No. 18-15845
Oral Argument Calendared For The Week Of March 25, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,
Plaintiffs-Appellants

v.

KATIE HOBBS, *et al.*,
Defendants-Appellees,
ARIZONA REPUBLICAN PARTY, *et al.*,
Intervenor-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES ON REHEARING EN BANC AND SUPPORTING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case presents important questions regarding the standards for liability under Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301, in cases challenging voting practices alleged to result in unequal access to the ballot box for minority voters (often referred to as vote denial or abridgement cases). The Department of Justice is charged with the VRA's enforcement, 52 U.S.C.

10308(d), and thus has a substantial interest in how courts construe and apply the statute.

STATEMENT OF THE ISSUES

1. Whether Arizona House Bill 2023 (2016) (H.B. 2023), which prohibits individuals who do not fall into certain categories from collecting completed ballots from voters, violates the VRA Section 2 results test.

2. Whether Arizona's longstanding requirement that in-person, election-day voters cast their ballot in their assigned precinct violates the VRA Section 2 results test.[1]

STATEMENT OF THE CASE

1. Challenged Provisions Of Arizona Law

a. Arizona provides voters with multiple options to cast a ballot, including early voting in person or by mail and traditional in-person voting on election day. Arizona voters do not need an excuse to vote early in person or by mail, Ariz. Rev. Stat. Ann. § 16-541 (2018), and all counties operate at least one in-person early voting location. E.R. 12.[2]

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[1] The United States takes no position on any other issue.

[2] "Doc. __, at __" refers to the docket entry number and relevant pages of the filings below in *Feldman* v. *Arizona Sec'y of State's Office*, No. 16-cv-1065 (D. Ariz.). "E.R." refers to appellants' Excerpts of Record.

Arizona has allowed early voting by mail for more than 25 years, and it is the most popular method of voting in the State. In the 2012 general election, approximately 66% of voters submitted early mail ballots. In the 2016 general election, 80% of voters submitted early mail ballots. E.R. 12-13, 22. Voters may request a mail ballot on an election-by-election basis or may join Arizona's Permanent Early Voter List, which ensures that participants automatically receive a mail ballot no later than the first day of the 27-day early voting period. See Ariz. Rev. Stat. Ann. §§ 16-542, 16-543, 16-544 (2018); 2007 Ariz. Sess. Laws 183.

In order to be counted, early ballots must be received by the county recorder by 7 p.m. on election day. See Ariz. Rev. Stat. Ann. § 16-548(A) (2018). Voters may return their early ballots by mail postage-free. Voters may also return their early ballots at any polling place or authorized election official's office without waiting in line. Some counties provide additional drop boxes for early ballots. E.R. 13.

As relevant here, H.B. 2023 makes it a felony for anyone other than the voter to possess that voter's completed early mail ballot, unless the possessor fits one of the statute's exceptions. Under those exceptions, the only third persons permitted to collect and return a voter's completed early mail ballot are a caregiver, family or household member, mail carrier, or election official. See Ariz. Rev. Stat. Ann. § 16-1005(H)-(I) (2018).

b. Since "at least 1970," Arizona has required that in-person voters cast their ballots at their assigned polling places in order for their votes to be counted. E.R. 14. When a voter arrives at a polling place but is not listed in the precinct register, that voter will receive a provisional ballot, which election officials will later review to determine whether it may be counted. See Ariz. Rev. Stat. Ann. §§ 16-122, 16-135, 16-584 (2018). If the voter is registered and resides in the precinct where the provisional ballot was cast, that ballot is counted. See Ariz. Rev. Stat. Ann. § 16-584(C)-(E) (2018). Arizona does not count any portion of a provisional ballot cast outside of the voter's correct precinct. E.R. 14.

Since 2011, Arizona counties may choose whether to conduct in-person, election-day voting by dividing the county into different precincts or by using "vote centers." 2011 Ariz. Sess. Laws 331, § 3(B)(4). A voter in a county using vote centers can cast his or her ballot at any vote center in the county, as each has the capability to print a ballot that lists the correct races for each voter. See Ariz. Rev. Stat. Ann. § 16-411 (2018). Some populous counties generally have continued to use precinct-based, election-day voting. E.R. 15. Nonetheless, the number of voters affected by Arizona's prohibition on out-of-precinct (OOP) voting has declined in recent elections. In the 2008 general election, 0.64% of all votes cast were not counted because they were cast OOP. That figure dropped to

0.47% in the 2012 general election, and to 0.15% in the 2016 general election. E.R. 40.

