook example" of a Section 2 vote-denial violation.

Plaintiffs have also demonstrated that minority voters in Arizona are consistently disenfranchised by the OOP Policy at significantly higher rates than nonminority voters are. Br. 54-55; ER1167-68 (disparities "have been quite persistent over time).[14] The arguments in Defendants' briefs do not undermine these showings.[15]

[14] Likely recognizing the unavoidable consequences of these disparities, the State contends that a comparison of the rates at which minority and nonminority voters are disenfranchised is misleading and that a comparison should instead be made based on the rates at which voters do *not* vote out of precinct. State Br. 32 & n.2. As the Fifth Circuit has pointed out, however, conveying disparities in this way does not change the basic question: whether a policy disproportionately impacts minority voters. *See Veasey v. Abbott*, 830 F.3d 216, 252 n.45. Moreover, unlike in *Frank* and *Veasey*, the disparities at issue here are not in ID possession but in *disenfranchisement* resulting from the challenged policy.

[15] The State inaccurately suggests that the District Court's holding that Plaintiffs' evidence as to step two was "too tenuous" means that "Plaintiffs never showed how historical racial discrimination caused more residential mobility or less access to transportation." State Br. 38. In fact, the District Court found that "Plaintiffs have shown that past discrimination in Arizona has had lingering effects on the socioeconomic status of racial minorities," ER75 (Op.), including disparities in transportation, housing, and education, ER71-72 (Op.). And the court's holding that Plaintiffs' causation theory was too tenuous should be reversed for the reasons set forth in the Opening Brief. Br. 56-59.

1. Defendants Incorrectly State the Applicable Legal Standards for Section 2 of the VRA.

Plaintiffs' Opening Brief describes the two-part test that courts apply to Section 2 vote-denial claims and summarizes certain principles that inform the application of that test. Br. 23-24. Although Defendants agree that the two-part test applies to this case, State Br. 25-26; Rep. Br. 41-42, they misconstrue that test in several different ways.

In particular, Defendants contend that step one of the VRA inquiry requires a showing not only of a disparate burden but also that the challenged law burdens some (unstated) threshold number of voters. State Br. 27-29; Rep. Br. 47-48, 52-53. While this position finds *some* support in the case law, *see, e.g.*, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), it is deeply flawed, inconsistent with other case law, and should be rejected.

To begin with, Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State … in a manner which results in a denial or abridgement of the right of *any* citizen … to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added). Defendants' position is therefore inconsistent with the plain language of the VRA. *Accord LWV*, 769 F.3d 224 at 244 (violation can be established through showing "that 'any' minority voter is … denied equal electoral opportunities") (quoting 52 U.S.C. § 10301(a)); *accord id.* ("[E]ven one disenfranchised voter—let

alone several thousand—is too many."); *see also Feldman II*, 842 F.3d at 635 (Thomas, C.J., dissenting) ("[T]he total number of votes affected is not the relevant inquiry; the proper test is whether minority votes are burdened."); *cf. Veasey v. Abbott*, 830 F.3d at 260 (en banc) (rejecting argument that "district court erred by failing to ask whether [Texas's voter ID law] causes a racial *voting* disparity, rather than a disparity in voter ID possession," and explaining that "Section 2 asks whether a standard, practice, or procedure results in 'a denial *or abridgement* of the right … to vote'" and that "[a]bridgement is defined as 'the reduction or diminution of something,' while the Voting Rights Act defines 'vote' to include 'all action necessary to make a vote effective.'") (citation omitted).

Defendants' position is also at odds with Justice Scalia's explanation that if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity to *participate* in the political process than whites, and § 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able to *elect* their own candidate." *Chisom v. Roemer*, 501 U.S. 380, 407-08 (1991) (Scalia, J., dissenting) (quotation marks and citation omitted); *accord id.* at 397 (majority). It further conflicts with Chief Judge Thomas's dissent regarding the challenge to HB2023 at the preliminary-injunction phase of this case. *See Feldman III*, 843 F.3d at 401 (question is "whether the

challenged practice, viewed in the totality of the circumstances, places a disproportionate *burden* on the *opportunities* of minorities to vote").[16] And it is inconsistent with the principle that the VRA "should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom*, 501 U.S. at 403 (citations and internal quotation marks omitted). Notwithstanding, it is also irrelevant here, where the record makes clear that thousands of voters utilized ballot collection each election prior to HB2023's passage, *see* Br. 27; ER22 (Op); ER424; ER422-23; ER448-49; ER617-20; ER637-38, and thousands are disenfranchised each election as a result of Arizona's OOP policy, *see* ER40 (Op.) (since 2008, Arizona has rejected 29,834 ballots in presidential general elections, and another 8,501 in midterm elections). In at least some cases, the number of disenfranchised OOP voters has been outcome determinative. *See, e.g.*, *Feldman II*, 842 F.3d at 634 (Thomas, C.J., dissenting) (listing elections); ER217-18; *see also Under Advisement Ruling 5-7*, *Jones v. Reagan*, CV2016-014708 (Ariz. Super. Ct. Sept. 9, 2016) (OOP votes exceeded margin of victory).