2. Procedural History

a. Plaintiffs filed this case and sought a preliminary injunction to enjoin H.B. 2023's enforcement and Arizona's OOP voting restrictions in time for the 2016 general election. Docs. 72, 84. Plaintiffs alleged that both practices violated Section 2 of the VRA and the First and Fourteenth Amendments. They further alleged that the Arizona legislature enacted H.B. 2023 with racially discriminatory intent. The district court denied preliminary injunctive relief as to each practice. Doc. 204 (H.B. 2023 claims); Doc. 214 (OOP voting claims).

This Court granted expedited review and a divided panel affirmed. See *Feldman* v. *Arizona Sec'y of State's Office*, 840 F.3d 1057 (9th Cir. 2016) (H.B. 2023 claims); *Feldman* v. *Arizona Sec'y of State's Office*, 842 F.3d 613 (9th Cir. 2016) (OOP voting claims). Days before the 2016 general election, this Court voted to rehear both appeals en banc and to enjoin enforcement of H.B. 2023 pending rehearing. The Supreme Court then stayed this Court's injunction of H.B. 2023. See *Arizona Sec'y of State's Office* v. *Feldman*, No. 16A460 (Nov. 5, 2016). Thus, Arizona enforced both H.B. 2023 and the State's in-precinct voting requirements during the 2016 elections.

b. After a ten-day bench trial, the district court rejected each of plaintiffs' claims. E.R. 1-83. The court used a two-step framework to analyze plaintiffs' Section 2 claims. The court stated that plaintiffs first must show that the challenged practices "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." E.R. 53. If they established such a burden, the court stated that plaintiffs then must show that "the burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against minority voters." E.R. 53. For both challenged practices, the court held that plaintiffs could not make the required showing at either step.

With respect to any burden imposed by H.B. 2023, the court found that "[t]here are no records of the numbers of voters who, in any given election, return[ed] their ballots with the assistance of third parties" before H.B. 2023's enactment. E.R. 22. Instead, the court stated that "even under a generous interpretation of the evidence, the vast majority of voters who choose to vote early by mail d[id] not return their ballots with the assistance of a third-party collector who does not fall within H.B. 2023's exceptions." E.R. 22 (citing testimony that ballot collectors affiliated with the Arizona Democratic Party collected "a couple thousand" ballots during the 2014 election). While the court credited

circumstantial evidence that minority voters were "generically more likely" to use third-party ballot collectors than other voters, the court explained that plaintiffs had failed to adduce evidence that would allow for more specific findings as to how much more likely minority voters had been than non-minority voters to rely on third-party ballot collectors, or what percentage of those voters could not rely on a person excepted under H.B. 2023 to return their ballot. E.R. 62.

Based on the evidence before it, the court held that plaintiffs had failed to prove that H.B. 2023 imposes a discriminatory burden on Hispanic, African-American, or Native-American voters. E.R. 63. The court summarized 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." E.R. 63.

With respect to OOP ballots, the court found that minority voters have been disproportionately likely to cast an OOP ballot that goes uncounted. E.R. 65. The court credited expert evidence showing that, among all counties that reported receiving OOP ballots in the 2016 general election, 1 in every 100 Hispanic voters, 1 in every 100 African-American voters, and 1 in every 100 Native-American voters cast an out-of-precinct ballot. In contrast, for non-minority voters, "the figure was around 1 in every 200 voters." E.R. 64-65. The court concluded, however, that plaintiffs had not shown that Arizona's OOP voting practices impose

a discriminatory burden for two reasons. First, the court stated that plaintiffs had not shown that "Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." E.R. 67. Second, the court reasoned that, because OOP ballots account for "such a small fraction of votes cast statewide," plaintiffs had not shown a racial disparity in voting "practically significant enough to work a meaningful inequality in the opportunities of minority voters" as compared to other voters. E.R. 67.

c. A divided panel of this Court affirmed. *Democratic Nat'l Comm. (DNC)* v. *Reagan*, 904 F.3d 686 (2018). The majority rejected plaintiffs' Section 2 results challenge to H.B. 2023 for two principal reasons. First, the majority reasoned that, because of the "small number" of voters affected, the "unavailability of third party ballot collection would have minimal effect on the opportunity of minority voters to elect representatives of their choice." *Id.* at 716. Second, it explained that, even as to "those few minority voters who used third party ballot collection," the burden at issue "was minimal" as "not a single voter testified at trial that H.B. 2023 made it significantly more difficult to vote." *Id.* at 716-717.

For similar reasons, the majority also rejected plaintiffs' challenge to Arizona's ban on OOP voting. Specifically, it held that the ban did not violate Section 2 because the burden of complying with the requirement was minimal, the

number of affected voters was small, and the requirement did "not cause any particular group to have less opportunity to 'influence the outcome of an election.'" *DNC*, 904 F.3d at 730 (quoting *Chisom* v. *Roemer*, 501 U.S. 380, 397 (1991)).