Further, if properly applied, step one of the Section 2 inquiry presents a straight-forward question: whether the challenged law disparately burdens minority

[16] The Republican Party argues that although the ruling in *Feldman III* was issued for "essentially the reasons provided in the dissent" in *Feldman I*, that dissent should not be given any precedential effect. Rep. Br. 7 n.2. Certainly, an *en banc* decision of this Court should at the very least be considered highly persuasive authority.

voters.[17] But it is not at all clear how a court would determine if step one had been satisfied under the District Court's and Defendants' approach. If a law disenfranchises minority voters at *three times* the rate at which nonminority voters are disenfranchised, would it satisfy step one? And how many voters must be disenfranchised or otherwise burdened for a law's burdens to be cognizable under the VRA? There are no answers to these questions, nor is there a principled basis for answering them given that Defendants' position is not rooted in the language of the VRA and is inconsistent with the law's "broad remedial purpose of rid[ding] the country of racial discrimination in voting." *Chisom*, 501 U.S. at 403.

The State asserts that Plaintiffs' "summation begs the question whether every inconvenience is a cognizable Section 2 burden." State Br. 28. The answer is: only where the pertinent election provision results in disparate burdens *and* those disparate burdens are linked to the ongoing effects of discrimination. *Veasey*, 830 F.3d at 246 ("Use of the two-factor test and the *Gingles* factors limits Section 2 challenges to those that properly link the effects of past and current discrimination with the racially disparate effects of the challenged law."). With Section 2, Congress effectuated a "permanent, nationwide ban on racial discrimination" because "any

[17] To be sure, a violation of the VRA cannot be established solely on the basis of disparate impact. *See Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d at 595. A plaintiff in a Section 2 case must demonstrate that the challenged law results in a disparate burden *and* that the burden is in part linked to the ongoing effects of discrimination. *See* Br. 23-24.

racial discrimination in voting is too much." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013). Section 2 thus "prohibits all forms of voting discrimination" that lessen opportunity for minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986); *see also Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969) ("The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."); *Veasey*, 830 F.3d at 259-60 ("[T]he Voting Rights Act defines 'vote' to include 'all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted.'") (quoting 52 U.S.C. § 10101(e)); *cf. id.* at 246 ("The State also argues that if we apply the *Gingles* factors and two-part test and find a Section 2 violation in this case, all manner of neutral election laws may be struck down. We disagree that the *Gingles* factors are inapposite here, and we have good reasons to believe that the State's gloomy forecast is unsound.").

The State's claim that application of the Senate Factors to vote-denial cases is "dubious," State Br. 35, fails as well. "These factors provide salient guidance from Congress and the Supreme Court on how to examine the current effects of past and current discrimination and how those effects interact with a challenged law." *Veasey*, 830 F.3d at 246. And this Court has recognized that the Senate Factors are relevant to the totality-of-the-circumstances analysis that must be conducted for a Section 2

vote-denial claim. *See Feldman I*, 840 F.3d at 1095; *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012),[18] *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Farrakhan v. Washington*, 338 F.3d 1009, 1015 (9th Cir. 2003). Further, while the State relies on *Frank*, that decision's assertion that "[t]he Fourth Circuit and the Sixth Circuit … found *Gingles* unhelpful" is incorrect. *Compare Frank*, 768 F.3d at 754, *with LWV*, 769 F.3d at 240 (Senate Factors "may shed light on whether the two elements of a Section 2 claim are met."); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554-55 (6th Cir. 2014) ("we see no reason why the Senate factors cannot be considered in assessing the totality of the circumstances in a vote denial claim, particularly with regard to the second element"; the court found "Senate factors one, three, five, and nine particularly relevant to a vote denial claim" but that "[a]ll of the factors . . . can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process") (internal quotation marks omitted). *See generally Veasey*, 830 F.3d at 245 ("As did the Fourth and Sixth Circuits, we conclude that the *Gingles* factors should be used to help determine whether there is

[18] That *Gonzalez* considered only some of the Senate Factors, State Br. 35, does not support the conclusion that *none* of those factors should be considered or even that the factors considered by *Gonzalez* are the only factors that are relevant *in any case*. It shows only that the factors considered in *Gonzalez* were those that were relevant to the totality of the circumstances *in that case*.

a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination.").