Chief Judge Thomas dissented. He would have held that, in addition to violating the First and Fourteenth Amendments, Arizona's restrictions on third-party ballot collection and out-of-precinct voting violate Section 2. *DNC*, 904 F.3d at 733-754.

SUMMARY OF THE ARGUMENT

Section 2 prohibits voting practices that, in the totality of circumstances, result in members of one racial group having less opportunity, on account of race or color, to participate in the political process and elect representatives of their choice. 52 U.S.C. 10301(a) and (b). On this record, neither H.B. 2023 nor Arizona's in-precinct voting requirement violates Section 2. Accordingly, this Court should affirm the district court's rejection of both Section 2 results claims.

In reaching that conclusion, this Court should clarify three crucial principles of law. First, the Court should reaffirm its long-standing precedent that the VRA does not ban any voting practice merely because it results in some racial disparity, but only practices that, when viewed in light of the jurisdiction's entire voting scheme, actually result in unequal access to the political process on account of race

or color. Second, the Court should adopt a legal standard that fully captures the essential statutory elements and analysis for vote denial or abridgement claims. Finally, this Court should clarify that Section 2 liability in this context does not require that a challenged practice affect a certain number of voters or change electoral outcomes. After all, Section 2 protects the right to equal participation and electoral opportunities, and as the Supreme Court has explained, "any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom* v. *Roemer*, 501 U.S. 380, 397 (1991). As explained more fully below, plaintiffs' failure to show any such abridgement warrants affirmance of the rejection of their Section 2 results claims.

ARGUMENT

PLAINTIFFS HAVE NOT SHOWN THAT EITHER CHALLENGED PRACTICE VIOLATES SECTION 2 OF THE VRA

A. Section 2 Prohibits Voting Practices That, In The Totality Of Circumstances, Result In Less Opportunity, On Account Of Race Or Color, For Protected Voters To Participate In The Political Process And Elect Representatives Of Their Choice

1. Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cty.* v. *Holder*, 570 U.S. 529, 557 (2013). Section 2(a) prohibits jurisdictions from imposing or applying a "prerequisite to voting" or "standard, practice, or procedure" that "results in a denial or

abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2), as provided in [Section 2(b)]." 52 U.S.C. 10301(a); see 52 U.S.C. 10303(f)(2) (applying VRA protections to language minorities). Section 2(b) provides that a violation is established if, "based on the totality of circumstances," "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of" a racial group, "in that [they] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). A voting practice therefore violates Section 2 if, considering the totality of circumstances, it results in voters having less opportunity, on account of race or color, to participate in the political process and elect their chosen representatives.

A Section 2 plaintiff need not prove that a voting rule is intentionally discriminatory. Congress specifically amended Section 2 in 1982 to reject an intent requirement and make clear that a statutory violation can be established by showing a discriminatory result. See *Thornburg* v. *Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); see also S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (Senate Report). As this Court has long recognized, however, Section 2 liability cannot rest on mere statistical racial disparities in an electoral system or correlations between race and poverty. See *Gonzalez* v. *Arizona*, 677 F.3d 383, 405 & 405 n.32

(9th Cir. 2012) (en banc), aff'd sub nom. *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Smith* v. *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). The ultimate question Section 2(a) asks, which Section 2(b) helps courts to answer, is whether a challenged voting practice denies or abridges individuals' right to vote "on account of race or color." 52 U.S.C. 10301(a). Although a plaintiff need not prove that the challenged rule's intended purpose was to impose racially disparate burdens, the rule must still *result* in persons having less opportunity to vote on account of their race. A contrary reading that allowed any statistical disparity to invalidate a practice could call into question countless commonplace, long-established, race-neutral voting practices, and could raise constitutional concerns. Cf. *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

Rather, as the Supreme Court has explained, the "essence" of a Section 2 results claim is that a challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47; see Senate Report 27-30 & nn.109-120. A finding of a Section 2 violation thus requires a "peculiarly" fact-based inquiry into the "design and impact of the contested electoral mechanism[]" in light of the jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (citations omitted).

2. The Supreme Court has never decided a Section 2 vote denial or abridgement case on the merits and, therefore, has never articulated the governing test for such claims. Most lower courts have applied a two-step framework in this context:

> [1] [T]he 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]
>
> [2] [T]hat 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.

League of Women Voters of N.C. (*LWV*) v. *North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014); see also, *e.g.*, *Michigan State A. Phillip Randolph Inst.* v. *Johnson*, 833 F.3d 656, 667 n.2 (6th Cir. 2016); *Veasey* v. *Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); cf. *Frank* v. *Walker*, 768 F.3d 744, 754-755 (7th Cir. 2014) (*Frank I*) (applying test "for the sake of argument").

The parties litigated, and the district court decided, this case under this two-step framework. E.R. 52-53. On appeal, the panel majority applied a modified version of the two-step test. *DNC* v. *Reagan*, 904 F.3d 686, 715 (9th Cir. 2018). If applied too literally, this test could be troublingly over-inclusive and could invalidate many commonplace rules of modern election administration, such as voter registration or precinct voting. See, *e.g.*, *Frank I*, 768 F.3d at 753-754. But

not all racially disparate impacts, including those rooted in socio-economic disparities, will actually result in "less opportunity" to vote. See *Gonzalez*, 677 F.3d at 405; *Frank I*, 768 F.3d at 753 ("[Section] 2[] does not condemn a voting practice [merely] because it has a disparate effect on minorities."); accord, *e.g.*, *Salt River*, 109 F.3d at 595; *Ortiz* v. *City of Phila. Office of the City Comm'rs*, 28 F.3d 306, 312-316 (3d Cir. 1994). Moreover, this two-part test does not precisely capture the essential elements or scope of analysis that Section 2's plain text requires, including the "results in" and "totality of circumstances" elements. 52 U.S.C. 10301(a) and (b).

a. To violate Section 2, a voting rule or practice must result in voters of a racial group "hav[ing] *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b) (emphasis added). A challenged voting practice results in "less opportunity" within the meaning of Section 2 when it results in protected voters having unequal access to "participate in the political process" and "elect representatives of their choice." 52 U.S.C. 10301(b); *Chisom*, 501 U.S. at 397; see *Lee* v. *Virginia State Bd. of Elections*, 843 F.3d 592, 600-601 (4th Cir. 2016); *LWV*, 769 F.3d at 240; *Frank I*, 768 F.3d at 754-755; *Gonzalez*, 677 F.3d at 405; *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1237-1239 (11th Cir. 2005) (en banc) (Tjoflat, J., concurring).

A showing of any disproportionate burden, without more, does not satisfy this element. See *Veasey*, 830 F.3d at 253-254; *Frank I*, 768 F.3d at 753; *Gonzalez*, 677 F.3d at 405. Rather, the burden a challenged rule imposes on the right to vote thus must be not only disproportionate, but also material to the voter's ability to vote, taking into account the totality of circumstances. Such a burden exists when members of a protected class face materially greater difficulty in complying with the challenged practice than other voters, and that burden is not sufficiently mitigated by other voting practices in the jurisdiction. *E.g.*, *Lee*, 843 F.3d at 600-601; *LWV*, 769 F.3d at 240; *Veasey*, 830 F.3d at 254; *Frank I*, 768 F.3d at 754-755; *Gonzalez*, 677 F.3d at 405. Plaintiffs may establish that the burden is "disproportionate" by showing that a challenged practice is more likely to affect the protected group (or groups) than other voters, or that the group has less relative ability to overcome the burdens that the challenged practice imposes on the right to vote. And a burden is material if it creates an impediment to the ability to vote that is not offset by other opportunities to register or vote. See, *e.g.*, *Lee*, 843 F.3d at 601; compare also *Crawford* v. *Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (election rules that impose "the usual burdens of voting" do not violate Constitution); *Storer* v. *Brown*, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest

and if some other order, rather than chaos, is to accompany the democratic process.").

Applying Section 2 by its terms to require plaintiffs to demonstrate that members of a racial group have less opportunity to vote—*i.e.*, that the challenged rule disproportionately and materially burdens their ability to vote—not only is faithful to the text, but also avoids improper invalidation of a host of commonplace, long-established voting practices that Congress could not have intended to sweep aside. As the Seventh Circuit reasoned, omitting or misapplying the less-opportunity requirement would have far-reaching consequences under Section 2, for "[n]o state has exactly equal registration rates, exactly equal turnout rates, and so on, at every stage of its voting system." *Frank I*, 768 F. 3d at 754. Section 2, however, "does not sweep away all election rules that result in a disparity in the convenience of voting." *Lee*, 843 F.3d at 601. The requirement that plaintiffs show "a disproportionate and material burden" ensures that, consistent with Section 2's text, the results test prohibits only those voting practices that actually "result[] in a denial or abridgement of the right * * * to vote" and "less opportunity" for "members" of a protected class, and not every practice that has *any* racially disproportionate impact or burden. 52 U.S.C. 10301(a), (b).