2. HB2023 Violates Section 2 of the Voting Rights Act.

Defendants' argument that HB2023 should be upheld because a plaintiff in a VRA case *must* provide statistical evidence of a disparate burden, State Br. 55-56; Rep. Br. 49-50, 50 n.18, is mistaken. There is no case law that supports this argument, and "[t]he relevant question is whether the challenged practice, viewed in the totality of the circumstances, places a disproportionate *burden* on the *opportunities* of minorities to vote." *Feldman III*, 843 F.3d at 401 (emphasis in original); *see also Gonzalez*, 677 F.3d at 406; *Sanchez v. Colorado*, 97 F.3d 1303, 1320-21 (10th Cir. 1996); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993); *One Wisconsin Inst., Inc.*, 198 F. Supp. 3d at 951; *Cuthair v. Montezuma-Cortez, Colo. Sch. Dist*., 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) ("Although an adequate statistical analysis was presented in this case, even where a small number of candidates or lack of data prevents the compilation of statistical analysis, a court should rely on other totality of the circumstances to determine if the electoral system has a discriminatory effect."). Notably, statistical evidence was *not* required for preclearance submissions under Section 5 of the VRA. FER 1496-97; *see also* 28 C.F.R. § 51.26(b) ("Where an estimate is provided in lieu of more reliable statistics, the submission should identify the name, position, and

qualifications of the person responsible for the estimate and should briefly describe the basis for the estimate."); *id.* § 51.26(f) ("Where information requested by this subpart is relevant but not known or available … the submission should so state."); *id.* § 51.27 (listing "Required contents" of preclearance submissions and not including any requirements for statistical or empirical analyses to meet the jurisdiction's burden regarding the anticipated impact of the change on minority communities).

Moreover, the State's argument that statistical evidence needed to be presented is particularly weak *in this case, because the State affirmatively declined* to implement a method of tracking which voters used ballot collection, *see* Br. 43-44 & n.14; ER380-81; FER1491; ER592-95; ER919; ER1115, and, as a result, the data that would be needed to conduct a statistical analysis of the impact of HB2023 "is not available in Arizona," *Feldman III*, 843 F.3d at 401-02. This is surely relevant to the totality-of-the-circumstances assessment of whether the considerable evidence that Plaintiffs have presented is sufficient to establish that HB2023 imposes disparate burdens. Indeed, a contrary holding would allow jurisdictions to insulate their election laws from VRA challenges by declining to collect relevant data. The State's argument should be rejected, and this Court should hold that HB2023 violates Section 2 of the VRA.

3. The OOP Policy Violates Section 2 of the Voting Rights Act.

The State again suggests that its OOP Policy does not violate the VRA because its disenfranchisement of OOP voters is not what causes OOP voting. State Br. 29-31. But, as explained, the issue is that the State's choice to disenfranchise OOP voters is what makes OOP voting so burdensome. Moreover, the fact that the OOP Policy results in disparate disenfranchisement due to the interaction of that policy with other factors does not, as the State suggests, "doom Plaintiffs' legal theory." State Br. 32. To the contrary, it demonstrates that the OOP Policy violates Section 2. *See Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.").

The State asserts that it "did not create" the "special circumstances on Indian Reservations" that contribute to OOP voting, implying that the disproportionate disenfranchisement of Native American voters under the OOP Policy is not linked to the ongoing effects of Arizona's history of discrimination. State Br. 37-38. This argument is without merit. The State does not and cannot dispute the District Court's findings that Arizona has a history of discrimination against Native Americans, including in education and voting, and that disparities in education, housing, and transportation have persisted. ER67-69, 71-72 (Op.). Indeed, the District Court

found that between one quarter and one half of households on Native American reservations in Arizona lack access to a vehicle. ER60 (Op.) (citing ER1377); *see also* ER949 (less than 6% of white households in Arizona lack access to a vehicle).

Defendants also contend that, when Arizona was subject to the preclearance requirement, the U.S. Department of Justice never objected to the State's disenfranchisement of OOP voters, State Br. 9; Rep. Br. 34-35, but that point is irrelevant. Preclearance review applied to *changes* made to voting procedures, 52 U.S.C.A. § 10304(a), and Defendants have presented no evidence that Arizona's policy of disenfranchising OOP voters was ever submitted for preclearance. In any event, preclearance of a policy would not prevent a subsequent action to enjoin that policy. *See* 52 U.S.C.A. § 10304(a); *see also Morris v. Gressette*, 432 U.S. 491, 506-07 (1977) ("Where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation.").

In sum, Defendants' arguments that the OOP Policy is consistent with Section 2 of the VRA are without merit. Arizona should be required to partially count OOP ballots.

IV. CONCLUSION

For the reasons set forth above, this Court should reverse the District Court and HB2023 and Arizona's OOP Policy should be enjoined.

RESPECTFULLY SUBMITTED this 17th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 17, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rules 32-1 and 32-2(b). The brief contains 8,358 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*