b. Section 2(b) also requires courts to evaluate "the totality of the circumstances" to determine whether or not the "political processes" in the jurisdiction are "equally open to participation by members" of a protected group. 52 U.S.C. 10301(b). Considering all relevant circumstances is essential to accurately assessing whether a voting rule results in less opportunity to vote. Because Section 2 claims must be analyzed under the "totality of circumstances," courts have properly considered the nature and extent of the burden a challenged practice imposes in light of any other practices in the jurisdiction that mitigate or eliminate the alleged burden. See, *e.g.*, *DNC*, 904 F.3d at 714 ("If a challenged election practice is not burdensome or the state offers easily accessible alternative means of voting, a court can reasonably conclude that the law does not impair any particular group's [electoral] opportunity."); *Lee*, 843 F.3d at 601; *Veasey*, 830 F.3d at 256. Indeed, it is only through a fact-intensive examination of a jurisdiction's electoral scheme that courts can properly determine that the challenged practice actually results in an "inequality in the opportunities enjoyed by [minority] and white voters." *Gingles*, 478 U.S. at 47; see also *Gonzalez*, 677 F.3d at 405-407.

Considering the totality of circumstances also enables courts to ensure that any inequality of opportunity that results from the challenged practice is "on account of race or color." 52 U.S.C. 10301(a); see also 52 U.S.C. 10301(b)

(prohibiting practices that result in "less opportunity" for "members" of a protected group). In practical terms, this showing of causation requires the plaintiff to prove that the unequal opportunity flowing from the challenged practice is attributable to the social, historical, and political effects of past or present race discrimination. See *Salt River*, 109 F.3d at 594-596. Courts frequently have relied upon the non-exhaustive list of factors often referred to as the Senate Factors to conduct this examination. These factors seek to capture the extent of racial politics and the lingering effects of past and present race discrimination in the jurisdiction. See *Gingles*, 478 U.S. at 44-45; Senate Report 28-29; see also *Gonzalez*, 677 F.3d at 405-406; *Salt River*, 109 F.3d at 594-596 & nn.6-8; *Johnson*, 405 F.3d at 1238-1239 (Tjoflat, J., concurring). Each factor's relevance will vary with "the kind of rule, practice, or procedure called into question." Senate Report 28; see also *Gonzalez*, 677 F.3d at 406 (citing *Gingles*, 478 U.S. at 45, and Senate Report 29).[3]

[3] The factors included in the Senate Report accompanying the 1982 amendments to Section 2 are based upon circumstantial factors that the Supreme Court identified in *White* v. *Regester*, 412 U.S. 755 (1973), and *Rogers* v. *Lodge*, 458 U.S. 613 (1982), as potentially probative of unconstitutional vote dilution. There is thus considerable overlap between the factors that courts analyze in addressing whether a Section 2 results violation exists and the factors that the Supreme Court has identified as permitting a fact-finder to infer purposeful discrimination. The Supreme Court has recognized the Senate Report accompanying the 1982 amendments as "the authoritative source for legislative intent" about Section 2. See *Gingles*, 478 U.S. at 43 n.7.

A disproportionate and material burden is not "on account of race or color" where the impact complained of is not sufficiently attributable to the on-going effects of race discrimination, but is instead traceable to some other factor, such as the promotion of a non-tenuous state interest. Thus, the "tenuousness" Senate factor requires courts analyzing Section 2 claims to examine a jurisdiction's claimed interest in imposing a challenged practice and whether the practice actually advances that interest. See Senate Report 29-30 & n.117; *LULAC, Council No. 4434* v. *Clements*, 999 F.2d 831, 869-876 (5th Cir. 1993) (en banc) (citing *Houston Lawyers' Ass'n* v. *Attorney Gen. of Tex.*, 501 U.S. 419, 426-428 (1991)). This factor does not cut against a finding of Section 2 liability where a defendant jurisdiction merely asserts a substantial interest or non-tenuous justification for a category of laws, but instead examines the fit with the specific, actual provisions of the challenged law or practice. *Houston Lawyers' Ass'n*, 501 U.S. at 426-427 (state interest "is merely one factor to be considered in evaluating the 'totality of circumstances'" and "does not automatically, and in every case, outweigh proof of" a disproportionate and material burden).

B. The District Court Correctly Concluded That H.B. 2023 And Arizona's In-Precinct Voting Requirement Do Not Violate Section 2's Results Test

Proper application of these standards to the record here shows that neither challenged practice results in a disproportionate and material burden on minority voters under Section 2. Therefore, neither practice results in minority voters

having "less opportunity" than other voters "to participate in the political process and elect representatives of their choice," 52 U.S.C. 10301(b), and the Court should affirm dismissal of the Section 2 results claims.

1. The Record Fails To Establish That H.B. 2023 Imposes A Disproportionate And Material Burden On Minority Voters

a. There Are Significant Evidentiary Gaps Regarding The Nature And Extent Of The Alleged Impact Of H.B. 2023's Restrictions

Plaintiffs failed to show that H.B. 2023 imposes a disproportionate and material burden on the right to vote that results in "less opportunity" for minority voters within the meaning of Section 2. Indeed, significant evidentiary gaps regarding the nature and extent of H.B. 2023's alleged impact on minority voters foreclose plaintiffs' claim.

Plaintiffs did not provide any quantitative evidence regarding the number or percentage of Arizona voters who had relied on third-party ballot collectors prior to H.B. 2023's passage. Nor did they offer any evidence quantifying or estimating how many African-American, Hispanic, or Native-American voters in Arizona previously had used third-party ballot collectors to return their ballots. Plaintiffs also failed to present testimony from any individual minority voter showing "that H.B. 2023's limitations on who may collect an early ballot would make it significantly more difficult to vote." E.R. 63. Plaintiffs did not offer any such

evidence even though H.B. 2023 had been in effect for two statewide elections (both the 2016 presidential primary and general election) prior to trial.

This evidentiary failure is particularly notable because the organizational plaintiffs in this case should have been well-positioned to provide such evidence given their professed reliance on ballot collectors pre-H.B. 2023. E.R. 16, 22, 62. While not automatically fatal, these evidentiary gaps are significant as nearly all successful Section 2 vote denial or abridgement claims will incorporate some kind of analysis of how many people are affected by the challenged practice and whether and to what degree minority voters are affected more than non-minority voters. See, *e.g.*, *Veasey*, 830 F.3d at 244 ("courts regularly utilize statistical analyses to discern whether a law has a discriminatory impact").

Instead of providing direct evidence of H.B. 2023's adverse effect on minority voters, plaintiffs relied on "two general categories of circumstantial evidence" regarding racially disparate use of ballot collectors. E.R. 58. First, plaintiffs offered testimony from "lawmakers, elections officials, and community advocates" that ballot collection tended to be used more by "communities that lack easy access to secure, outgoing mail services"—namely, "the elderly, homebound, and disabled; the poor; those who lack reliable transportation; those who work multiple jobs or lack childcare; and less educated voters who are unfamiliar with or more intimidated by the voting process." E.R. 58-59. Plaintiffs then offered data

showing that such "socioeconomic circumstances are disproportionately reflected in minority communities." E.R. 59. Second, plaintiffs offered evidence showing that "ballot collection ha[d] become a larger part of the Democratic Party's [get-out-the-vote] strategy," with a particular focus on minority voters, who "in Arizona tend to vote for Democratic candidates." E.R. 62.

The court credited both categories of circumstantial evidence in finding that "prior to H.B. 2023's enactment minorities generally were more likely than non-minorities to return their early ballots with the assistance of third parties." E.R. 62. The court further found, however, that "[a]lthough there are significant socioeconomic disparities between minorities and non-minorities in Arizona," such disparities "are an imprecise proxy for disparities in ballot collection use." E.R. 62-63. Indeed, "anecdotal estimates from individual ballot collectors indicate that a relatively small number of voters have used ballot collection services in past elections" and that "even among socioeconomically disadvantaged voters, most do not use ballot collection services." E.R. 63.

Ultimately, the court found that plaintiffs could not prove an unlawful burden merely by showing a racial disparity of an uncertain degree and by showing that H.B. 2023 "makes it slightly more difficult or inconvenient for a small, yet unquantified subset of voters to return their early ballots." E.R. 63.

b. The Only Permissible Conclusion On This Record Is That H.B. 2023 Does Not Impose A Disproportionate And Material Burden That Results In Less Opportunity For Minority Voters

Assuming the correctness and completeness of the district court's factual findings, its holding that plaintiffs failed to show that H.B. 2023 imposes a cognizable burden was the only conclusion it could have reached. Nor could plaintiffs have shown a "disproportionate and material" burden given: (a) the weaknesses in their evidence regarding a racial disparity in the use of third-party ballot collectors; and (b) the absence of evidence showing that H.B. 2023's ban on unlimited third-party ballot collection materially affects minority voters' access to the ballot box, especially where certain excepted third-persons still can return their completed ballots.

In the first place, plaintiffs failed to prove that any burden H.B. 2023 imposes on minority voters is "disproportionate" to the burden it imposes on other voters. To be sure, plaintiffs are not required as a matter of law to offer precise quantitative evidence that a challenged practice—here, a previously available voting mechanism that now is prohibited—affects a higher percentage of minority voters in order to show that the practice imposes a disproportionate and material burden on such voters. Nor do relatively small numbers of affected voters automatically preclude Section 2 liability. But plaintiffs' evidence of H.B. 2023's effects on minority voters was insubstantial and of limited probative value.

Arguably the strongest evidence of a racially disparate impact came from an expert report by Dr. Jonathan Rodden, who recounted that, outside of Maricopa and Pima counties, "around 86 percent of non-Hispanic whites have home mail service," but "only 80 percent of Hispanics do, and only 18 percent of Native Americans have such access." E.R. 8. But the court reasonably found that "mail access is an imprecise proxy for determining the number and demographics of voters who use or rely on ballot collection services." E.R. 8. "Simply because a voter lacks home mail access does not necessarily mean that she uses or relies on a ballot collector to vote, let alone a ballot collector who does not fall into one of H.B. 2023's exceptions." E.R. 8. Plaintiffs failed to offer sufficient evidence showing the degree to which minority communities that lack home mail service actually relied on ballot collectors who are not excepted under H.B. 2023.

Nor did plaintiffs offer testimony from a single minority voter explaining that he or she relied on ballot collectors because of the lack of home mail service. Testimony from individual minority voters explaining how and why H.B. 2023's restrictions would make it more difficult for them to vote was not required as a matter of law. Yet the absence of such testimony may reasonably cause a court to give less weight to other, more attenuated evidence regarding the presence and magnitude of a racially discriminatory impact. See *Gonzalez*, 677 F.3d at 406-407

(affirming the district court's rejection of a Section 2 challenge where there was no evidence that the voting practice resulted in any disparate impact).

Plaintiffs' failure to offer probative evidence regarding the degree of racial disparity in the use of third-party ballot collectors is all the more significant given their failure to show that any burden that H.B. 2023 imposes is material. Arizona law provides many remaining avenues to cast a valid ballot, including an early ballot. Over the course of a 27-day period, voters may return their ballot, postage free, by taking it to "a mail box, post office, early ballot drop box, any polling place or vote center[,] * * * or an authorized election official's office, either personally or with the assistance of" an election official, postal worker, or statutorily authorized family member, household member, or caregiver. E.R. 23. On election day itself, Arizona requires that employers provide employees sufficient time to vote, irrespective of their ability to vote an early ballot. Ariz. Rev. Stat. Ann. § 16-402 (2018). And voters who are ill or who have a disability may request in-person assistance from county officials to vote at their home. Ariz. Rev. Stat. Ann. § 16-549 (2018). Given the existence of these many options for returning a ballot, and the marked absence of evidence showing that these options were insufficient to address the needs of any minority voters adversely affected by H.B. 2023, the only permissible conclusion is to reject plaintiffs' Section 2 claim.

2. The Record Fails To Show That Arizona's Longstanding In-Precinct Voting Requirement Imposes A Disproportionate And Material Burden On Minority Voters

In their challenge to Arizona's treatment of out-of-precinct provisional ballots, plaintiffs showed both the number of voters affected in recent elections and a disproportionate likelihood that minority voters would cast an OOP ballot that would not be counted. E.R. 64-65. Notwithstanding this evidence, the district court held that plaintiffs failed to prove an unlawful burden. The court reached this conclusion for two reasons. First, it stated that plaintiffs "ha[d] not shown that Arizona's policy to not count OOP ballots causes minorities to show up to vote at the wrong precinct at rates higher than their non-minority counterparts." E.R. 67. Second, it stated that because "OOP ballots account for such a small fraction of votes cast statewide," plaintiffs cannot show that racial disparities in OOP voting "are practically significant enough to work a meaningful inequality in the opportunities of minority voters as compared to non-minority voters." E.R. 67. Given the record before the district court, this Court should affirm the decision rejecting plaintiffs' OOP Section 2 claim but on alternative legal grounds.

a. Plaintiffs' Challenge To Arizona's Restrictions On OOP Voting Does Not Fail Merely Because The Restriction Itself Does Not Cause The Racial Disparity Or Affects Only A Small Number Of Voters

The district court's analysis went astray in presuming that plaintiffs must show that the challenged law itself *causes* an underlying racial disparity that

contributes to the practice's disproportionate effect. E.R. 67 (faulting plaintiffs for failing to show that Arizona's OOP policy "causes minorities to show up to vote at the wrong precinct"). Such a circular requirement makes little practical sense. Plaintiffs challenging a voter identification law under Section 2, for example, have never been required to show that the law itself causes minority voters to possess specific forms of ID at lower rates (*e.g.*, that the law causes minority voters to possess fewer driver's licenses). Likewise, poll taxes did not adversely affect minority voters by causing them not to have sufficient money to pay the tax.

Rather, in both instances, any adverse effect on relative voting opportunities depended on preexisting socioeconomic disparities that, taken together with the challenged practice's enforcement, caused racial disparities in the voting system. See *Gingles*, 478 U.S. at 47 ("essence" of a Section 2 claim is that challenged practice "interacts with social and historical conditions" attributable to race discrimination "to cause an inequality" in voting opportunities). Indeed, the court here found as much: "OOP voting is concentrated in relatively dense precincts that are disproportionately populated with renters and those who move frequently," both groups that are disproportionately composed of minorities, who in turn "have disproportionately higher rates of residential mobility" and are "more likely to need to renew their voter registration and reeducate themselves about their new voting locations." E.R. 66. But as in this case, the mere existence of a racial

disparity (even one rooted in disparate socioeconomic circumstances) is not synonymous with a disproportionate and material burden on the right to vote. Cf. *Ortiz*, 28 F.3d at 312-316.

Likewise, the district court's reasoning was not correct to the extent that it suggested that plaintiffs' Section 2 claim would fail solely because of the small number of voters affected. E.R. 67. The panel majority below repeated this error while ultimately reaching the correct conclusion. The majority reasoned that the "small" number of voters affected means that the burden imposed could not impact the minority group's ability to "elect representatives of their choice." *DNC*, 904 F.3d at 716. While a small number of affected voters may bear on whether the burden imposed is material or "on account of race or color," the panel's reasoning implies that Section 2 can be violated only if the challenged practice adversely affects a sufficiently large number of minority voters so as to potentially influence an election outcome. *Id.* at 717, 730.

That is not a proper reading of the statute. Section 2 prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a) (emphasis added); see also *Frank* v. *Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily."). Section 2

safeguards a personal right to equal participation opportunities. A poll worker turning away a single voter because of her race plainly results in "less opportunity * * * to participate in the political process and to elect representatives of [her] choice." 52 U.S.C. 10301(b). As the Supreme Court explained in *Chisom*, "any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." 501 U.S. at 397. A more tailored remedy may be appropriate, however, where a Section 2 results violation impacts only a limited number of voters.

b. The Only Permissible Conclusion On This Record Is That Arizona's In-Precinct Voting Requirement Does Not Impose A Disproportionate And Material Burden On Minority Voters

Applying the proper legal framework, under the "intensely local" and "functional" analysis of a jurisdiction's electoral scheme required by Section 2, plaintiffs did not show that Arizona's long-standing ban on counting OOP ballots imposes a disproportionate and material burden on minority voters' equal access to the political process. *Gingles*, 478 U.S. at 45, 79 (citations omitted). Plaintiffs failed to prove that the current system imposes significant travel burdens, or that there are systemic problems in providing the correct polling place information to minority voters. E.R. 45. Arizona has enforced its precinct rule for decades (E.R. 14), but the percentage of voters potentially affected by this rule has continued to decline both because of the use of vote centers and the dramatically increased

reliance on mail ballots. Accordingly, the percentage of voters actually affected by the ban on counting OOP ballots has continued to decline (0.64% of all votes cast in the 2008 general election were uncounted OOP ballots, as compared to only 0.15% in the 2016 general election). E.R. 40. In light of these facts, and further taking into account Arizona's expansive in-person early voting period, plaintiffs have not proven that Arizona's OOP rules constitute a disproportionate and material burden on minority voters' access to the polls.

Context matters under Section 2 of the VRA. With different surrounding facts, a similar or newly enacted restriction on counting OOP ballots could yield a different result. See *North Carolina State Conf. of the NAACP* v. *McCrory*, 831 F.3d 204, 217 (4th Cir. 2016). However, on this record, Arizona's in-precinct voting requirement is an unremarkable, decades-old component of the State's framework of electoral rules organizing how and where Arizona voters may cast a ballot. Plaintiffs did not prove that complying with this requirement is materially burdensome for any group of voters, including the State's minority voters. They therefore failed to prove that this requirement results in "less opportunity" for minority voters. 52 U.S.C. 10301(b).

CONCLUSION

This Court should affirm the district court's rejection of the Section 2 results claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(1) This brief complies with Circuit Rule 29-2(c)(3) because it contains 7000 words; and

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

s/ Thomas E. Chandler
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Date: February 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2019, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES ON REHEARING EN BANC AND SUPPORTING AFFIRMANCE with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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